



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Air Inc.

File: B-238468

Date: June 6, 1990

D. A. Dean, for the protester.

Roger D. Waldron, Esq., Office of General Counsel, General Services Administration, for the agency.

James M. Cunningham, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where two of 42 bids submitted are prematurely opened and publicly exposed, the improper exposure does not warrant restricting consideration for award to the two opened bids since other bidders would thereby be prejudiced. Under the circumstances, agency reasonably determined to cancel the invitation for bids.

DECISION

Air Inc. protests the cancellation of invitation for bids (IFB) No. FCEP-BT-890066-S (the "tools" IFB), which was issued by the General Services Administration (GSA) on November 11, 1989, for a 2-year requirements contract for various "pneumatic, hydraulic, and swaging" tools described in 51 line items which were to be awarded on an item-by-item basis. The bids of Air and one other firm were opened prematurely. Air contends that it would be prejudiced by a resolicitation of this requirement since its bid prices have been publicly exposed, and it therefore argues that GSA should proceed with award under the original solicitation considering only the two bids which were opened early.

We deny the protest.

GSA reports that it received, but did not open, 42 bids, including bids from Air and Atcom/Air Tool Control Inc., as of the original, but subsequently postponed, bid opening date of December 6, 1989. GSA thereafter canceled the IFB on January 17, 1990, because Air's and Atcom's bids had been prematurely and erroneously opened on December 27, 1989,

048692 / 141533

more than 3 weeks before the amended bid opening date of January 25. GSA states that the erroneous opening of Air's and Atcom's bids was incident to the opening of bids on December 27 under another solicitation, No. FCEB-BB-890006-S (the "auger bits" IFB), which also had been originally scheduled for opening on December 6. The erroneous opening was apparently caused by confusion relating to the nearly identical number designations of these two IFBs. After Air's and Atcom's bids were erroneously opened under the auger bits IFB, the two bids were also erroneously recorded on the "Record of, and Receipt for, Bids & Responses" form for that IFB. Moreover, Air states that a bid recording firm also prepared an abstract which shows the two erroneously-opened bids.^{1/}

On January 17, 1990, GSA issued amendment No. 2 to the tools IFB canceling it because "two bids [had been] opened and prices exposed before the appointed bid opening." In this IFB amendment, GSA also informed bidders that "all bids received [would] be returned to the prospective bidders and [that] bids [would] be resolicited at a later date." Thereafter, GSA returned the erroneously-opened bids and all other unopened bids to the bidders.

GSA's position is that it properly canceled the IFB under Federal Acquisition Regulation (FAR) § 14.404-1(a)(1), which provides that after bids have been opened only a compelling reason can justify the rejection of all bids and the cancellation of an IFB. Specifically, GSA notes that for it to proceed with awards based solely on the basis of the two bids erroneously opened on December 27, as urged by Air, would prejudice, at a minimum, two bidders who were allowed to withdraw their bids after the contracting officer represented to them that bid opening would be delayed until January 25, 1990.

In determining whether the premature opening of bids justifies either canceling the IFB and resoliciting later or continuing with the process by opening bids on a later date, we have held that consideration must be given both to the

^{1/} GSA's bid opening officer for the auger bits IFB also states that duplicate copies of Air's and Atcom's bids were left in the Bid Room and "could have been viewed by any number of people after the official bid opening" on December 27.

best interests of the contracting agency and to whether all bidders have been treated fairly and equally. See Leach Co., B-212534, Nov. 29, 1983, 83-2 CPD ¶ 623. In Leach we held that it was reasonable for the contracting agency to continue the procurement by opening bids on a subsequent date notwithstanding the premature bid opening, which took place on the original day scheduled for bid opening rather than on the later, amended bid opening day. In that case, the specifications had been modified significantly after the premature opening and the bidders who had submitted the prematurely-opened bids were allowed to confirm or revise their bids before the other bids were exposed. Several bidders had relied on the agency's amendment of the bid opening date and had not submitted bids on the original bid opening day based on that fact. In Chemical Compounding Corp., B-210317, May 10, 1983, 83-1 CPD ¶ 499, we found reasonable a decision to cancel an IFB and resolicit after a premature bid opening made by a contracting officer who "decided that greater harm would be done to the competitive bidding procedures by awarding the contract, thereby excluding firms from competing, than by canceling the IFB despite the fact that the low responsive bid of [the protester] had been exposed."

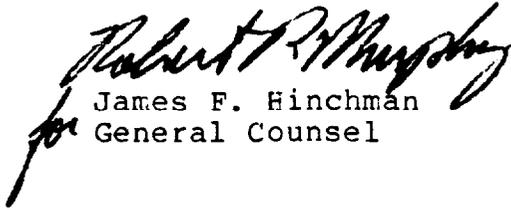
Here, there is no question that the timely bids of 38 other bidders were in the possession of GSA as of the time Air's and Atcom's bids were opened on December 27, and therefore also properly for consideration by GSA as much as the bids of Air and Atcom. Not to have considered these other bids, as Air now insists was the only proper course of action, would clearly have been prejudicial to these 38 bidders who were not at fault in any way during the contracting process.

Further, two bidders, both incumbent contractors for some of the items, withdrew their bids on GSA's informal advice that the bid opening date for the tools IFB would ultimately be extended. Air correctly points out that the erroneous informal advice of government contracting employees given to bidders or offerors during the contracting process generally does not bind the government. See, for example, Jensen Corp., 60 Comp. Gen. 543 (1981), 81-1 CPD ¶ 524. However, the advice under this IFB was not erroneous because in fact GSA subsequently did issue an amendment extending bid opening to January 25. Further, one other company has advised our Office that it would have been interested in bidding under the tools IFB had the IFB not been canceled.

Given the clear showing that 40 actual bidders (38 bidders whose bids were never opened plus the two bidders who withdrew their bids) and one potential bidder would be clearly prejudiced by limiting competition for the award to

the bids of only Air and Atcom, we conclude that GSA's decision to cancel the IFB and resolicit the requirement was reasonable.

We deny the protest.


for James F. Hinchman
General Counsel