

01486

Stephen Borrett

Proc. I

DECISION



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

FILE: B-187327

DATE: January 27, 1977

MATTER OF: Royson Engineering Company

DIGEST:

1. Free and full competition required under 10 U.S.C. § 2305(a) (1970) was not achieved where only one bid from incumbent contractor was submitted in response to IFB that provided for 15 days between issuance of IFB and bid opening, buying agency by mistake initially mailed IFB only to the sole bidder, and IFB did not clarify to other bidders material change in description of commodity sought in IFB from previous procurement of same item.
2. While bidder may be placed in unfavorable competitive posture because of cancellation of IFB after bid opening, GAO will not question such action since contracting agency has broad authority to reject all bids and readvertise when compelling reason, such as determination of unreasonable price, exists.
3. Contracting agency may properly issue new IFB while earlier IFB involving same item is under protest. 4 C.F.R. § 20.4 (1976) and ASPR § 2-407.8(b) (1976 ed.) only proscribe award prior to resolution of the protest.
4. Once propriety of procurement action is questioned through protest, GAO is obligated to consider all relevant circumstances including any which may not have been considered by contracting officer.

By letter dated August 23, 1976, Royson Engineering Company (Royson) protested the determination by the Defense Industrial Supply Center (DISC), Philadelphia, Pennsylvania, that its bid price on invitation for bids (IFB) No. DSA500-76-B-3013 (IFB 3013), a total small business set-aside, was unreasonably high and the proposed cancellation of that solicitation. Royson was notified of DISC's determination on or about August 23, 1976. To date, DISC has neither made an award nor canceled IFB 3013.

B-187327

The Defense Supply Agency (DSA) reports, by letter dated October 15, 1976, that IFB 3013 was issued on May 12, 1976, with a bid opening date of May 27, 1976, for 2,065 each, Block, Tackle, NSN 3940-00-263-3041. DSA further indicates that, due to administrative difficulties involving the mailing of IFB 3013, Royson was initially the only bidder on the bidders list and consequently was the only bidder who received a copy of IFB 3013. Specifically, DSA states:

"Accordingly, in the initial mailing, a copy of IFB 3013 was sent only to Royson. The procurement was synopsisized. Apparently, as a result thereof, sixteen (16) firms requested and received a copy of the solicitation. However, in view of the fifteen day period allowed between the issuance of the solicitation and the receipt of the offers, it was not known whether any of said firms had sufficient time to prepare and submit a bid in response to said solicitation prior to the date scheduled for bid opening."

DSA also indicates that Royson previously had been given a sole-source award under a procurement for this item on September 30, 1975. That contract, as well as procurements for a period of 9 or 10 years, provided that a plastic block of Royson's (Royson Part No. 64700) was an acceptable alternate to an applicable drawing under NSN3940-00-263-3041 which specified a block of all metal construction. Consequently, Royson had been the sole bidder on the 1975 procurement, as well as the instant one.

Due to a finding by the Naval Ship Engineering Center in the latter part of 1975 that the Royson plastic block was reported to have proven unsatisfactory in use due to various failures associated with its plastic construction, the purchase description was revised to delete the reference to the Royson part number as an acceptable alternate item. DSA suspects " * * * that the significance of the deletion of said reference from the purchase description went unnoticed, except by Royson, and that this may have contributed to the lack of competition under IFB 3013."

When the bids were opened on May 27, 1976, Royson offered a unit price of \$28.80 net for a total dollar amount of \$59,472.00.

On June 2, 1976, DISC issued IFB No. DSA500-76-B-2216 (IFB 2216) covering an additional quantity of 1,636 each of the same commodity with 813 each not set aside and 818 set aside for labor surplus area concerns. The solicitation was issued to the entire bidders list, without

B-187327

difficulties similar to those encountered during the mailing of IFB 3013, and the opening of bids was scheduled for June 21, 1976--19 days from the date of issuance. In order to assure competition under this solicitation, DISC inserted the statement in the item description (pages 16 and 18) "Plastic Blocks are not acceptable." A total of 47 firms were solicited, and four bids were received. The low bidder's bid price was \$24.62 each, terms 1/2 of 1 percent - 20 days. Royson's bid price was 28.80 each, net. Award was made to the low bidder on September 15, 1976.

In justifying its position that Royson's bid under IFB 3013 was unreasonably priced, and that the solicitation should be canceled for that reason in accordance with ASPR § 2-404.1(b)(v1), DSA reasons:

"The 818 units solicited as the non-set-aside-portion of this procurement [IFB 2216] is substantially less than the 2,065 units solicited under IFB 3013. Yet, on this relatively small quantity of 818 units, the low bid received was in the amount of \$24.62 each, terms 1/2 of 1% - 2 days, which is significantly less than Royson's sole bid of \$28.80 each, net, received under IFB 3013 for the larger quantity of 2,065 units. Royson's price of \$28.80 under IFB 3013 is approximately 17% more than the low bid of \$24.62 received in response to IFB 2216."

We have long recognized that a determination of unreasonableness of bid prices is a matter of administrative discretion which our Office will not question unless such determination is unreasonable or there is a showing of bad faith or fraud. See Support Contractors, Inc., B-181607, March 18, 1975, 75-1 CPD 160. We are unable to conclude that the Agency's determination was unreasonable.

We also believe that IFB 3013 properly may be canceled because of the apparent lack of free and full competition as required by 10 U.S.C. § 2305(a) (1970). The facts here indicate that had there not been a problem in the mailing of IFB 3013 to all the bidders on the bidders list and had the solicitation clearly indicated that plastic blocks were not acceptable, there is a strong likelihood (as evidenced by the number of bids received under IFB 2216) that there would have been more than one bidder submitting

B-187327

a bid by the bid opening date of May 27, 1976. Further, ASPR § 2-404.2 (1976 ed.), entitled "Rejection of Individual Bids," provides in subsection (e) that any bid may be rejected if the contracting officer determines in writing that the bid price is unreasonable. While this determination has not apparently been put in writing, our Office has held that once the propriety of a procurement action has been questioned through the filing of a protest, GAO is obligated to consider all relevant circumstances including any which may not have been considered initially by the contracting officer. Hercules Demolition Construction, B-186411, August 18, 1976, 76-2 CPD 173. In the circumstances, we conclude that there would be no legal objection to the rejection of Royson's bid and cancellation of the IFB if such actions are supported by a written determination that its bid is unreasonable as to price.

With regard to Royson's contention that it was placed in an unfavorable competitive position on IFB 2216 due to public exposure of its price on the earlier opening of IFB 3013, we have recognized, in analogous cases, that:

"The rejection of all bids after they have been opened tends to discourage competition because it results in making all bids public without award, which is contrary to the interests of the low bidder, and because rejection of all bids means that bidders have expended manpower and money in preparation of their bids without the possibility of acceptance. * * * [However] [O]ur Office ordinarily will not question the broad authority of the contracting officer to reject all bids and readvertise when a 'compelling reason' to do so exists. * * *"

(Automate Datatron, Inc.; Exspeedite Blueprint Service Inc., B-183706, B-184415, November 17, 1975, 75-2 CPD 315, and cases cited therein.)

Ward Leonard Electric Co., Inc., B-186445, July 29, 1976, 76-2 CPD 98.

Lastly, by letter dated October 1, 1976, Royson questions the propriety of the issuance of DSA700-76-B-2918 for 1185 Bloc's, Tackle, FN3940-263-3041 with bid opening date of October 18, 1976. Royson states:

B-187327

"We understand that a contracting officer should not solicit a bid while another bid for the same item is under protest."

4 C.F.R. § 20.4 (1976) provides, in pertinent part, that the agency against whom a bid protest is lodged "will not make an award prior to resolution of the protest." There is, however, no such prohibition against solicitation of bids for the same or additional item, under protest. ASPR § 2-407.8(b) (1976 ed.), Protest Before Award, similarly proscribes award pending the outcome of the bid protest, except for certain circumstances delineated in ASPR § 2-407.8(b)(2) and (3) which do not apply here; but there is no prohibition against merely soliciting bids for additional items while another bid for the same item is under protest.

For the above-stated reasons, the bid protest of Royson is denied.

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