



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Duracell, Inc.; Altus Corporation
File: B-229538; B-229553; B-229553.2
Date: February 12, 1988

DIGEST

1. There is no basis to require a contracting agency to obtain a justification and approval for the use of other than competitive procedures where the agency has determined that its minimum needs can be met through full and open competition.
2. Cancellation of a bid item after competitors' prices have been revealed does not result in an improper auction upon resolicitation where the cancellation was in accordance with governing legal requirements.
3. Under invitation for bids (IFB) providing for split award, bidder which did not offer its lowest price on item representing 60 percent of agency's requirement because it interpreted IFB as providing for award of item representing 40 percent of agency's requirement to second low bidder was not prejudiced by agency's decision not to cancel 60 percent quantity. IFB instructed bidders to treat each item as a separate quantity and to price each accordingly, and the protester elected not to compete for 60 percent item.
4. Protest alleging that if under IFB providing for split award item representing 60 percent of agency's requirement is awarded while item representing 40 percent is canceled and resolicited, awardee of 60 percent quantity will have an unfair advantage upon resolicitation due to its ability to combine material requirement purchases, and entire IFB therefore should be canceled, is denied where possible advantage to awardee of 60 percent item is outweighed by prejudice to the competitive bidding system of cancellation of the item after prices have been exposed.

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DECISION

Duracell, Inc. and Altus Corporation protest the partial cancellation of invitation for bids (IFB) Nos. DAAB07-87-B-C094 and DAAB07-87-B-C090, issued by the United States Army Communications and Electronics Command for two sizes of lithium sulfur dioxide batteries.

The total quantity of batteries under each solicitation was divided between two line items, one representing 60 percent of the requirement and the other representing 40 percent. The Army canceled the item representing the 40 percent share under each solicitation after bid opening. Duracell argues with regard to solicitation No. C094 that there was no compelling reason to cancel the 40 percent share; cancellation will result in an improper auction upon resolicitation; and, in the alternative, if cancellation is warranted, the entire solicitation should be canceled. With regard to solicitation No. C090, both Duracell and Altus argue that if the 40 percent share is to be canceled, the entire solicitation should be canceled. We deny the protests.

Solicitation No. C094 requested bids for a total of 150,000 BA-5590 lithium sulfur dioxide batteries; line item LAA represented 60 percent of the requirement (90,000 batteries), and item LAB covered the remaining 40 percent (60,000 batteries). Solicitation No. C090 asked for bids on a total of 161,000 BA-5598 batteries, with item LAA representing 60 percent of the requirement (96,600 batteries) and item LAB, 40 percent (64,400 batteries). According to the Army, the contracting officer split the total quantity under each solicitation into two lots in order to permit bids from small businesses on less than the entire requirement. Both IFBs required bidders to be producers of the lithium sulfur dioxide cells used in the batteries. The solicitations advised bidders that the government intended to make two awards under each and emphasized that both items would not be awarded to the same bidder. Bidders were instructed to treat each item as a separate quantity and to price each accordingly.

The four known domestic lithium sulfur dioxide battery cell producers responded to both IFBs with the following bids:

IFB No. C094

<u>Bidder</u>	<u>Price per unit</u>	
	<u>Item 1AA</u>	<u>Item 1AB</u>
SAFT America	44.94	44.94
Duracell	47.00	47.00
Power Conversion	50.67	50.67
Altus	56.00	56.70

IFB No. C090

<u>Bidder</u>	<u>Price per unit</u>	
	<u>Item 1AA</u>	<u>Item 1AB</u>
Power Conversion	27.00	28.95
Altus	31.89	31.89
SAFT America	33.32	33.32
Duracell	38.17	38.17

Since under both IFBs the same bidder was low on both the 60 percent and the 40 percent shares, the IFBs called for the awards for the 40 percent shares to be made to the second low bidders. Under these circumstances, the Army determined that cancellation of the 40 percent shares was required since, under the Competition in Contracting Act of 1984 (CICA), award under an IFB may be based only on lowest price. The Army also concluded that cancellation of the 60 percent shares was not required since those awards would be made to the low bidders. The contracting officer subsequently advised the bidders that the government intended to proceed with the 60 percent award and cancel the 40 percent share under both solicitations.

With regard to solicitation No. C094, Duracell, the second low bidder on the 40 percent lot, argues that there was no compelling reason to cancel that item. The protester argues in effect that in order to allow award to be made under the IFB for the 40 percent item, we should instruct the agency to make a retroactive determination under CICA, 10 U.S.C. § 2304(c)(3)(A) (Supp. III 1985), that use of other than competitive procedures was required here to maintain an industrial mobilization base. We find this argument to be without merit. It is within the procuring agency's discretion to determine whether restrictions on competition are required to meet the needs of industrial mobilization, and we will question those decisions only if the evidence

convincingly shows that the agency has abused its discretion. Technical Systems, Inc., B-225143, Mar. 3, 1987, 87-1 CPD ¶ 240, 66 Comp. Gen. _____. Here, the agency elected not to restrict competition because it had determined that its minimum needs could be met through full and open competition among the known lithium sulfur dioxide battery cell producers. The protester has offered no evidence to refute the agency's position.

Duracell further argues that cancellation of the 40 percent items after competitors' prices have been revealed is improper because it will lead to an auction upon resolicitation. We disagree. Resolicitation does not create an impermissible auction where the original post-bid opening cancellation of an IFB was proper. Alden Electronics, Inc.--Reconsideration, B-224160.2 et al., Mar. 12, 1987, 87-1 CPD ¶ 277. A contracting officer must have a compelling basis to cancel an IFB after bid prices have been exposed. Federal Acquisition Regulation § 14.404-1(a)(1). Here, as explained below, the Army could not legally make award under the IFBs of the 40 percent items. As a result, the Army clearly had a compelling basis for canceling those portions of the IFBs.

Under CICA, a contracting agency may solicit sealed bids only if, among other factors, award will be made based on lowest price. 10 U.S.C. § 2304(a)(2)(A)(ii); Adrian Supply Co.--Reconsideration, B-225440.2, Mar. 30, 1987, 66 Comp. Gen. _____, 87-1 CPD ¶ 357. Here, the IFBs, in effect, provided for award of the 40 percent shares to the second lowest priced firms; such awards clearly would not be made solely on the basis of lowest price. As a result, the Army could not properly use sealed bidding to carry out the split award scheme it intended. Stic-Adhesive Products Co., Inc., B-227162, Sept. 25, 1987, 66 Comp. Gen. _____, 87-2 CPD ¶ 300, aff'd. on reconsideration, B-227162.2, Nov. 16, 1987, 87-2 CPD ¶ 486.

With regard to IFB No. C090, Altus Corporation, the second low bidder on the 40 percent lot, contends that since CICA precludes award of the item to other than the low bidder, the entire solicitation should be canceled. Similarly, Duracell argues that since the agency did not obtain a justification and approval for the use of other than competitive procedures, any award under the solicitation would be illegal. We find these arguments to be without merit. As noted above, under both solicitations all four known domestic producers of the battery cells submitted bids on the 60 percent shares and the awards were made to the lowest price bidders. Accordingly, the defect posed by award of the 40 percent shares--award to other than the lowest

bidder--was not involved in award of the 60 percent shares, and we see no other basis on which to require the Army to cancel these portions of the IFBs.

Duracell also argues that cancellation of the 40 percent lot together with award of the 60 percent lot to the low bidder is unfair to other bidders who thought that they did not have to bid low in order to obtain award of the 40 percent item. Duracell contends that it deliberately offered a price higher than the price that it had determined would be required to be low on the 60 percent quantity because it was more interested in the 40 percent quantity, which "more closely fit [its] internal production planning and likely would be awarded at a more appealing price." According to the protester, it would have bid a lower price on the 60 percent share if it had known that the second low bidder would not be in line for award of the 40 percent share.

We note first that, as a general matter, cancellation of only portions of an IFB is not objectionable where, as here, the solicitation reserves to the government the right to reject any or all offers and to accept any item or group of items of any offer. Hampton Metropolitan Oil Co., et al., B-186030 et al., Dec. 9, 1976, 76-2 CPD ¶ 471. With regard to the protester's argument that it would have adopted a different bidding strategy if it had known that the second low bidder would not be in line for partial award, we further note that the IFB specifically instructed bidders to treat each item as a separate quantity and to price each accordingly. It was the protester's decision not to compete for the 60 percent quantity, and we do not think that it is unfair for it to have to bear the consequences of that decision. In addition, Duracell will have the opportunity to compete for the 40 percent shares when the Army resolicits.

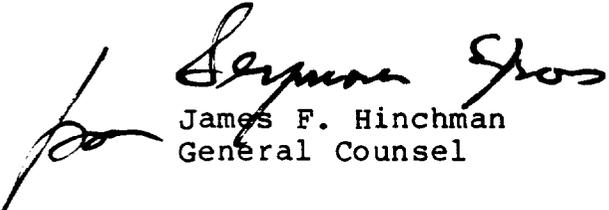
Duracell further argues that if the 40 percent quantity is canceled, the 60 percent quantity should also be canceled since SAFT, the awardee, will have an advantage upon solicitation. Duracell contends that due to the protracted delivery schedule and close proximity of resolicitation, only SAFT will be afforded the advantage of combining its material requirement purchases. Similarly, Altus argues that Power Conversion, the 60 percent awardee under IFB No. C090, will enjoy an unfair competitive advantage upon resolicitation because it will be bidding on a larger overall quantity than other bidders.

The agency points out in response to these arguments that Duracell and Altus have current production lines running and thus also maintain the routine "incumbent" advantage.

Duracell counters by emphasizing that it is not the routine incumbent advantage to which it objects, but rather the opportunity, enjoyed by the awardees alone, to combine purchases of materials and supplies for the 60 percent quantity with the purchase of materials for the 40 percent quantity.

As a preliminary matter, we are not persuaded that only the awardees of the 60 percent shares will have the opportunity to combine material purchases given the absence of any allegation by either protester that these batteries are manufactured exclusively for the Army. Duracell's statement that it had sought to obtain award of the 40 percent quantity rather than the 60 percent since it more closely fit its internal production planning in fact suggests that Duracell anticipates battery orders from other sources. Furthermore, even if we assume the awardees will enjoy a competitive advantage upon resolicitation due to their exclusive ability to combine material purchases, we fail to see how that advantage differs from the advantage enjoyed by any firm which is properly awarded more than one government contract for an item. As discussed above, cancellation of the 40 percent quantities was required because the Army was precluded by CICA from making those awards under the terms of the IFBs; in contrast, the awards of the 60 percent quantities were consistent with CICA. Accordingly, we see no reason to require the Army, based solely on the alleged competitive advantage resulting from the proper awards of the 60 percent quantities, to cancel those awards and resolicit after prices have been exposed.

The protests are denied.



James F. Hinchman
General Counsel