

DECISION

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

FILE: B-219981.4

DATE: June 12, 1986

MATTER OF: Tektronix, Inc.

DIGEST:

Cancellation of an invitation for bids (IFB) after bid opening is proper where funds for the procurement are no longer available. Contracting agency is not precluded from resoliciting if funds become available in the future, since there is no evidence that the current unavailability of funds is merely a pretext to permit cancellation of the IFB and resolicitation in the future.

Tektronix, Inc. protests the cancellation by the Marine Corps of invitation for bids (IFB) No. M00027-85-B-0037 for time domain reflectometers and associated technical data. We deny the protest.

The IFB, issued on April 23, 1985, called for bidders to submit unit and extended prices for a basic quantity of 100 reflectometers and an additional option quantity of 100 reflectometers, as well as separate option prices for related technical data. At bid opening on May 23, bids were received from two bidders, Tektronix and Biddle Instruments. Award was made to Biddle on August 5, after the Marine Corps had allowed Biddle to correct an apparent mistake in its bid for the option quantity.

Tektronix then filed a protest with our Office challenging the Marine Corps' decision to permit correction of Biddle's bid. We sustained the protest, finding that withdrawal of the bid, not correction, was the appropriate remedy under the circumstances. We recommended that Biddle's contract be terminated for convenience and award made to Tektronix if the firm was otherwise eligible. Tektronix, Inc., B-219981, Nov. 27, 1985, 85-2 CPD ¶ 611.

The Marine Corps agreed to implement our recommendation to terminate Biddle's contract. In considering whether Tektronix was eligible for award, the

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Marine Corps advised Tektronix that there was an apparent mistake in its bid. Biddle, the other bidder, also filed a protest with our Office alleging that the Tektronix bid was nonresponsive because it did not conform to the specifications in the IFB.

The Marine Corps then canceled the IFB on March 20, 1986.^{1/} The contracting officer found that cancellation was warranted in the public interest in view of the lengthy delay in making award; apparent deficiencies in both bids received; and allegations of fraud by Tektronix. The contracting officer also stated that the funds originally earmarked for the procurement had expired for obligation and thus were no longer available; that no other funds currently were available for the procurement; and that it could not be predicted if funds would become available in the future. Tektronix filed its protest challenging the cancellation with our Office on April 4.

As a preliminary matter, the Marine Corps contends that our Office lacks jurisdiction under the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551 et seq. (Supp. II 1984), to consider the protest. The Marine Corps argues that protests such as this one which challenge an agency's decision to cancel a solicitation do not fit the definition of protest in CICA, 31 U.S.C. § 3551(1). We recently rejected this argument in Contract Services Co., Inc., 65 Comp. Gen. 41 (1985), 85-2 CPD ¶ 472, where we concluded that CICA authorizes our Office to continue to decide protests involving the cancellation of solicitations even where a resolicitation is not contemplated. The Marine Corps has made no new arguments which would justify revising our position. Accordingly, we conclude that we have jurisdiction to consider the protest by Tektronix.

Cancellation of an IFB where, as here, bids have been opened and prices exposed is not permitted unless a compelling reason for the cancellation exists. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(a)(1) (1984); Military Base Management, Inc., B-216309, Dec. 4, 1984, 84-2 CPD ¶ 619. The Marine Corps has offered several grounds in support of cancellation of the IFB, including

^{1/} After the IFB was canceled, the protest filed by Biddle challenging the responsiveness of the Tektronix bid was dismissed as academic.

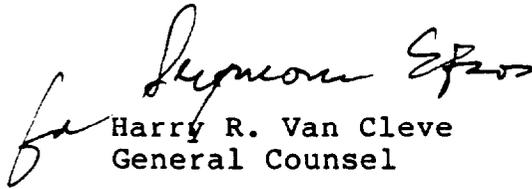
the fact that no funds currently are available for the procurement. An agency's determination that funds are not available for a procurement is a sufficient reason to cancel a solicitation, since statutory limitations prevent the award of a contract when funds are not available, even if the determination is not made until after bid opening. Spruill Realty/Construction Co., B-209148.2, Jan. 31, 1983, 83-1 CPD ¶ 102. Since the unavailability of funds is by itself a sufficient basis for cancellation, we need not consider whether any of the other grounds asserted by the Marine Corps also provided a proper basis for canceling the IFB. NDT-1, Inc., B-220570, Nov. 20, 1985, 85-2 CPD ¶ 576.

The Marine Corps has stated that funds are not currently available and that it has no plans at present to resolicit; if funds become available in the future, however, the Marine Corps has said that it will issue a new solicitation for the reflectometers. Tektronix contends that the current unavailability of funding is merely a pretext by the Marine Corps to avoid making award to Tektronix. As a result, Tektronix argues, if funds become available in the future, the Marine Corps should be required to reinstate the canceled IFB and make award to Tektronix, instead of issuing a new solicitation.

To the extent Tektronix is challenging the Marine Corps' decision to allocate current funds for purposes other than this procurement, we will not review this determination, since it depends on the Marine Corps' judgment concerning which projects and activities shall receive increased or reduced funding. NDT-1, Inc., B-220570, supra.

Moreover, we reject Tektronix's assumption that any future decision to resolicit if funds become available would necessarily demonstrate that the Marine Corps' present decision to cancel the IFB was an improper pretext only, and thus that resolicitation would be improper in all circumstances. On the contrary, since funds are not available currently and cancellation thus is proper at present, we see no reason why the Marine Corps should now be foreclosed from resoliciting if funds become available in the future. See James M. Carroll--Reconsideration, B-221502.3, Mar. 24, 1986, 86-1 CPD ¶ 290. If the Marine Corps decides to resolicit and Tektronix believes that the circumstances of the resolicitation demonstrate that the present decision to cancel was improper at the time it was made, Tektronix may challenge the resolicitation at that time. Id.

The protest is denied.


for Harry R. Van Cleve
General Counsel