

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-206127.3**DATE:** August 29, 1983**MATTER OF:** Charles Beseler Company**DIGEST:**

1. There is no requirement that an agency make an award while a protest is pending before GAO even though delay in awarding the contract results in an urgent situation requiring that the solicitation be canceled and a portion of the requirement resolicited.
2. The contracting officer has the right to question a bidder's status as a small business at any time during the award process.

Charles Beseler Company protests the cancellation of invitation for bids (IFB) DAAB07-82-B-E033 by the U.S. Army Communications-Electronics Command (CECOM), Ft. Monmouth, New Jersey. It also claims reimbursement of its bid preparation costs.

The protester essentially contends that award should have been made to it well before the decision to cancel was made, and that the contracting officer was arbitrary and capricious in not so awarding the contract. We find no legal basis for the protester's position and therefore we deny the protest and the claim.

The solicitation, which was set aside for small business, called for 1,522 driver's viewers, which were to be provided as Government Furnished Material to manufacturers of tanks for the Army and U.S. Marine Corps. The solicitation sought prices with and without first article testing and provided for delivery to begin 300 days after award. It also provided the Government the option to increase the quantity up to 100 percent of the base quantity. Seven bids were opened on March 24, 1982. The lowest five bidders were as follows: Numax Electronics Incorporated at \$2,614,620, Baird Corporation at \$2,646,036, Beseler at \$2,844,618, ICSD Corporation at

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\$2,917,529, and Opto Mechanik, Inc. at \$3,361,208. These prices all include first article testing. Baird was the only bidder eligible for waiver of first article testing and it bid the same price with or without such testing.

Subsequently, four of the five low bidders filed at least one protest regarding the award of this contract with either the contracting agency or our Office. First, Baird and Beseler, by letters of March 26 and 29, respectively, protested to CECOM that the bid submitted by Numax was nonresponsive because Numax failed to price the option quantities in accordance with the solicitation instructions. By another letter of March 29 to CECOM, Beseler also protested Baird's eligibility for award, contending that the firm was other than a small business. On April 13, CECOM sustained the protests against award to Numax and rejected Numax' bid. Numax subsequently filed a protest with our Office against the rejection of its bid. In October, we denied the protest. See Numax Electronics Incorporated, B-206127.2, October 8, 1982, 82-2 CPD 317. On April 29, the Small Business Administration (SBA) advised CECOM that Baird was not a small business and therefore ineligible for award. This determination, coupled with CECOM's rejection of Numax' bid, made Beseler potentially the low bidder and the contracting officer consequently in early May requested that a preaward survey of Beseler be conducted. The completed survey did not reach the contracting office until July 9.

Baird protested to the agency by letter of May 11 that Beseler was not responsible and not small. SBA, by letter of June 7, determined Beseler to be small. On July 2 Opto Mechanik protested Beseler's responsibility to CECOM and on July 14 Opto Mechanik challenged Beseler's status as a small business.¹ After we issued our decision denying the Numax protest, the contracting officer, in response to the Opto Mechanik protest, again referred the question of Beseler's size status to SBA. By letter of November 5, the SBA affirmed its prior determination that Beseler was small.

Meanwhile, CECOM learned that the delay in award was jeopardizing the tank delivery schedules. On June 8, the Marine Corps advised CECOM that it required its first

¹ICSD by letter dated July 7, 1982 to our Office complained that no award should be made to Beseler. Since, however, ICSD's letter was sent in response to CECOM's report in connection with Numax' protest filed with our Office we do not consider it a separate protest.

delivery of viewers by August 1983, and that in light of the solicitation's 300-day delivery schedule, delivery probably would not occur in time to be coordinated with its tank production schedule. On July 29, the Army Tank-Automotive Command (TACOM) advised CECOM that it required its first delivery of viewers in January 1983, and it later informed CECOM that delivery to it after that date would require shutting down tank production lines at a daily cost of \$50,000. In view of the urgency, CECOM decided that the Army's initial requirements could only be met by a firm for which first article testing could be waived. Since none of the bidders considered by the SBA to be small under the solicitation qualified for waiver of first article testing, CECOM in late September requested permission to cancel the solicitation, resolicit the most urgent portion of the requirement from the only two firms, both large, for which first article testing could be waived, and later resolicit the remainder under a solicitation set aside for small business. The SBA concurred, permission was obtained, and the solicitation was canceled on October 26.

Beseler does not challenge the urgency of the situation that led to the cancellation. Rather, Beseler asserts that because of the urgency the contracting officer should have awarded a contract while the protests were pending. Beseler points out that the contracting officer's failure to make the award and the subsequent cancellation resulted in the termination of "a significant portion of a small business set-aside."

The Army reports that the contracting officer did not appreciate the urgent need for the viewers until late July. At that time, the record indicates, efforts were made to satisfy the most urgent requirements through other contract sources. This effort was successful for the Marine Corps requirement, but not for the Army's own requirement. The contracting officer reports that she requested permission to cancel the solicitation when it became apparent that the Army's urgent requirements could no longer be met under the outstanding IFB.

We do not believe the protester has established that the contracting officer's actions were arbitrary or capricious or otherwise improper. Although it is not clear to us why the contracting officer did not appreciate the urgency of the procurement--the IFB itself, in a provision captioned "URGENCY OF DELIVERY," warned bidders that the delivery schedules "are firm" and that no extensions would be considered--there is absolutely no requirement that an

award must be made while a protest is pending. The regulation relied on by the protester, Defense Acquisition Regulation (DAR) § 2-407.8(b), authorizes award of a contract prior to resolution of a protest filed with this Office if, among other reasons, the items being procured are urgently required and approval is received from the appropriate level above the contracting officer. It does not, however, mandate the use of such authority, and it is clear from reading the regulatory provision in its entirety that award prior to protest resolution should be made only in exceptional cases. In other words, the decision to seek approval for award while a protest is pending is within the discretion of the contracting officer, and no bidder has the right to insist that an award be made pursuant to the authority in DAR § 2-407.8.

Moreover, even if the contracting officer wanted to make an immediate award, the record indicates that in light of the various protests it was not clear to her which bidder in fact should have been viewed as in line for award. While Beseler insists it was in line for award after the SBA first ruled that it was a small business and after the preaward survey was completed in July, the Numax protest was still pending (had it been sustained, Numax would have been in line for the award), and Beseler's size status had again been called into question. Although Beseler points out that Opto Mechanik's July 14 protest challenging Beseler's size status was untimely under DAR § 1-703(b)(1), the contracting officer had the authority to question Beseler's size status on her own in light of the information supplied by Opto Mechanik. See DAR § 1-703(b)(2). In this regard, the contracting officer points out that the original size determination on Beseler did not encompass consideration of all the firms alleged by Opto Mechanik to be affiliates of Beseler; she further states that she wanted to be certain that Beseler indeed was a small business so that the purposes of the Small Business Act would be furthered.

The contracting officer does not explicitly indicate why, in light of this concern, she did not again refer the question of Beseler's size status to SBA until October. We note, however, that it was about this time when she became concerned about the urgency aspects of the procurement and became involved in the effort to have the most urgent requirements satisfied through other sources. Also, as the contracting officer further points out, once the urgency became apparent to her and the corollary efforts were to no avail, she realized that the Army's needs could not be

met by an award under this IFB and she initiated action to have the IFB canceled. Thus, although the referral to SEA was eventually made, presumably to provide for the possibility that authority to cancel the IFB would not be forthcoming, it is clear from this record that the contracting officer was not prepared to make an award to Beseler in July or August because 1) the contracting officer had some doubt as to Beseler's small business status, and 2) she believed that award under the IFB would not meet the Army's needs unless other arrangements could be made to meet certain urgent requirements.

These circumstances suggest no arbitrary or capricious action, but rather action that is within the permissible bounds of contracting officer discretion. While another contracting officer might have handled the procurement differently, that does not render this contracting officer's actions improper. In short, the protest falls short of establishing the existence of action to which we can interpose legal objection.

The protest and claim are denied.

for 
Comptroller General
of the United States