

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**Golden
P.I.
29915**FILE:** B-215891**DATE:** December 3, 1984**MATTER OF:** Getty Oil Company**DIGEST:**

1. By statute, the Secretary of the Department of Energy (DOE) is authorized to conduct sales of Naval Petroleum Reserve petroleum products; each sale shall be a public advertised sale to the highest qualified bidder at such time and in such amounts as the Secretary considers proper. Thus, DOE has some discretion concerning the conduct of the sale, including the decision as to the amount of gas to sell at a particular sale.
2. Department of Energy did not abuse discretion granted by law in conduct of petroleum sales at Naval Petroleum Reserve in its determination that it could not take immediate remedial action concerning a protest against accuracy of sales information under natural gas sales solicitation filed 4 days before bid opening. Immediate agency action was not possible because solicitation did not permit increasing quantities without amendment, an amendment could not be issued in timely fashion because agency needed time to verify accuracy of protester's information, and sale could not be delayed without adversely affecting the operations of the Naval Petroleum Reserve.

Getty Oil Company (Getty) protests the sale of natural gas from the Naval Petroleum Reserve No. 1 (NPR), Kern County, California, under invitation for bids (IFB) No. DE-FB01-84FE60521 issued by the Department of Energy (DOE).

Getty contends that DOE issued a defective IFB because it did not contain the best current estimate of gas which could be sold at the NPR 17Z delivery location. Getty believes that, in view of its pre-bid-opening protest asserting that DOE had underestimated the quantity of gas, DOE should have taken steps to revise the sale estimates. Getty argues alternatively that the IFB as issued permitted award of greater than listed quantities without revision of

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the IFB by amendment, or that an amendment should have been issued as soon as possible after its protest was filed, or the sales under the IFB should have been made on an interim basis until a revised IFB could be issued. Finally, Getty argues that DOE's sale violates 10 U.S.C. § 7430(b) (1982), which governs the sale of NPR natural gas, because DOE allegedly is required to sell the gas at the highest price available and the gas sold at delivery location 24Z, at a lower price than at 17Z, should have been included in the 17Z estimate. Getty asserts that DOE had information prior to bid opening showing that 17Z had a greater delivery capacity than was stated in the IFB and, thus, DOE was required to sell the greater quantity at 17Z.

We deny the protest.

This IFB was issued for the sale of 136,900 million British thermal units (MBTU) per day of natural gas from NPR and established a bid opening date of July 13, 1984. Various quantities of gas were offered for delivery at four different points including 17Z and 24Z. The quantities offered at each delivery point were based on quantities available for sale and throughput capacity at each of the locations. At three of the locations, the gas offered, based on the throughput capacity, was less than the quantity of gas DOE could deliver to those points.

On July 9, 1984, 24 days after the IFB was issued and 4 days before the scheduled bid opening, Getty telephoned the DOE contract specialist to request that the volume of gas for sale at the 17Z location be increased to the maximum volume that could be delivered. Getty has suggested at various times that the proper pipeline capacity should be either 121,000, 124,000 or 132,000 MBTU per day. The contract specialist advised Getty that, before changing the amount of gas for sale, DOE would need to verify Getty's information concerning the capacities of the connecting pipelines, and that, if the capacities were as Getty alleged, the change would have to be accomplished by an IFB amendment since the IFB quantities were affected. DOE further stated that it could not issue such an amendment, in any event, since bid opening was only 4 days away and the bid opening could not be extended. Also, DOE advised that, since there were 232 prospective bidders on the mailing list, DOE could not ensure the timely receipt of an amendment before bid opening.

Based on its verification of Getty's pipeline capacity information during the pendency of Getty's protest, DOE advises that future solicitations will permit the purchase of higher amounts of gas from 17Z. Nevertheless, DOE asserts it acted properly in the conduct of this sale and believed in good faith that the IFB reflected the best available estimates.

With regard to DOE's decision not to revise the IFB in response to Getty's protest, DOE explains that it is absolutely essential that the flow of gas off the NPR not be interrupted. DOE states that, unless the gas is removed from the field on a continuous uninterrupted basis, wells would have to be shut down. DOE asserts that the shutdown of wells conflicts with DOE's statutory mandate to manage the petroleum production at the field at its maximum efficient rate. DOE concludes that an amendment to the IFB would have required the bid opening date be extended and, as a result, the date for commencement of deliveries would have been delayed.

DOE also points out that, even if Getty's information could have been verified immediately, it would not have been possible to amend the IFB without delaying the bid opening date to permit prospective bidders to consider the amendment in arriving at their bids. The IFB was sent to approximately 232 addressees who comprise the bidders list, and DOE states that in the past it has taken at least 2 days to draft the amendment to the IFB, to have it internally approved within DOE, and reproduce and prepare it for mailing. Since Getty's objection was first made known to DOE on July 9, 1984, DOE advises it believed that any amendment issued would not be received by prospective bidders in time for it to be considered in arriving at their bids. Thus, DOE asserts that it would not have been possible to issue an amendment without extending the bid opening date and interrupting the flow of gas off the NPR, thereby requiring some of the gas and oil production to be curtailed.

In this connection, DOE further points out that, after bid opening, approximately 5 working days are generally required to determine qualified prospective awardees. DOE also points out that by law, the sales contracts must be forwarded to the Department of Justice for certification that the award will not violate antitrust laws and that Justice has 30 days for this review. Finally, after DOE approval, DOE advises that proposed awardees must obtain

performance guarantees subject to DOE approval before deliveries begin. DOE states approximately 10 days are needed for this procedure. DOE concludes that, based on this schedule of actions which must be accomplished prior to contract performance, issuance of an amendment in this case would have jeopardized NPR operations.

Initially, we note that under the applicable law, 10 U.S.C. § 7430(b) (1982), the Secretary of Energy has some discretion in the sale of the gas, including the decision as to the amount of gas to sell at a particular sale. Under the statute, DOE must sell the gas at public sale to the highest qualified bidder at such time and in such amounts as the Secretary of Energy considers proper. Therefore, DOE's actions here did not constitute an abuse of administrative discretion.

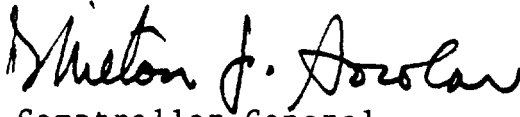
The record clearly shows, and Getty does not dispute, that DOE was under a tight time schedule for the completion of this sale to avoid disruption of petroleum production at NPR. Under these circumstances, DOE's decision to complete the sale based on the estimates contained in the IFB was reasonable.

Getty's primary contention is that DOE had sufficient information on hand at the time Getty raised the issue to permit prompt amendment or to increase sales quantities without amendment or to make temporary sales under the existing IFB until a new revised IFB could be issued.

With regard to Getty's contention that DOE ignored the record of previous bids which allegedly showed that the pipeline capacity at 17Z was 119,800 MBTU per day, DOE points out that, under these prior IFB's and under the current IFB, bidders could submit bids without determining or securing pipeline capacity to fulfill contract obligations. Under these IFB's, bidders were required to submit with bids only a statement of their existing or proposed transportation arrangements. After bid opening, DOE asks successful bidders to demonstrate their actual transport ability. DOE points out that this approach is used because limiting bids only to bidders with established transportation arrangements would be restrictive and permit pipeline owners to determine who can bid. Thus, in our view, DOE properly decided to verify Getty's information since the amounts bid previously did not necessarily establish actual pipeline capacities.

Alternatively, Getty asserts that DOE should have used the existing IFB for temporary sales for an interim period while DOE issued a revised solicitation on the basis of Getty's protest. DOE responds that it considered this option, but rejected it on the grounds that the original IFB asked for bids for 1 year of sales and that firms submitted prices on this basis. DOE concluded that to award contracts for 1 year with the intent of prematurely terminating those contracts would have been unfair, led to protests and would probably have led to an auction under the revised IFB since the identity and number of bidders and prices bid would have been exposed. In our view, DOE properly rejected this approach under the circumstances.

Getty also argues that the IFB permitted DOE to shift quantities offered from one location to another. In this connection, Getty refers to a quantity reduction made by DOE under the 1983 contract. DOE points out that the reduction which occurred in 1983 was based on field conditions which caused a temporary production decrease. The clause to which Getty refers provides that the quantities offered for sales are estimates, but that the quantity may vary depending on "practical considerations in field operations." We agree with DOE that the clause is intended to allow for quantity variations after award due to production fluctuations arising from the NPR operations and that it was not intended to permit award of contracts for quantities not contemplated under the IFB.

for 
Comptroller General
of the United States