

PLI



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Able Fence and Guard Rail Inc.
File: B-223380
Date: September 4, 1986

DIGEST

Agency's cancellation of solicitation, after bids had been opened, on basis of determination that protester's price was unreasonably high, will not be disturbed by the General Accounting Office, even though the validity of that determination is questionable because the agency unknowingly compared the protester's price with those for a less expensive item, where as a result of the protest, the agency reviewed its specifications and reasonably concluded they no longer reflect its actual needs.

DECISION

Able Fence and Guard Rail, Inc. (Able), protests the Defense Logistics Agency's (DLA's) decision to cancel invitation for bids (IFB) No. DLA700-86-B-0309, for barbed wire issued on December 5, 1985, as a small business set-aside. We deny the protest.

The procurement was based on a purchase request for barbed wire requiring 12 gauge line wire with 4 inches between the barbs. DLA reports that, relying on past procurement history and a market survey, the contracting officer determined that there was a reasonable expectation that bids would be obtained from at least two small business concerns at reasonable prices, and the solicitation was set-aside for small business.

On January 24, 1986, bids were opened. The low bid submitted by Guardian Purchasing Corporation (Guardian) was rejected as nonresponsive because Guardian failed to represent that it would furnish an item manufactured by a small business. The next two bids, including one by Able in which wire manufactured by a large business was offered, also were rejected as nonresponsive to the set-aside requirements. Able also submitted an alternative bid, based on its own manufacture of the wire, which was the low responsive bid. On March 14,

036589

1986, the contracting officer determined Able to be nonresponsible based on a preaward survey which found Able's production and quality assurance capabilities unsatisfactory. The contracting officer referred her determination of Able's nonresponsibility to the Small Business Administration (SBA) for a certificate of competency (COC), and on April 1, 1986, a COC was issued to Able.

The record indicates that in early May the contracting officer proposed an award to Able, but the procuring activity's contract review office questioned whether Able's bid price was reasonable. After reevaluation, the contracting officer decided to cancel the IFB because she determined that the prices submitted by firms whose bids were nonresponsive because they offered to supply the product of a large business were considerably lower than Able's responsive bid, and thus precluded a determination that Able's price was reasonable. The nonresponsive bids were \$238,738.71 to \$294,211 lower than Able's total price of \$1,376,548.50. By letter dated May 22, 1986, DLA notified SBA of DLA's decision to cancel the IFB, and notified Able of the cancellation by letter of May 30.

DLA also reports that, subsequent to the filing of Able's protest, it determined that its minimum needs could be met, and competition could be enhanced, by revising the IFB to specify a lighter 12-1/2 gauge line wire with 5 inch spacing of barbs rather than 12 gauge line wire with 4 inch spacing of barbs specified under the original IFB.

Able objects to the cancellation of the IFB, requesting that it be reinstated and that award be made to Able. Able argues that during the period from bid opening on January 24 until the cancellation in late May, Able was led to believe it would receive the contract, and that it incurred costs when it made commitments to suppliers to permit Able to extend its bid at the agency's request and also incurred costs during the COC proceeding, which was resolved in its favor.

It overcame the challenge to its responsibility, Able states, only to be advised later that it would not receive the award because its price was unreasonably high, as a result of which the solicitation was canceled. Able questioned the validity of that determination in its protest, where it pointed out to the agency, for the first time, that the nonresponsive bids submitted by it and others reflected a large manufacturing firm's quotation which erroneously was based on the use of less expensive 12-1/2 gauge wire, not the 12 gauge wire solicited. DLA subsequently investigated this information and found that the principal supplier for the nonresponsive bidders, Keystone Steel, indeed had quoted on the basis of

12-1/2 gauge line wire. This led to a further evaluation of the 1973-vintage specifications used here, as a result of which DLA determined that the thicker 12 gauge wire exceeded the government's minimum needs.

In this connection, DLA reports that the 12-1/2 gauge line wire with 5 inch spacing of the barbs, as quoted by Keystone, is the industry standard for this type of barbed wire. DLA further states that in the past wire with 4 inches between barbs was used for security purposes by stringing it along the top of chain link fencing. When barbed wire was used for security purposes, the more closely spaced barbs were preferable because of the increased likelihood that an intruder's hand would grab a barb.

However, barbed tape, not barbed wire, is currently used on fencing for security purposes and barbed wire is used only for animal control and boundary demarcation which does not require the type of wire solicited under the protested IFB. DLA advises that the cancellation of the IFB at issue and solicitation of 12-1/2 gauge line wire with 5 inch spacing of barbs will increase competition and, as indicated by the bids of those firms offering this type of wire, reduce the cost of the barbed wire.

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting officer must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation (FAR), § 14.404-1 (FAC 84-5, Apr. 1, 1985); Designware, Inc., B-221085, Jan. 28, 1986, 86-1 C.P.D. ¶ 101; Aul Instruments, Inc., B-219992.2, Sept. 20, 1985, 85-2 C.P.D. ¶ 315. In considering cases involving cancellations, we recognize that the contracting officer has broad discretion to decide whether there is a compelling reason to cancel, and we limit our review to determining whether the exercise of that discretion is reasonable. Hoyer Construction Co., Inc., B-216825, Feb. 13, 1985, 85-1 C.P.D. ¶ 194.

From this record it does appear that the price unreasonableness determination was based on an erroneous comparison of Able's price with prices for barbed wire of a type which did not comply with the specifications. However, this apparently was discovered by DLA only as a result of the protest. DLA also discovered, during the course of the protest, that it no longer needed the more expensive barbed wire solicited and Able does not rebut DLA's findings that the 12 gauge wire no longer reflects the agency's needs. As a general rule, changing the requirements of a procurement after the opening of bids to express properly the agency's minimum needs does constitute a compelling reason to cancel a

solicitation. Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 C.P.D. ¶ 484.

Where it is determined that an IFB contains specifications which overstate the minimum needs of the procuring agency, or the agency after bid opening decides that the needs of the government can be satisfied by a less expensive design differing from that on which bids were invited, there exists a compelling reason for cancellation of the solicitation. Ikard Manufacturing Co., B-192248, Sept. 22, 1978, 78-2 C.P.D. ¶ 220. In these circumstances, we cannot conclude that the cancellation was improper. International Trade Overseas, Inc., B-221824, Apr. 1, 1986, 86-1 C.P.D. ¶ 310.

We also have held that an agency may properly determine to cancel a solicitation after bid opening no matter when the information precipitating cancellation first surfaces. International Trade Overseas, Inc., B-221844, *supra*. Therefore, DLA properly could determine, after bids were opened or even in the course of reviewing the protest allegations, that cancellation based on the above grounds was warranted even if the agency had initially determined that the specifications were adequate. Chrysler Corp., B-208943, Sept. 24, 1982, 82-2 C.P.D. ¶ 271.

In this instance we have found that the agency had a reasonable basis for its decision to cancel. While this decision may have been based on facts--that the specifications were for a type of barbed wire no longer needed--which arguably should and could have been discovered at an earlier date had the agency acted more diligently, rather than approximately 6 months after the IFB was issued, there is no indication that the IFB was issued in bad faith.

We deny the protest.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel