

118532
Reports

DECISION



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

FILE: B-205969.2; B-205969.3 DATE: May 28, 1982

MATTER OF: Professional Materials Handling Co.,
Inc.--Reconsideration

DIGEST:

1. The rule, expressed in recent GAO decisions, that a bidder offering less than the requested bid acceptance period cannot extend that period to accept award when others have offered the requested period does not apply where an award in fact was made to another firm within the shorter bid acceptance period and the bidder that offered the shorter period filed a timely and successful protest that it should have received the contract.
2. It would be fundamentally unfair and tantamount to sanctioning a prohibited auction for an agency to declare unreasonably high the low bid under a reinstated solicitation based on a comparison with the low bid under a resolicitation where a bidding misrepresentation by the resolicitation's low bidder in connection with the first procurement created the auction situation.
3. A procuring agency properly may make award to a bidder at the price it bid under a reinstated IFB despite the fact that that bidder submitted a lower bid under an invalid resolicitation.
4. A bidder can offer an acceptance period that is shorter than the one requested and still be responsive to a solicitation that does not mandate a minimum acceptance period, although the bidder runs the risk that award will not be made before the shorter period expires.

The Defense Logistics Agency (DLA) and Ludlow Sales & Service have requested reconsideration of our decision Professional Materials Handling Co., Inc., B-205969, April 2, 1982, 82-1 CPD (hereinafter Professional), in which we sustained Professional's protest against the rejection of its bid under DLA invitation for bids (IFB) No. 700-81-B-2138 for a forklift truck. We recommended that DLA reinstate the IFB, which had been canceled in favor of resolicitation, and make award to Professional. To implement this remedy, we recommended that DLA first terminate contract No. DLA-700-82-C-8097 that it had awarded to Ludlow Sales under the resolicitation.

We affirm our decision and recommendations.

Background

Professional's bid of \$16,759 under the IFB offered an acceptance period of 30 calendar days after bid opening, instead of the 60-calendar day period requested by the IFB and offered by other bidders. Ludlow Sales offered a truck for \$17,200, and represented that 80 percent of the contract costs would be incurred in a labor surplus area (LSA). That representation made the firm eligible for a five percent preference in bid evaluation, which in turn caused its bid to be evaluated as lower than Professional's. DLA awarded the contract to Ludlow Sales 23 days after bid opening.

Professional then protested successfully to DLA that the awardee's bid in fact should not have been afforded the bid evaluation preference. DLA therefore sustained the protest and canceled the Ludlow Sales contract. But since Professional's 30-day bid acceptance period had expired by that time, DLA did not allow Professional to revive its bid, and instead canceled the IFB. At that point, Professional protested to our Office against the rejection of its bid. DLA subsequently resolicited the requirement and awarded another contract to Ludlow Sales, the low bidder at \$14,860.

Bases for Prior Decision

In Professional, we found DLA's determination that it was precluded from accepting Professional's bid under the IFB to be incorrect. DLA based its determination on its interpretation and application of recent decisions by our Office that held, in pertinent part, that a bidder offering

less than the requested acceptance period cannot be allowed to extend that period either before or after its expiration, where other bidders offered the longer requested acceptance period, Introl Corporation, B-206012, February 24, 1982, 82-1 CPD 164; Ramal Industries, Inc., 60 Comp. Gen. 666 (1981), 81-2 CPD 177, aff'd, B-202961.2, B-202961.3, November 12, 1981, 81-2 CPD 400.

The rationale for our holdings in Introl and Ramal is that the bidder offering less than the requested bid acceptance period has not assumed as great a risk of price or market fluctuations as have the firms that offered the requested acceptance period. Thus, allowing the bidder to decide whether it desires to extend the bid or whether to let it expire subject to the dictates of its own particular interests, would be prejudicial to the bidders who offered the requested acceptance period and who therefore are bound by their bid prices for the entire period.

In Professional, however, we concluded that the facts clearly distinguished that situation from those in Introl and Ramal. We stated:

"We do not believe this [Introl/Ramal] rationale applies to a bidder which files a timely protest against award of the contract to another firm where the contract was awarded within the protester's bid acceptance period. The bidder in such a case is not attempting to extend its bid acceptance period after minimizing its exposure by initially offering a short acceptance period. Rather, by filing a protest against an award that was made within its offered acceptance time, the bidder is asserting that it was entitled to the award within that time and that it still seeks the award. Thus, unlike the bidder which offers a shorter period than its competitors, and then seeks to extend it when it would be advantageous for it to do so, the protester does no more than seek to correct a perceived impropriety that caused its bid to be rejected rather than accepted within the offered acceptance period. Under the circumstances, we believe the filing of a protest against the award that was made within the 30-day acceptance period offered here had the effect of tolling expiration of the period. * * * In

such a situation, of course, the bidder is not automatically entitled to award; that entitlement depends on the outcome of the protest, over which the protester has little direct control."

DLA's Request for Reconsideration

Because DLA rejected Professional's bid based on its interpretation of the holdings in Introl and Ramal, the thrust of its request for reconsideration is that the fact situation in Professional was not significantly different from those in Introl and Ramal to call for cancellation of the contract awarded on resolicitation. DLA suggests that a number of recent decisions by this Office on the subject of bid acceptance periods--Introl, Ramal, Esko & Young, Inc., B-204053, January 4, 1982, 82-1 CPD 5, and Professional--have caused confusion among the contracting agencies and could lead to problems in the future. DLA questions, for example, whether the Professional rule would apply to an untimely protest, or a timely protest filed after the expiration of the protester's short acceptance period.

We believe that the cited decisions are sufficiently clear so that they reasonably can be applied by agencies seeking guidance in appropriate fact situations. As stated above, in Introl and Ramal we held that when a bidder accepts the risk of losing a contract by offering an acceptance period less than that contemplated by the Government as necessary to complete the selection process, although the bid is responsive it cannot be extended after expiration if other firms offered the requested bid acceptance period. The reason is, essentially, that the bidder minimized its risk and can control the Government's ability to accept the bid to the prejudice of firms that offered the requested period. Esko & Young simply held that in the single bid situation, where there are no other bidders that would be prejudiced by the extension of the bid, the Introl/Ramal rationale obviously is inapposite, so that the bid can be extended. Professional merely holds that if a bid offers less than the requested bid acceptance period, and the agency indeed awards within the shorter period, the bid's expiration should not estop the Government, in response to a timely protest, from correcting an erroneous award and awarding the bidder in issue the contract that it should have received while its bid was viable.

Regarding DLA's concern whether an untimely protest would require application of the Professional rule, Professional clearly states that the protest must have been filed in a timely manner.* The Professional rule also would apply to a situation where an ultimately successful protest against an award that was made within the protester's shorter acceptance period is timely filed, but after the expiration of the protester's shorter acceptance period. The award within the shorter acceptance period, and the timely protest, are the factors that toll the expiration of the successful protester's acceptance period.

DLA also suggests that due to the large number of protest-like complaints it receives, only protests to our Office, and not those to a contracting agency, should invoke application of Professional. We believe, however, that as long as a firm indicates a clear intent, pursuant to agency and General Accounting Office bid protest procedures, to protest a perceived deficiency in the selection process, and is successful, the deficiency should be corrected under the rationale of Professional.

Price Unreasonableness

DLA specifically disagrees with our recommendation that the \$14,860 contract with Ludlow Sales be terminated and award in the amount of \$16,759 be made to Professional under the reinstated IFB. DLA states:

"In light of the prices received on resolicitation, the contracting officer believes that Professional Materials'

*DLA submits that Professional's protest against the initial award to Ludlow Sales was not filed in a timely manner because Professional allegedly had knowledge of its bases for protest at bid opening, yet did not file a protest to DLA until nearly a month thereafter. There is no reason to believe, however, that Professional knew or should have known that Ludlow Sales should have been found ineligible for the LSA preference until shortly before the protest was filed. Moreover, even if Professional did know, the firm was entitled to assume that DLA would not make an improper award. The protest's timeliness thus must be measured from the time Professional learned that DLA intended to award the contract to Ludlow Sales, not from bid opening. (The protest was filed two working days after the award.) See International Harvester Company, 59 Comp. Gen. 409 (1979), 79-1 CPD 259.

(\$16,759 bid under the IFB) is unreasonable. Therefore, the contracting officer does not believe an award should be made to Professional Materials. Furthermore, the contracting officer believes that an award to Professional Materials at \$16,759 would be improper when the Government has another bid from Professional Materials [under the resolicitation] of only \$16,459."

We believe that it would be entirely unfair to sanction the award to Ludlow Sales under the resolicitation on the basis argued by DLA. It must be expected that whenever bid prices are exposed and award made to the wrong firm,* so that the contract subsequently is canceled and the requirement resolicited, the resolicitation will result in lower bids-- the competitors have seen the price below which they must bid in order to secure the contract. The problem in this case essentially resulted from Ludlow Sales' misrepresentation in its bid under the initial IFB that the forklift truck it was offering was supplied by an LSA concern, which caused Ludlow Sales to be evaluated as the low bidder. This representation, while it may have been innocent, coupled with DLA's failure to investigate adequately before awarding to the firm, resulted in Professional's losing the contract that it should have won. In our view, rewarding Ludlow Sales with the contract on resolicitation because it was able to take advantage of the auction situation that it created would undermine the integrity of the competitive bidding system.

Thus, we believe that any DLA determination that Professional's bid under the initial IFB is unreasonably high, based on a comparison with bids received under the resolicitation after disclosure of bid prices under the original IFB, would be inappropriate in these circumstances.

Finally, we find it irrelevant that Professional bid \$200 less under the resolicitation than it did under the initial solicitation, since Professional in fact was entitled to the contract at the price bid initially (\$16,759).

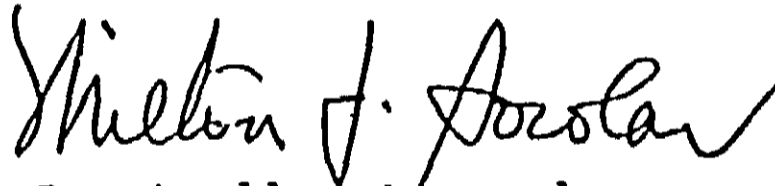
*We note here that DLA was perfectly willing to award Ludlow Sales the contract under the original IFB at \$17,200.

Ludlow Sales Request for Reconsideration

Ludlow Sales suggests that Professional cannot receive award under the reinstated IFB because its bid thereunder was nonresponsive in offering less than a 60-day bid acceptance period. The IFB, however, did not mandate a minimum acceptance period, but merely requested a 60-day acceptance period. We have held that a bidder can offer an acceptance period that is shorter than the one requested and still be responsive to a solicitation which does not mandate a minimum acceptance period, although the bidder runs the risk that award will not be made before the shorter period expires. See Introl, supra.

Finally, Ludlow Sales is concerned that the Government will have to pay approximately \$2,000 more for the required forklift truck by awarding to Professional under the reinstated IFB. As discussed above, however, we believe that to allow the existing award to Ludlow Sales to stand would undermine the integrity of the system of competitive bidding, despite the immediate advantage the Government may gain by a lower price in this particular procurement. We note here that DLA suspended performance under the resolicitation contract pending our decision so that termination for convenience could be accomplished easily.

Our prior decision is affirmed.

for 
Comptroller General
of the United States