

DECISION

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

26886

FILE: B-211368

DATE: November 18, 1983

MATTER OF: Surgical Instrument Company of America

DIGEST:

1. Cancellation of a portion of a solicitation after bid opening is proper where the agency reasonably determines that all prices received were excessive and that it will be more cost effective to satisfy the Government's needs using a less expensive model differing from that on which bids were solicited.
2. A violation of internal agency guidelines provides no basis for questioning the legality of an award since such internal guidelines do not have the force and effect of law.
3. Evidence of agency's past allegedly improper procurement actions is not sufficient to satisfy the protester's heavy burden of proof in establishing bad faith on the part of agency procurement officials.

Surgical Instrument Company of America protests the Veterans Administration's (VA) decision not to award a contract to supply certain items under solicitation No. MI-62-83. We deny the protest.

The solicitation contemplated the award of requirements contracts for quantities of both aneroid and mercurial sphygmomanometers (instruments for measuring blood pressure), to be stocked at VA supply depots. Items 1 through 4 covered mercurial sphygmomanometers. Labtron Scientific was the low bidder on this portion of the solicitation and apparently received the award. Items 5 through 8 were for quantities of "palm model" aneroid sphygmomanometers. Surgical was the low bidder on these items at \$21.48 each, but the contracting officer determined that this price, although lower than the Federal Supply Schedule (FSS) price of \$28.00 for the item, was not low enough to offset the increased handling costs for

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stocking (including lab testing and inspection), and that all bids thus should be rejected as unreasonably high. The contracting officer further determined that the items should be dropped from the depot supply system altogether based on recent experience showing that the increased handling of the item when stocked increases the likelihood of inaccurate readings when the items are finally used. It appears the contracting officer determined that the VA's needs could better be met with a less expensive "pocket model" (\$16.00 on FSS) and, where the pocket model will not suffice, by ordering the palm model off the FSS at \$28.00 on an as needed basis.

Surgical contends that VA's decision to cancel this portion of the solicitation was improper.

A solicitation may be canceled (all or in part) after bid opening when there exists a compelling reason to do so. We have considered a number of reasons sufficiently compelling to justify cancellation, such as where all otherwise acceptable bids are found to be unreasonable, Federal Procurement Regulations § 1-2.401-1(b)(5); Photo Data, Inc., B-208272, March 22, 1983, 83-1 CPD 281, or where the agency finds that its needs can be satisfied by a less expensive design or model differing from that on which bids were invited. Uffner Textile Corporation, B-204358, February 8, 1982, 82-1 CPD 106. The determination of whether a sufficiently compelling reason exists is primarily within the discretion of the agency and we will not disturb it unless it is arbitrary, capricious or not supported by substantial evidence. Chamberlain Manufacturing Corporation, B-209187, March 10, 1983, 83-1 CPD 243.

We find no evidence that the contracting officer abused his discretion in canceling the requirement. As indicated, the contracting officer determined that although Surgical's bid was lower than the FSS price for a comparable item, it was not low enough to offset the costs which would be incurred if the item were kept in stock. The contracting officer was also concerned about the increased risk of inaccurate readings. Further, it appears the contracting officer also has determined that it will be more cost effective to satisfy requirements for aneroid sphygmomanometers by using the less expensive pocket model where possible and obtaining the palm model

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off the FSS only when needed. Surgical has not established that these determinations are incorrect or unreasonable.

Surgical argues that cancellation in this instance violated VA's internal guidelines for determining when an item should be stocked. Even if the protester is correct in its assertion, however, such internal guidelines do not have the force and effect of law, and their violation provides no basis for questioning the legality of an award. Moore Services, Inc., et al., B-204704.2, et seq., June 4, 1982, 82-1 CPD 532.

Surgical also maintains that cancellation of the solicitation here is only one of a series of "subterfuges" through which VA has denied Surgical awards to which it allegedly was entitled. The only evidence presented in support of this allegation, however, is an account of these prior procurements. In order to sustain the heavy burden of proving bad faith on the part of agency procurement officials, the record must show a malicious and specific intent to injure the accuser. Photo Data, Inc., supra. Evidence of prior allegedly improper procurement practices is not sufficient to meet this high standard of proof. Arlandria Construction Co., Inc.--Reconsideration, B-195044; B-195510, July 9, 1980, 80-2 CPD 21. Moreover, we will not find a discretionary determination to be arbitrary, capricious or biased where, as here, the record indicates the determination was rationally founded. Photo Data, Inc., supra.

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1982), Surgical has asked our Office to furnish it a copy of the VA's project file for this procurement. This request is properly for consideration by VA, the agency in possession of the information, not our Office. See Daedalus Aviation, B-210339, April 13, 1983, 83-1 CPD 399.

The protest is denied.

for *Harry R. Van Cleave*
Comptroller General
of the United States