

DECISION

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

27253

FILE: B-212038; B-212038.2 **DATE:** January 24, 1984

MATTER OF: MIL-STD Corp.

DIGEST:

1. GAO has no basis to object to agency's rejection of protester's bid, submitted in a brand-name-or-equal procurement, on the basis that the bid was unreasonably high when the protester's bid was 48 percent higher than a nonresponsive bid submitted by the only other brand-name bidder and the protester's price did not reflect the economies of scale which might reasonably be expected since this procurement was for a quantity approximately 1,500 percent greater than that of a previous contract under which the protester had been paid a unit price comparable to its present bid.
2. An impermissible auction situation is not created where an advertised solicitation is canceled because the bid prices received were excessive and the agency then uses a negotiated solicitation upon resolicitation.
3. Protest against alleged improprieties in a solicitation which is filed after closing date for receipt of proposals is untimely.

MIL-STD Corp. protests the General Services Administration's (GSA) cancellation of invitation for bids (IFB) No. FEN-EX-L303Y-1-A-3-24-83, for 2,284 slide hammers, and award of a contract under request for proposals (RFP) No. FEN-EX-L303Y-1/N-8-5-83, the resolicitation for the same requirement. The protest with respect to solicitation No. -3-24-83 is denied and the protest with respect to solicitation No. -8-5-83 is denied in part and dismissed in part.

Solicitation No. -3-24-83, a small business set-aside, was issued on February 24, 1983 as a brand name or

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equal procurement. On March 24, GSA received and opened the following bids in response to the solicitation:

<u>Bidder</u>	<u>Unit Price</u>	<u>Total Price</u>
O.N.E., Inc.	\$19.24	\$43,944
P.R. Machine Works, Inc.	21.82	49,837
International Tool & Machine Co., Inc.	29.94	68,383
MIL-STD	32.39	73,979
Hamco, Inc.	32.93	75,212
Advanced Energy Products	35.74	81,630
L-K Tool Mfg., Inc.	49.40	112,830
Wilbourn Tools & Accessories	55.15	125,963
AIW-Alton Iron Works, Inc.	118.00	269,512

The bids of seven of the firms responding to the solicitation were rejected as nonresponsive: the bids of O.N.E., Hamco and AIW were rejected for failure to submit required descriptive literature; the bid of P.R. Machine was rejected for taking exception to the payment due terms in the solicitation; the bids of International Tool and Wilbourn were rejected for failure to acknowledge a material amendment; and the bid of L-K Tool was rejected for being from a large business.

The bids of the two remaining bidders, MIL-STD and Advanced Energy, were determined to be responsive, but GSA determined that contracting with either of these firms was not in the best interest of the government. According to GSA, the previous contract for this item was entered into with MIL-STD in January 1983 for 139 units at a price of \$35 per unit. Although here MIL-STD, the low responsive bidder, bid a price 7.5 percent below that, GSA expected a more significant decrease in the price per unit in view of the approximately 1,500 percent increase in quantity from the previous procurement. GSA also compared MIL-STD's price with that submitted by P.R. Machine, the only other brand name manufacturer and previous supplier submitting a bid, and found that MIL-STD's bid was 48 percent higher. On the basis of these comparisons GSA determined that MIL-STD's price was unreasonable and consequently it canceled the solicitation.

Based on the results of this solicitation, GSA determined that it was impractical to secure competition for this item by formal advertising and it then issued solicitation No. -8-5-83, a request for proposals. This solicitation contained essentially the same terms and conditions

of the initial solicitation. Award of a contract under the resolicitation has been made notwithstanding the filing of this protest.

MIL-STD asserts that its bid and that of Advanced Energy are reasonable in comparison to prices received from previous contractors and therefore the initial solicitation should not have been canceled. Specifically, MIL-STD notes that it received a contract for the identical item in 1982 at a price of \$38 per unit. MIL-STD further asserts that it was improper to compare its bid to those of nonresponsive bidders because the prices submitted by those bidders allegedly reflect a misunderstanding of the specifications and the costs which would be incurred by the manufacturer.

MIL-STD next alleges that the cancellation of the invitation for bids and the subsequent issuance of the request for proposals results in an auction which should not be permitted. The protester appears to use the word "auction" in two senses. First, MIL-STD contends that to conduct a second competition after prices have been exposed under the first solicitation creates an auction situation which should not be tolerated. Second, it speculates that in the conduct of the second, negotiated procurement, GSA will engage in the type of "auction technique" prohibited by Federal Procurement Regulations (FPR) § 1-3.805-1(b) (amend. 153, September 1975). In correspondence filed shortly after the second solicitation was issued, MIL-STD predicted that GSA would repeatedly ask offerors to submit revised prices, each instance of which the protester states would be an "auction." MIL-STD adds that since it and Advanced Energy submitted responsive, competitive bids in response to the initial solicitation, there was no legal justification for resoliciting on a negotiated basis instead of on an advertised one.

As a general rule, cancellation of an advertised solicitation after bid opening is improper absent a cogent and compelling reason. IFR, Inc., B-209929, May 17, 1983, 83-1 CPD 524. However, FPR § 1-2.404-1(b)(5) authorizes cancellation for a compelling reason, such as where "all otherwise acceptable bids received are at unreasonable prices." Our Office has stated that a determination concerning price unreasonableness is a matter of administrative discretion which we will not question absent a showing of fraud or bad faith. Photo Data, Inc., B-208272, March 22, 1983, 83-1 CPD 281. In this respect, we have recognized that a determination of price unreasonableness may be based

upon a comparison with such factors as government estimates, past procurement history, current market conditions or any other relevant factors, including any which have been revealed by the bidding. Omega Container, Inc., B-206858.2, November 26, 1982, 82-2 CPD 475.

GSA determined MIL-STD's bid to be unreasonable because (1) MIL-STD's price was 48 percent higher than that of the only other brand-name bidder, P.R. Machine, and (2) the quantity procured here was approximately 1,500 percent higher than a previous contract under which MIL-STD had been paid a price comparable to its present bid.

We believe some caution should be exercised in using nonresponsive bids as the basis for finding another bidder's price to be unreasonable, although it is permissible to consider nonresponsive bids in determining the reasonableness of a bid, unless the nonresponsiveness affected the bid price. Theatrical Electronics Corp., B-200361, February 11, 1981, 81-1 CPD 93. The nonresponsiveness of P.R. Machine's bid related to the bid price in that its bid was premised on the firm being paid by the government 20 days after it furnished the slide hammers instead of 30 days as provided for in the solicitation and thus its bid price may have been higher had it realized that it would have to wait an additional 10 days before receiving payment. Moreover, as we stated in Theatrical Electronics Corp., supra, it is not a good practice to base a determination of price unreasonableness only on a comparison with a nonresponsive bid because it is difficult to tell whether the nonresponsive bidder seriously wished to have its bid accepted. Thus, had GSA relied solely on the comparison between the bids of P.R. Machine and MIL-STD, it may not have had a reasonable basis for its determination of price unreasonableness.

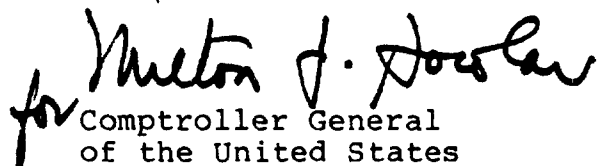
However, the agency also based its determination on the expectation that a lower bid price would result from the approximately 1,500 percent increase in quantity over the January 1983 procurement. Although GSA does not document why it expects lower prices than under previous contracts for this item, there is a logical assumption that lower prices should be obtained as a result of economies of scale: there will be much greater quantities of the item produced here than under the January 1983 procurement and consequently there should be lower production costs and thus lower prices per unit. MIL-STD's claim that its bid price was reasonable because it is lower than its 1982 contract for this item is not persuasive because it fails

to show that the previous price was for a quantity similar to that involved here. We conclude that the difference between MIL-STD's bid price and both the only other bid received from a brand name manufacturer and the government estimate provides a reasonable basis for the determination of price unreasonableness and subsequent cancellation of the solicitation.

We do not accept MIL-STD's contention that the cancellation and resolicitation created an impermissible auction because, as we stated in Stewart-Thomas Industries, Inc., B-196295, March 5, 1980, 80-1 CPD 175, that argument leads to the illogical conclusion that, contrary to what is permitted in the regulations, unreasonable bid prices could not be rejected since those prices would be exposed and an attempt to get reasonable prices would constitute an impermissible auction. Further, where, as here, an agency properly cancels an advertised solicitation because the prices are unreasonable, it is authorized to then use a negotiated solicitation upon resolicitation. FPR § 1-3.214; R. S. Bowers Construction Company, B-208164, November 29, 1982, 82-2 CPD 482. Since the cancellation and resolicitation were in accordance with the governing legal requirements, an impermissible auction was not created. See N.V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 CPD 467.

Finally, MIL-STD's contention that the agency improperly used negotiation is untimely. Under our Bid Protest Procedures a protest against alleged improprieties in a solicitation must be filed prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(b)(1) (1983). This includes protests against the method of solicitation used by an agency. Scott Aviation, B-212063, June 24, 1983, 83-2 CPD 18. The closing date for receipt of proposals here was August 5 but this issue was not raised by MIL-STD until its letter of October 5, received by our Office on October 7, 2 months after the closing date, and it therefore is untimely and not for consideration.

The protest is denied as to solicitation No. -3-24-83 and denied in part and dismissed in part as to solicitation No. -8-5-83.


for Comptroller General
of the United States