

DOCUMENT RESUME

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[Invitation for Bids Cancellation after Bid Opening, and Resolicitation]. B-186422. June 13, 1977. 4 pp.

Decision re: Royal Silver Manufacturing Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: General Services Administration.
Authority: General Services Administration Appropriation Act for 1977 (P.L. 94-363; 90 Stat. 963). Department of Defense Appropriation Act [of] 1976 (P.L. 94-212; 90 Stat. 172). Buy American Act. 49 Comp. Gen. 244. 49 Comp. Gen. 249. 53 Comp. Gen. 737. 53 Comp. Gen. 739. P.P.R. 1-2.401(a). B-186422 (1976). B-186663 (1976).

The low bidder protested cancellation of solicitation for stainless steel flatware and bid resolicitation. Cogent and compelling reason existed for the Agency's action, as a GAO decision issued shortly before bid opening in effect changed estimated quantities that could be foreign source items and application of "Buy American Act" differential on which offerors had bid competitively. The protest was denied. (Author/DJM)

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DECISION



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

FILE: B-186422

DATE: June 13, 1977

MATTER OF: Royal Silver Manufacturing Company, Inc.

DIGEST:

Compelling reason exists for canceling IFB after bid opening and resoliciting bids where no contract consistent with solicitation could have been awarded due to GAO decision issued shortly before bid opening which in effect changed estimated quantities that could be foreign source items and application of "Buy American Act" differential on which offerors had bid competitively.

Royal Silver Manufacturing Company, Inc. (Royal), protests the cancellation of invitation for bids (IFB) 9PR-W-856-77T/KO issued by the General Services Administration (GSA) on October 1, 1976, and the rejection of all bids received in response thereto. The IFB solicited bids for a national term requirements contract for stainless steel flatware for the period December 1, 1976, or later date of award, through November 30, 1977.

A special clause, entitled "Buy American Act - Stainless Steel Flatware," providing for the addition of a 50-percent evaluation factor to foreign bids, was included in the IFB as required by Federal Supply Service Procurement Letter No. 213, dated July 21, 1976, implementing special "Buy American" preferences contained in GSA's Appropriation Act for 1977, Pub. L. No. 94-363, 90 Stat. 963. The IFB scheduled bid opening for November 3, 1976.

On October 26, 1976, this Office issued decision B-186422, Procurement of Stainless Steel Flatware, 76-2 CPD 364, which held that although the prohibition of section 723 of the Department of Defense (DOD) Appropriation Act, 1976, approved February 9, 1976, Pub. L. No. 94-212, 90 Stat. 172, against the use of funds appropriated therein for procurement of stainless steel flatware not produced in the United States under most circumstances does not apply to GSA procurement of flatware using its own funds for its store-stock program, it would apply to DOD requisition of GSA-procured flatware.

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On November 1, 1976, representatives of Oneida Ltd. brought the decision of October 26, 1976, to the attention of the contracting officer. At that time the contracting officer determined that it was too late to postpone the bid opening and that it would be preferable, in view of the fact that GSA had been without contract coverage for flatware for more than 2 months, to open the bids, study our decision and coordinate with GSA's Central Office before mapping out a course of action.

Seven bids were publicly opened as scheduled. Although one bid was determined to be nonresponsive because bid samples were not received before the time set for bid opening as required by the IFB, the bid was evaluated with the others. After the "Buy American Act" differentials were applied, bids for foreign source flatware were low for 63 items. Royal's domestic source bids were evaluated low for 24 items. On the basis of domestic bids only, Royal was the low bidder on 81 of the 97 items in the IFB.

According to the contracting officer's report, at that time an informal survey was made of in-house requisitions for stainless steel flatware and it was discovered that approximately 98 percent were from DOD activities. Based on this sample and on consultation with GSA regional counsel, the contracting officer concluded that there was no authority to award a contract on any basis other than the special "Buy American Act" provision mandated by Procurement Letter No. 213 and thus could not award to low domestic bidders and reject foreign bidders. The contracting officer further concluded that the estimated quantities shown in the IFB were erroneous in light of the October 26, 1976, decision, since the estimates included DOD requirements which GSA was precluded from filling with foreign source flatware. Also, the contracting officer concluded that GSA did not have authority to resolicit excluding foreign source flatware until the mandatory instructions of Procurement Letter No. 213 were removed and revised instructions issued. Following instructions from GSA Central Office, the contracting officer issued amendment "A" effective January 5, 1977, under which the IFB was canceled and all bids received were rejected. The amendment advised that the cancellation was caused by recent legislative action limiting procurement of stainless steel flatware for use of DOD activities to that produced in the United States or its possessions which rendered the requirements as advertised in the solicitation no longer required since the major portion of the

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solicitation's estimated requirements was based on military requisitions. Amendment "A" further advised that a solicitation with revised requirements would be issued shortly.

On January 24, 1977, the contracting officer determined that a public exigency existed and issued a definite quantity negotiated solicitation 9PR-W-990-77/KO. According to the contracting officer, the quantities in this solicitation were GSA's best estimate of its needs from October 1, 1976, the expiration of the last contract, to June 1, 1977, the anticipated delivery date under the new contract.

By letter dated January 25, 1977, Royal protested GSA's cancellation of the IFB to this Office, explaining its reasons as follows:

"The Department of Defense Appropriations Act specifying domestic manufacture of stainless flatware for use of Department of Defense activities was signed into law on February 19, 1976. Our company was aware of this legislation, and it is our feeling that all other manufacturers and suppliers of stainless flatware would be aware of legislation which so directly involves our industry.

"Abstracts of bids for this solicitation have been published. They include a total of 7 bidders, 3 offer qualified domestically manufactured merchandise.

"In view of the above, we feel that the contract should be awarded in accordance with terms offered by legally qualified bidders. * * *"

This Office has recognized that the authority vested in the contracting officer to reject any or all bids and readvertise is extremely broad, and ordinarily we will not question such action. See 49 Comp. Gen. 244, 249 (1969); Surplus Tire Sales, 53 id. 737, 739 (1974), 74-1 CPD 161. In exercising such authority, the contracting officer must not act in a manner which would compromise the integrity of the competitive bidding system. As was stated by the Court of Claims in Massman Construction Company v. United States, 60 F. Supp. 635, 643, cert. denied 325 U.S. 866 (1945):

"* * * To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons. * * *"

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Consistent with the policy set forth in the Massin case, subparagraph (a) of section 1-2.404-1 of the Federal Procurement Regulations provides that in order to preserve the integrity of the competitive bid system, award must be made to the responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

We believe that the circumstances of this case provided a cogent and compelling reason justifying GSA's action.

The IFB stated that award would be made item by item on the basis of the Government's estimated peak monthly requirements to the low responsive bidder, after application of the "Buy American Act" differential. The October 26, 1976, decision in effect changed both of these factors. Since anticipated DOD requisitions comprised almost all of the estimated quantities, the "Buy American Act" differential could not be applied and the estimated quantities were rendered excessive because the Government no longer had any substantial requirement for, nor could it use, foreign source items. As a result, no contract could have been awarded consistent with the terms set forth in the IFB.

In addition, any award of the items in the IFB would have been prejudicial to all bidders. Since the IFB did not indicate that only domestic source items would be acceptable for most of the required quantities, some domestic suppliers may not have bid against foreign source suppliers who assumably could offer lower prices. Award to the domestic suppliers would have been prejudicial to foreign source bidders who, had the IFB advised them of the applicability of the DOD appropriation limitation, could have offered goods from domestic sources.

Although it would have been preferable for the contracting officer to delay bid opening pending investigation into the effect of our October 26, 1976, decision on the instant procurement, it is obvious that the cancellation of the IFB was appropriate in the circumstances. In that connection, in Stahl Soap Corporation, B-186663, October 22, 1976, 76-2 CPD 359, affirmed December 15, 1976, 76-2 CPD 491, the cancellation of an IFB was upheld where it did not contain the latest requirements approved prior to bid opening and thereby failed to adequately reflect the agency's actual needs.

Accordingly, the protest is denied.

R. F. Kottler
Deputy Comptroller General
of the United States