



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: G. Marine Diesel Corporation

File: B-238703; B-238704

Date: May 31, 1990

Thomas J. Touhey, Esq., Dempsey, Bastianelli, Brown & Touhey, for the protester.

Joseph J. Brigati, Esq., Kirkpatrick & Lockhart, for Bethlehem Steel Corporation, and Daniel R. Weckstein, Esq., Vandeventer, Black, Meredith & Martin, for Norfolk Shipbuilding & Drydock Corporation, the interested parties. Stephen G. Berman, Esq., Department of the Navy, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's cancellation of solicitation after bid opening on the basis that all otherwise acceptable bids are unreasonable in price is proper where the low responsive bid exceeds the government estimate by a significant amount.
2. Conversion of invitation for bids to a negotiated procurement after rejection of all otherwise acceptable bids for price unreasonableness is proper where the contracting officer follows the procedures set forth in the Federal Acquisition Regulation at section 15.103, and preserves the integrity of the competitive process.

DECISION

G. Marine Diesel Corporation (GMD) protests the Department of the Navy's rejection of all acceptable bids received under invitation for bids (IFB) No. N62789-90-B-0001, and the subsequent conversion of the requirement to a negotiated procurement, under request for proposals (RFP) No. N62789-90-B-0001. The Navy states that this decision was based on the determination that all otherwise acceptable bids were excessively priced. GMD disputes this finding and argues, among other things, that the determination was unreasonable.

We deny the protest.

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The Department of the Navy issued the solicitation on November 15, 1989, for the overhaul and repair of the USS WATERFORD, an auxiliary repair dry dock at the Navy's shipbuilding, conversion, and repair facility in Groton, Connecticut. Four firms submitted bids in response to the solicitation by the January 9, 1990, closing date. The bids were priced as follows:

Bethlehem Steel Corp.	\$ 6,798,671
GMD	10,413,732
Norfolk Shipbuilding & Drydock Corp.	10,636,488
General Ship Corp.	12,591,924

After receiving notification that it had submitted the low bid in response to the IFB, and learning the amount of the next low bid, Bethlehem Steel began a review to determine whether it had erred in preparing its bid for this procurement. By letter to the contracting officer dated January 18, Bethlehem Steel asserted it had made mistakes in preparing its bid and asked permission to submit a "corrected bid" of \$8,653,127.

The contracting officer reviewed the information submitted by Bethlehem Steel, together with supplemental information submitted by the company on January 31 and February 1, and concluded that while the evidence reasonably demonstrated a mistake in the submitted bid, the evidence did not clearly and convincingly establish the amount of the intended bid. The Navy therefore concluded that Bethlehem Steel could withdraw its bid, but that correction would not be permitted.

By letters dated February 9, the Navy advised all bidders of its decision permitting Bethlehem Steel to withdraw its bid, and the Navy's decision to reject the three remaining otherwise acceptable bids as unreasonably priced. In these letters, the Navy also advised each bidder that it would amend the IFB to convert it from a sealed bid procurement to a negotiated procurement, and that it would limit consideration for award to the parties, including Bethlehem Steel, who responded to the IFB. After receiving the Navy's February 9 letter, GMD protested to our Office.

GMD initially protests that the Navy lacked cogent and compelling reasons to cancel the IFB after bid opening, as required by the Federal Acquisition Regulation (FAR), because the contracting officer wrongly concluded that the bid prices received were unreasonable. According to GMD, a simple mathematical comparison of bids with the government estimate, standing alone, may not properly support a

determination that the bid prices received were unreasonable, especially where the acceptable bids received are from firms that are active competitors, and the bids are close in price.

Further, GMD argues that our prior decisions have not heretofore sanctioned canceling an IFB after bid opening based on a mere comparison of bids with the government estimate, without additional factors to support the conclusion of price unreasonableness. In support of its argument, GMD cites several prior decisions of our Office where cancellation was based on both a determination that bid prices were unreasonable and on some other factor--i.e., the bids exceeded available funds (Groathouse Constr., B-235236; B-235250, July 13, 1989, 89-2 CPD ¶ 44); or the bids exceeded a recent competitive price (Sylvan Serv. Corp., B-222482, July 22, 1986, 86-2 CPD ¶ 89); or the bids exceeded nonresponsive, but otherwise acceptable, bids received under the same solicitation, where the nonresponsiveness did not affect the bid price (MIL-STD Corp., B-212038; B-212038.2, Jan. 24, 1984, 84-1 CPD ¶ 112).

GMD correctly asserts that an IFB may be canceled after bid opening only when there is a cogent and compelling reason to do so. FAR § 14.404-1(a)(1). However, when all otherwise acceptable bids received are at unreasonable prices, the FAR specifically permits canceling a solicitation after bid opening. FAR § 14.404-1(c)(6). In this regard, our prior decisions have held that a determination of price reasonableness is within the discretion of the contracting agency and will not be disturbed unless the determination is unsupported or there is a showing of fraud or bad faith on the part of the contracting officials. Rolette Meats & Distrib., Inc., B-234383, June 5, 1989, 89-1 CPD ¶ 525; aff'd, B-234383.2, Aug. 2, 1989, 89-2 CPD ¶ 96.

We disagree with GMD's assertion that a contracting officer's determination regarding excessively priced bids is per se unreasonable if the determination is based only on a comparison of the government estimate with the prices received. The facts here are almost identical to those present in our decision in Harrison Western Corp., B-225581, May 1, 1987, 87-1 CPD ¶ 457. In that case, the low bidder established that its bid of \$10.5 million contained errors and was permitted to withdraw its bid. Three of the four remaining bids ranged from \$15.1 million to \$15.9 million, and the contracting officer determined that the bids were unreasonably priced and canceled the solicitation. The contracting officer in Harrison also made his determination solely on the basis of a comparison of the submitted bids with the government estimate; however, GMD argues that our

decision in Harrison is inapposite to this case because the government estimate and the bids in Harrison were broken out on a line-by-line basis, while here there was a lump-sum comparison of the government estimate and the bids received. We do not agree. Regardless of whether the comparison of bids with the government estimate was on a line-by-line basis, or on a lump-sum basis, absent a showing that the determination was unreasonable, we will not overturn the contracting officer's exercise of discretion in this area. Rolette Meats & Distrib., Inc., B-234383, supra.

GMD next argues that the contracting officer improperly converted the IFB to a negotiated procurement, because the conversion here violated the integrity of the competitive procurement system. According to GMD, despite the discretion granted by FAR § 15.103 permitting agencies to convert canceled IFBs to negotiated procurements, the circumstances here, including the determination discussed above, that the bid prices were excessively high, amount to an impermissible auction and a compromise of the competitive bid process.

In support of this argument, GMD asserted during the conference on this protest that the Navy was improperly refusing to release Bethlehem Steel's "intended" bid price under the canceled IFB, putting Bethlehem Steel in a preferred position, since it could compete under the RFP knowing the other bidder's prices. GMD also argued that, given the conversion of the IFB to a negotiated procurement, the Navy's interaction with Bethlehem Steel while that company attempted unsuccessfully to establish the amount of its "intended" bid, constituted improper discussions with only one offeror. By letter dated April 17, the Navy informed this Office that it would both release Bethlehem Steel's intended bid price, which it has done, and would conduct discussions with all four offerors before seeking best and final offers (BAFO). Accordingly, these issues are now academic, and need not be resolved by our Office. See Midwest CATV, B-233105.3, Apr. 4, 1989, 89-1 CPD ¶ 351; aff'd, B-233105.4, July 20, 1989, 89-2 CPD ¶ 64.

In any event, our review of the record indicates that the agency's conversion of the IFB to a negotiated procurement, and its decision to permit Bethlehem Steel to participate in the procurement, are in accord with the FAR and with our prior decisions. See FAR § 15.103; Sylvan Serv. Corp., B-222482, supra. Further, the contracting officer's revelation of Bethlehem Steel's "intended" bid, and decision

to conduct discussions with all four companies prior to calling for BAFOs has largely restored a level field of competition among the offerors, despite the disruptive effects of canceling an IFB after bids have been opened.

The protest is denied.


James F. Hinchman
General Counsel