

DECISION

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

PLI 25500

FILE: B-210819**DATE:** June 21, 1983**MATTER OF:** Kan-Du Tool & Instrument Corp.**DIGEST:**

1. Protest issues do not become academic so long as the protest, if sustained, may result in award of a contract to the protester.
2. Partial cancellation of a solicitation is justified when the agency no longer needs the quantity of supplies originally solicited.
3. Agency need not withhold award of contract to another bidder found to be responsible or indefinitely suspend emergency procurement to meet critical need pending Small Business Administration (SBA) certificate of competency (COC) determination since applicable regulation permits award 15 working days after notice to SBA of request for COC.
4. Protest by a firm which is not a bidder under solicitations against failure to receive notice of awards is without merit. Under Defense Acquisition Regulation, agency is required to provide prompt notice of award only to unsuccessful offerors. In any event, failure to provide notice is a procedural matter which does not affect validity of award.

Kan-Du Tool & Instrument Corp. (Kan-Du) protests the Army Tank-Automotive Command's (TACOM) refusal to award it a contract for 10,248 direct vision blocks under invitation for bids (IFB) No. DAAE07-82-B-A932 and objects to the partial awards to other bidders of quantities of blocks under emergency oral solicitations. Furthermore, the protester asserts that the contracting agency and the Small Business Administration (SBA) unreasonably delayed the issuance of a certificate of competency (COC) for Kan-Du.

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We deny the protest.

On June 25, 1982, the Army issued the IFB requesting bids for small businesses to produce 10,248 direct vision blocks for the M60 tank. The IFB was intended to fill three procurement work directives (PWD) issued in January, February and March of 1982. The Army intended that a fourth PWD, dated May 17, 1982, for 1,374 vision blocks would be covered under an option provision under the IFB. Kan-Du, a small business, submitted the apparent low bid of \$74.36 per unit. The next low bid was for \$83.83 per unit.

Prior to this procurement, Kan-Du had never manufactured vision blocks or anything similar. The contracting officer therefore asked for a preaward survey (PAS), with a TACOM representative's participation, to be conducted at Kan-Du and its subcontractors, Foley Precision Optical, Inc. (Foley), and Laminated Glass. Although the contracting officer asked that the PAS be completed by August 27, the results did not reach him until October 11.

The PAS of Kan-Du and of Foley resulted in a nonresponsibility determination by the contracting officer on October 14. On October 18, the matter was referred to the SBA for COC consideration. On November 2, the SBA New York regional office wrote the contracting officer to inform him that Kan-Du had applied for a COC, and that the expiration date for SBA action was November 18. Under DAR § 1-705.4(c) (DAC 76-34, April 27, 1982), the Army was required to wait 15 working days for an SBA COC decision before making an award.

By the end of the 15-day waiting period, November 18, SBA had not issued a COC. On November 22, 4 days later, SBA's New York representative called to say that the SBA's processing deadline had been postponed to November 30. The next day, he called the contracting officer to report that he would recommend the issuance of a COC for Kan-Du primarily on the basis of a favorable PAS for Laminated Glass. The contracting officer objected because no Tacom representative had been on the PAS team for the Laminated Glass PAS. He asked SBA to postpone issuance of a COC until a PAS could be conducted with TACOM participation.

Before receiving any PAS results, the contracting officer had received notice that direct vision blocks were out of stock. This shortage created a public exigency under Defense Acquisition Regulation (DAR) § 3-202.2(vi) (Defense Acquisition Circular (DAC) 76-20, September 17, 1979), and the contracting officer decided to orally solicit bids for the May 17 PWD under DAR § 3-101(b) (1976 ed.). Two previous suppliers of direct vision blocks were solicited and a contract was awarded on November 24, 1982, after the 15-day waiting period had expired. According to the contracting officer, the quantity solicited represented the fourth PWD which quantity was an option under the IFB.

Because of the continued delays in determining Kan-Du's entitlement to a COC, the Army generated another PWD for 1,500 vision blocks on December 9 and again orally solicited bids under the public exigency provision. A contract was awarded on December 27. On December 29, the contracting officer elected to exercise an option for 1,374 additional blocks under the November 24 contract. An option for 1,500 blocks in the December 27 contract was exercised on January 11, 1983. Another public exigency oral solicitation was made on January 4, resulting in the award of a contract for 1,500 blocks. The option for an additional 1,500 blocks for this contract was exercised on January 25.

The PAS of Laminated Glass was finally held on January 17, 1983. The COC evaluation for Kan-Du was completed on February 4, 1983, when SBA's New York office issued a COC for Kan-Du. By the time SBA issued its COC on February 4, the contracting officer had issued contracts for 8,748 vision blocks. All quantities were awarded after the 15-day waiting period for COC action had expired, November 18.

On January 30, the contracting officer was advised that two of the three PWD's included in the original IFB were being canceled. The total number of blocks under the IFB was reduced from 10,248 to 1,549.

After Kan-Du received the COC, the Army offered to award it a contract for 1,549 direct vision blocks at a price of \$74.36 per unit under the original IFB. Kan-Du responded by extending its offer for 10,248 blocks at \$74.36 each and protested the delays in awarding the contract and the failure to award the full, original quantity.

The Army initially contends that the terms of Kan-Du's extension amount to a withdrawal of its bid. Further, it asserts that withdrawal of the bid renders the Kan-Du protest issues academic and that our Office should not consider a protest when the issues have been rendered academic.

We will not consider academic issues in the context of a protester's withdrawn bid. Risi Industries, Inc.; Westmont Industries, B-191024, April 27, 1978, 78-1 CPD 329. However, we will consider protests where, as here, the issue being protested is the reasonableness of the delay in awarding a contract. See Yardney Electric Division, 60 Comp. Gen. 499 (1981), 81-1 CPD 440. Kan-Du has extended its offer for 10,248 vision blocks and protests the Army's reduction of the quantity under the IFB. It has not qualified its extension in any way. If we were to sustain Kan-Du's protest, it would be eligible for award of a contract; therefore, the issues in this protest are not academic.

Generally, cancellation of a solicitation after bid opening requires a compelling reason on the part of the agency. This rule applies to both total cancellation and partial cancellation. LM&E Company, Inc., 61 Comp. Gen. 496, (1982), 82-1 CPD 603. The regulations clearly permit cancellation when the supplies or services being solicited are no longer needed. DAR § 2-404.1(b)(iii) (1976 ed.); Ramsey Canyon Enterprises, B-204576, March 15, 1982, 82-1 CPD 237.

With respect to partial cancellation, we note that the IFB contained a provision which reserves the right to the Government to award on any line item for a quantity less than the quantity offered, at the unit prices offered, unless the bidder specifies otherwise in its bid. Thus, a partial cancellation and the Army's offer to award Kan-Du a reduced quantity were permissible under the IFB. See, e.g., LM&E Company, Inc., supra.

Kan-Du contends the Army's determination of nonresponsibility and the COC proceeding were unreasonably delayed. However, Kan-Du acknowledges that production of the direct vision blocks requires expertise in several areas. Also, the contracting officer reports that the end item was not within Kan-Du's normal line of business, and

that Kan-Du was subcontracting with two other firms for part of the work. According to the Army, because of these factors, the Army believed an in-depth preaward survey with a contracting officer's representative present at the PAS was necessary. The Army advises that as soon as a negative responsibility determination was made, the matter was referred to SBA. Under these circumstances, we think the time taken for the PAS was not unreasonable.

As required by DAR § 1-705.4(c), supra, the contracting agency in this case referred the question of Kan-Du's responsibility to SBA. In this connection, while an agency is bound by SBA's issuance of a COC, it need not indefinitely withhold award to another bidder which it has found to be responsible pending SBA's decision on the COC. The regulation requires that award be withheld until SBA action concerning the issuance of a COC or until 15 working days after SBA is notified of the request for a COC, whichever is earlier. DAR § 1-705.4(c), supra.

After the 15-day period had expired on November 18, the agency properly could make an award to another bidder where, as here, SBA had not acted on the COC. See Diesel Energy Systems, Co., B-203781, July 8, 1981, 81-2 CPD 24. The Army was not legally required to further suspend procurement action to meet its needs. In fact, the Army delayed awards until the needs became critical, apparently trying to hold the awards until Kan-Du's responsibility was resolved by the SBA.

Under the DAR, in a public exigency situation, the contracting agency solicits offers "from the maximum number of qualified sources consistent with the nature and requirements of the supplies * * * to be procured." DAR § 3-101(b) (1976 ed.). Because of questions regarding Kan-Du's responsibility, the Army properly did not consider Kan-Du as a "qualified source" for these urgent procurements. We note that these emergency awards were made to companies which had produced vision blocks or similar products under prior procurements and which were in the best position to satisfy first article testing to expedite delivery of the supplies.

Since Kan-Du was not eligible for award under these emergency solicitations, the failure to notify Kan-Du of these awards did not prejudice Kan-Du. Furthermore, DAR § 3-508.3 (1976 ed.) requires only that notice be given to unsuccessful offerors promptly and Kan-Du was not an offeror under the oral solicitations. In any event, the failure to provide prompt notice of the award is merely a procedural matter which does not affect the validity of the awards. See Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172.

We deny the protest.

for 
Comptroller General
of the United States