

# DECISION



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

50142 97235

FILE: B-182399

DATE: June 3, 1975

MATTER OF: D. Moody & Co., Inc.

## DIGEST:

1. Failure of IFB to include delivery date is improper and grounds for cancellation.
2. Utilization of small purchase negotiation procedure for procurement of supplies costing under \$10,000 after cancellation of defective IFB was appropriate and exclusion of surplus dealer, who was low bidder under IFB, was reasonable considering delay in procurement that had been encountered because of IFB cancellation, technical advice that it would require about 90 days to determine acceptability of surplus and possibility it might not be acceptable.

This case involves a protest by D. Moody and Co., Inc. (Moody), against the award of a purchase order to Stratoflex, Inc. (Stratoflex), for a quantity of hose-to-flange elbows under the provisions of the Armed Services Procurement Regulation (ASPR) governing small purchase procedures.

Invitation for bids (IFB) DSA700-74-B-3600 for 78 hose-to-flange elbows was issued on June 7, 1974, by the Defense Construction Supply Center (DCSC), Columbus, Ohio. Moody submitted a low bid of \$38 per elbow for surplus material, and Stratoflex and Aeroquip Corporation (Aeroquip) submitted bids of \$40.09 and \$46.08, respectively, for newly manufactured elbows. Subsequently, it became evident that the IFB lacked a delivery date. Because this defect prevented the bidders from competing on an equal basis, the IFB was canceled on August 28, 1974. After the cancellation, DCSC decided to increase the quantity of elbows to 207 and to procure the supplies under the small purchase procedure in ASPR, Section III, Part 6 (1974 ed.). In order to decide which sources to solicit, the contracting officer asked technical personnel whether surplus elbows were acceptable. The contracting officer was advised that the Engineering Support Activity (ESA) would have to determine the acceptability of surplus material and that this normally took about 90 days. Because of the delay which had occurred as a result of the cancellation of the IFB,

in addition to the advice of the further delay that might result from an ESA study concerning the acceptability of surplus material (along with the possibility that approval might not be granted), the contracting officer decided not to solicit Moody on the small purchase procurement.

On September 3, 1974, the contracting officer received oral quotations for 207 elbows from Aeroquip and Stratoflex. Stratoflex's price of \$38.89 per elbow was lower than the Aeroquip price. On September 20, 1974, Stratoflex was awarded Purchase Order DSA700-75-M-Z302 requiring delivery by June 2, 1975.

Moody contends that it was improper for the contracting officer to cancel the IFB, to decide subsequently to procure the materials by means of a small purchase procedure, and not to resolicit Moody. Moody makes the following points in support of its protest:

- (1) the change in the solicitation from an advertised IFB to a small purchase procurement was improper;
- (2) the resolicitation following the cancellation of the IFB should have included all of the original bidders; and
- (3) the justification by DCSC for not resoliciting Moody is faulty.

ASPR § 2-404.1 (1974 ed.) provides for the cancellation of IFB's after bid openings in certain circumstances. We have consistently held that, in the absence of a showing of abuse of administrative discretion, a contracting officer's decision to cancel an IFB will be upheld. See 49 Comp. Gen. 584 (1970). We have also held that the failure of an IFB to include a delivery date is improper and grounds for cancellation. 51 Comp. Gen. 518 (1972). Accordingly, there is no basis for us to object to the cancellation of the IFB.

10 U.S.C. 2304(a)(3), as amended by Pub. L. No. 93-356, § 4 (July 25, 1974), and ASPR § 3-203 (1974 ed.), as amended by ASPR Committee interim changes pending formal amendment of ASPR, provide for negotiation rather than formal advertising if the amount of the purchase does not exceed \$10,000. Moreover, ASPR § 3-600 (1974 ed.), as amended by ASPR Committee interim changes, supra, provides for the

small purchase procedure being utilized for supplies when the aggregate cost does not exceed \$10,000. Further, ASPR § 3-603.1 (1974 ed.) states that all purchases covered by Part 6 shall be accomplished by negotiation. Therefore, because the purchase of the elbows was to cost the Government well under \$10,000, it was appropriate for DCSC, following the IFB cancellation, to solicit prices for the elbows by negotiation instead of formal advertising.

Moody contends that the failure to solicit new proposals from all the original bidders "renders the resulting purchase order improper and a legal nullity." In support of the contention, Moody relies on ASPR § 2-209 (1974 ed.), which provides the procedure to be followed when an IFB cancellation occurs before bid opening. The regulation states in part:

"\* \* \* The notice of cancellation shall \* \* \* where appropriate, assure prospective bidders that they will be given an opportunity to bid on any resolicitation of bids or any future requirements for the type of material or services involved. \* \* \*"

As Moody indicates, ASPR § 2-209 (1974 ed.) refers to situations in which an IFB is canceled before bid opening. While there is no requirement comparable to the quoted provision for an IFB cancellation after bid opening, we believe that "where appropriate" prospective bidders should be given the same assurance when the IFB is canceled after opening. The case depends on the appropriateness of the action in the circumstances. As a practical matter, there can be situations which render inappropriate soliciting all the original offerors after cancellation of the original solicitation. For example, the resolicitation may be brought about by a valid determination to so modify the requirements as to call for an entirely different bidders list.

In this case, the decision to exclude Moody was based on technical advice that it would take approximately 90 days to determine the acceptability of surplus material. Although Moody contends that this is "a surprisingly long period of time for such a relatively simple decision" and the record shows that the actual determination advising that surplus material was acceptable was furnished in 35 days when it was subsequently requested after the protest was made to our Office, it does not appear that at the time the contracting officer decided to exclude Moody from competition under the small purchase procedure he had reason to know the determination could be accomplished so promptly. The contracting officer's explanation, which is reasonable, is:

"\* \* \* In view of the delay in the procurement that had already been encountered because of the cancellation of B-3600, the additional delay that could be expected before approval for the purchase of surplus material could be obtained, and the possibility that this approval might not be granted, it was decided that D. Moody would not be solicited on the small purchase procurement."

Moody contends that the contracting officer incorrectly justified the exclusion of Moody on the resolicitation on the basis of the urgency of the procurement. However, the contracting officer has stated that the decision not to resolicit Moody was not based on a determination of public exigency.

The contracting officer has stated:

"\* \* \* There was not an urgent need for the supplies but there was concern for the delay that had been caused by cancellation of the first solicitation. \* \* \*"

We do not think it is reasonable to assume that if there is no exigency the time for the procurement may be extended substantially. It appears that the contracting officer's action was based upon a legitimate concern with avoiding further delays. However, Moody contends that, even if this is so, it should not have to bear the consequences of a delay which was created by a defect in the original IFB, a matter in which Moody was faultless. Although it is unfortunate that Moody must, in its own words, "bear the consequences" of the defective IFB, the fact remains that the cancellation was correct and the contracting officer had to consider the procurement from the standpoint in time when it was being resolicited.


In reporting on the protest, the contracting officer estimated, based on Moody's original price and Stratoflex's price upon resolicitation, that there could have been a savings of \$432.62 if the surplus material had been purchased. The contracting officer rationalized that the savings could have been exhausted by the administrative cost of the procedure involved in having the surplus properly approved before award. Moody contends that the estimate is unrealistic, since the contracting officer does not know what price Moody would have offered if resolicited. In that regard, it notes that the Stratoflex price was reduced upon resolicitation. Further, it contends that the administrative costs of evaluating the surplus material could have been amortized over future procurements.

The contracting officer's letter of October 18, 1974, to Moody stated that the reason an offer was not solicited from the firm under the small purchase procedure was that acceptance of the surplus material would normally take about 90 days. No statement was made in the letter that administrative cost entered into the determination. Moreover, in view of the explanation given to Moody, it would appear that if it were not for the anticipated delay in obtaining approval, administrative cost would not have deterred the contracting officer from soliciting Moody. The administrative cost contention did not enter into the matter until after a protest was made to our Office. Since, in our view, the contracting officer's determination to exclude Moody from the resolicitation because of the anticipated delay was reasonable, the conflict over the administrative cost is academic and need not be resolved by our Office.

Moody contends that DCSC, in soliciting proposals from only two firms, failed to obtain sufficient competition for the procurement. "Moody submits that the field could have been increased to three, a 50 % improvement, merely by soliciting from all original bidders. When increased competition can be secured with such ease, a procuring agency should not be permitted to make do with de minimis efforts." Although it is true that competition could have been increased by soliciting Moody under the small purchase procedure, in view of the legitimate concern of the contracting officer over the anticipated 90-day delay that would result from that action, the decision not to resolicit Moody does not mandate a finding of insufficient competition.

Finally, Moody contends that DCSC has incorrectly interpreted ASPR § 1-1208 (1974 ed.) in a manner which unduly discriminates against surplus property and thereby lessens competition. However, although that ASPR section was discussed in the agency report, it was not the basis for the contracting officer's decision to exclude Moody from the resolicitation. Further, as Moody points out, this issue is pending in other protests currently before us, notably B-181971 and B-180732. Therefore, that aspect of the protest will be considered in the two cited protests.

For the reasons indicated above, the protest is denied.

  
Deputy Comptroller General  
of the United States