

DECISION



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

FILE: B-212665; B-212665.2 **DATE:** February 22, 1984

MATTER OF: The Nedlog Company; Institutional Beverages

DIGEST:

1. Third low bidder is an interested party under GAO Bid Protest Procedures to protest the cancellation of an invitation for bids where the low bidder complains as well, and the third low bidder also alleges that the lower bidders are nonresponsive.
2. The cancellation of an invitation for bids after bid opening is justified where the procuring agency no longer requires the item sought due to the availability of a substitute item that will meet the agency's needs at a lower cost.
3. Where the only available evidence on a matter is the conflicting statements of the protester and the procuring agency, the protester has not met its burden of affirmatively proving its case.

The Nedlog Company and Institutional Beverages protest the cancellation of invitation for bids No. DAKF40-83-B-0165 issued by the Department of the Army at Fort Bragg for liquid fruit beverages and the installation of dispensing equipment. Both firms question the contracting officer's determination that the agency's needs could be better met through utilization of dry mix beverages. Nedlog further challenges the contracting officer's assertion that the agency already has at its disposal proper dispensing equipment. Finally, Nedlog complains that, if cancellation was proper, the Army acted in bad faith in issuing the solicitation.

We deny the protest.

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Three firms submitted bids in response to the solicitation. At bid opening, Institutional Beverages was the apparent low bidder; Nedloq was the high bidder. Thereafter, Nedloq filed a protest with the contracting officer challenging the responsiveness of the other two bids. Several days later, the contracting officer canceled the solicitation, stating that the supplies sought were no longer required. Nedloq and Institutional Beverages subsequently filed protests with this Office.

The Army contends initially that we should dismiss Nedloq's protest because the firm, as the third low bidder, would not be in line for award even if we determined that cancellation was improper, and thus is not an "interested party" under our Bid Protest Procedures. See 4 C.F.R. § 21.1(a) (1983). While the Army correctly states the general rule, we note that Institutional Beverages, the low bidder under the solicitation and clearly an interested party here, also protests the cancellation. In addition, Nedloq argues that the two lower bidders were nonresponsive. Therefore, we consider Nedloq an interested party in this case. See Com-Tron, Inc., B-209235, May 9, 1983, 83-1 CPD 486.

The Army asserts that cancellation of the solicitation was proper since the Army has dispensing equipment, and dry mix beverages are available through the Army rations supply system at a fraction of the cost of purchasing the liquid beverage. The protesters, on the other hand, contend on various grounds that the cancellation was improper. Both assert that the solicitation was canceled because of the protest Nedloq filed with the contracting officer. Nedloq also argues the Army is biased against it. In addition, both believe that the dry mix beverages are not comparable to the liquid beverage in terms of nutrition, taste, and ease of use. Nedloq also states that the dry mix beverage is not cheaper per serving, and questions the Army's assertion that it has proper dispensing equipment. Finally, Nedloq contends that the cancellation was premature since the Fort Bragg Menu Board did not vote to use the dry mix beverage until after the cancellation occurred.

Applicable regulations require that a decision to reject all bids and cancel a solicitation after bid opening be supported by a compelling reason. Defense Acquisition Regulation (DAR) § 2-404.1(a) (1976 ed.). Those regulations note that a compelling reason exists where it is determined that the supplies or services are no longer needed. DAR § 2-404.1 (b)(iii). To prevail here, the protester must demonstrate that the contracting officer's decision in this regard was arbitrary, capricious, or not supported by substantial evidence. International Type-writer Exchange, B-205989.3, September 27, 1982, 82-2 CPD 279. Based on the record in this case, we are unable to conclude that the contracting officer acted arbitrarily or capriciously in canceling this solicitation.

First, there is no evidence to suggest that cancellation resulted either from the fact that Nedloq filed a protest with the contracting officer, or from the desire to avoid awarding a contract to Nedloq (assuming, as Nedloq argues, that the two lower bids were nonresponsive). The record contains a copy of a pre-cancellation memorandum from the contracting officer clearly stating that the cancellation was ordered because the services were no longer needed. The protesters' speculation is based on an alleged statement to Institutional Beverages from a contracting official other than the contracting officer that the action was taken because of Nedloq's protest, and on the fact that the cancellation occurred within days of the protest. In view of the contracting officer's memorandum, and since the protesters' allegation is not supported by any evidence in the record, we consider the allegation to be without merit. See Consolidated Services, Inc., B-206413.3, February 28, 1983, 83-1 CPD 192.

Second, concerning the protesters' view that the nutrition, taste, and ease of use of dry mix beverage are not comparable to those of the liquid beverage, a lack of equivalency between the products would not alone render the cancellation improper. We have held that the cancellation of a solicitation is appropriate where an item substantially the same as the item for which the solicitation was issued is available within the government at a lower cost, and the available item meets the agency's needs. Cf. Keco Industries, Inc., 54 Comp. Gen. 215 (1974), 74-2 CPD 175 (concerning cancellation of a request for proposals).

Clearly, the liquid beverage and the dry mix beverage differ in some respects. The Army informally advises us, however, that the dry mix beverage has been widely used in Army rations for some time. We find no evidence in the record upon which to conclude that the dry mix and liquid beverages are not substantially the same so that the Army's needs cannot be met by substituting the dry mix beverage for the liquid beverage.

The record also does not supply us with a basis to conclude that the liquid beverage is less costly per serving than the dry mix, as Nedlog contends. The Army states that the cost of an 8-ounce serving of the then-incumbent contractor's liquid beverage was 10-1/2 cents while the cost of the same sized serving of the dry mix beverage is 1-1/2 cents. (The incumbent contractor was the second low bidder under the canceled solicitation and bid essentially the same price as it had last year.) Nedlog, on the other hand, asserts that its liquid beverage costs 7 cents per 8-ounce serving, and that the actual cost of the dry mix beverage increases at least 2 cents with the addition of the cost of sugar, and even more when the costs of labor and inconvenience are added. Other than the cost of sugar, however, Nedlog merely guesses that the cost of a serving of the dry mix beverage is greater than is stated by the Army. The protester has the burden to prove its case, Alchemy, Inc., B-207954, January 10, 1983, 83-1 CPD 18, and since the record is devoid of evidence to negate the Army's assertions that the dry mix beverage is the lower-cost drink, we find this portion of Nedlog's protest to be without merit.

Nedlog disputes the Army's assertion that the agency has appropriate dispensing equipment. Since the only evidence on the issue is conflicting statements of the protester and the procuring agency, which obviously is in the better position to know what it has available, the protester has not met its burden of proof. Gulf Outlet Energy Corporation, B-210199, July 11, 1983, 83-2 CPD 73.

Nedlog also challenges the contracting officer's cancellation of the solicitation as premature since it was not until 1 week after cancellation that the Fort Bragg Menu Board voted to use the dry mix beverage rather than the liquid beverage. Nedlog suggests that the contracting

officer did not yet have justification for the cancellation at the time the decision was made. We note, however, that the contracting officer indicates that she relied upon information from the food service officer in determining to cancel the solicitation,¹ and that the contracting officer's pre-cancellation memorandum states that the items are no longer needed. Whether or not that reflected anticipation of the Menu Board's action, it is clear that the authorities at Fort Bragg decided they no longer wanted liquid beverages. We see nothing in the record upon which to conclude that the contracting officer acted without justification.

Alternatively, Nedlog alleges that, if cancellation was proper, the Army issued the solicitation in bad faith since the agency had access to the dry mix beverage for many years through its ration supply system. While the preservation of the integrity of the competitive bidding system requires that the procuring agency take every possible step to determine its specific needs before bids are opened, see Essex Electro Engineers, Inc., B-206012.3, October 4, 1982, 82-2 CPD 307, we find nothing in the record to suggest that the contracting officer was aware of the dry mix beverage's availability for the requirement in issue before issuing the invitation. We are unable to conclude, therefore, that the contracting officer acted in bad faith in either issuing or canceling the solicitation.

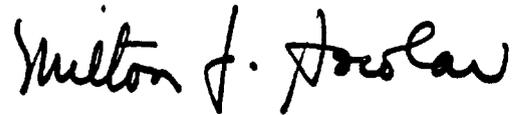
Finally, Nedlog contends that the contracting officer improperly denied the firm the opportunity to appear at the Menu Board meeting and present its case. The contracting officer disputes that contention. In our view, this issue is academic since the solicitation had already been canceled by the time the meeting took place. In any case, the procurement regulations do not require a contracting

¹A letter in the Army's report, written by the Judge Advocate General Corps to this Office, states that the contracting officer relied on the Menu Board's findings to cancel the solicitation. The Army has now informally advised us that the letter was in error and that the contracting officer's statement is correct.

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officer to solicit bidders' views before canceling a solicitation. See generally DAR § 2-404.

The protest is denied.

A handwritten signature in black ink, reading "Milton J. Jorlow". The signature is written in a cursive style with a large initial "M".

Acting Comptroller General
of the United States