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DECISION

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

FILE: B-218015 **DATE:** April 12, 1985

MATTER OF: Mil-Base Industries

DIGEST:

1. The government cannot be said to have awarded a contract to a bidder merely because the bidder was informed that a contract number had been assigned to the solicitation, since such information falls short of indicating a clear, unconditional acceptance of the offer.

2. GAO questions a contracting agency's decision to cancel a solicitation on the basis of the protester's low bid price being too high where the protester's bid price was compared to a post-bid opening, unsubstantiated, quote by a 1980 supplier that was significantly lower than the supplier's 1980 contract price, the government estimate, and the price paid by the agency in its most recent prior procurement for the item, and the agency's price analysis does not include consideration of all the factors relevant to the bid's reasonableness.

3. Failure of one of a limited number of suppliers to submit a bid does not in itself support cancellation of the invitation where the firm was sent a copy of the IFB and the supplier had constructive notice of the solicitation and its contents from publication in the Commerce Business Daily.

Mil-Base Industries (MBI) protests the cancellation of invitation for bids (IFB) No. N00104-84-B-0850 issued by the Department of the Navy for the supply of 272 guidance shields for the MK 46 torpedo. The IFB was canceled because the Navy determined that MBI's bid price of $229.50 per unit was unreasonably high and because a previous supplier of the guidance shields, Honeywell, Inc., was not

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solicited. MBI, however, contends that it actually was already awarded a contract before cancellation because the Navy informed it that a contract number had been assigned to the solicitation. In the alternative, MBI contends that its price was fair and reasonable when compared to prices paid by the Navy in previous procurements and when compared to the government's initial estimate for this procurement. MBI also argues that the Navy's failure to solicit Honeywell should not have been a basis for cancellation because Forway Industries, Inc., which was solicited, was the most recent supplier of the guidance shields, not Honeywell.

We sustain the protest.

The IFB was issued to 18 potential sources of supply. In addition, the solicitation was synopsized in the Commerce Business Daily. At bid opening, however, MBI submitted the only bid. Honeywell failed to bid in part, apparently, because the Navy addressed the copy of the invitation to the wrong division of the company.

The Navy requested an immediate preaward survey on MBI because the Navy's stock of guidance shields was low. The completed survey found MBI responsible and recommended award to the company. In the meantime, based on the fact that Forway had supplied 8 shields in 1981 at a unit price of $250.00, the Navy found MBI's price to be reasonable and assigned a contract number to the solicitation. Subsequently, however, the Navy determined that the acquisition history of the shields did not provide a valid basis for price comparison because all prior acquisitions were only for a small number of the items.

The Navy then decided to contact the previous suppliers to ascertain why they did not submit bids under the IFB. In contacting Honeywell, the Navy was informed that the company never received the IFB. In addition, Honeywell stated that it could supply the required 272 units for approximately $125.00 each. Honeywell later confirmed this quote in writing. Based on Honeywell's quoted price, the Navy determined MBI's bid to be unreasonable and, accordingly, decided to cancel the IFB.

After receiving notification of the cancellation from the Navy, MBI filed a timely protest with our Office.

MBI first argues that it in fact was awarded a contract because the assignment by the Navy of a contract number to the IFB shows that the agency must have approved a contract for MBI. According to MBI, it is not possible to obtain a contract number without there first being an approval of a contract by the Navy's procurement officials.

With regard to the reasonableness of its bid price, MBI asserts that its price was more than 18 percent lower than a government replacement price estimate of $270.50 per unit stated on the purchase worksheet that was prepared prior to the issuance of the IFB. MBI points out that this estimated cost was formulated by a competent Navy price analyst, based on prior acquisition history, conditions of the market and knowledge of the product.

As to the prior acquisition history of the shields, MBI notes that in 1981 the Navy paid Forway Industries $250.00 per shield, and MBI's price some 3 years later is 8 percent lower. MBI argues that Forway Industries' 1981 price was more realistic than Honeywell's post bid opening quote of $125.00 per shield. In MBI's opinion, Honeywell, having missed the competition and being aware of MBI's bid price, simply quoted a unit price that would not bind the firm as a legal matter but would, presumably, cause the competition to be reopened. MBI also points out that Honeywell's quote was based on delivery "to be completed in 1985," whereas the IFB required delivery within 150 days of contract award.

In addition, MBI alleges that the Navy's justification for finding Honeywell's quote reasonable contains several factual inadequacies and inaccuracies. In specific, MBI complains that the Navy characterized the guidance shield as being 99 percent copper, when it is actually more than 30 percent plastic, and that the Navy's finding that the price index for refined copper had declined by 30 percent, based on which the agency assumed shield prices should have decreased over the last few years, fails to take into account the fact that the copper used in the manufacture of the guidance shield is fabricated sheet. Further, according to MBI the cost of raw or even refined copper is small in comparison to the cost of fabrication. Finally, MBI alleges that the Navy's analysis fails to make any allowance for the cost of inflation from 1980 to 1984.

The Navy states that a contract specialist at the procuring activity did inform MBI in a telephone conversation that a contract number had been assigned to the IFB. Nevertheless, the Navy argues that MBI is incorrect in asserting that this amounted to an actual contract award. With respect to the reasonableness of MBI's bid price, the Navy admits it initially determined MBI's price to be acceptable. The Navy states, however, that after further review of its determination and after a comparison of MBI's price with the contemporaneous Honeywell quote of $125.00, MBI's price was ultimately determined to be unreasonable. The Navy argues that since a price reasonableness determination can be based on factors such as government estimates, past procurement history or current market conditions, the comparison of a bid price with prices quoted by a contractor like Honeywell who did not bid is proper.

The Navy also takes the position that where there is a limited number of manufacturers of a required item, the failure to solicit one of them is itself a proper basis for cancellation and resolicitation. In this regard, the Navy points out that the prior acquisition history of the guidance shields indicates that there are only two manufacturing sources--Honeywell and Forway Industries.

Initially, we think it is obvious that MBI was not actually awarded a contract under the IFB. MBI merely was notified that a contract number had been assigned; certainly, this did not constitute a clear and unconditional acceptance of the firm's offer. See Marino Construction Co., Inc., 61 Comp. Gen. 269 (1982), 82-1 C.P.D. ¶ 167. Therefore, we find no merit to the protester's first contention.

Turning to the cancellation of the IFB, it is improper, as a general rule, to cancel an advertised solicitation after bid opening absent a cogent and compelling reason, IFR, Inc., B-209929, May 17, 1983, 83-1 C.P.D. ¶ 524, such as where all bids received are at unreasonable prices. Federal Acquisition Regulation, 48 C.F.R. § 14.404-1(c)(6) (1984). Our Office has stated that a determination concerning price reasonableness is a matter of administrative discretion which we will not question unless the determination is unreasonable or there is a showing of fraud or bad faith. Spruill Realty/ Construction Co., B-209148.2, Jan. 31, 1983, 83-1 C.P.D. ¶ 102. In this regard, as the Navy points out a determination concerning price reasonableness 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, Nov. 26, 1982, 82-2 C.P.D. ¶ 475.

Here, the Navy canceled the IFB because Honeywell indicated that it could supply the guidance shields at a unit price $104.50 less than MBI's. However, we question the Navy's acceptance of Honeywell's quote of $125.00 as a realistic price, given the fact that no explanation accompanied the quote and the procurement history suggested that $125.00 per shield was very low. In this respect, the record indicates that the Navy mistakenly believed at the time it contacted Honeywell that the unit price for the company's 1980 contract was $125.00--we note MBI suggests the Navy, rather than Honeywell acting independently, therefore may have initiated a quote of $125.00. Subsequent to the filing of MBI's protest, the Navy discovered that the $125.00 figure was only an estimate prepared for that procurement and that the final negotiated unit price for the 1980 Honeywell contract was in fact $197.00. The Navy further discovered that in 1980 there was a later separate purchase of four shields from Honeywell at a unit price of $203.00. Thus, the Navy's history of purchasing from Honeywell, in itself, simply does not support the reasonableness of the $125.00 quote.

The Navy correctly points out that we have allowed an agency to cancel a solicitation for price unreasonableness based on price information obtained from a prior supplier who did not bid. See Stewart-Thomas Industries, Inc., B-196295, Mar. 5, 1980, 80-1 C.P.D. ¶ 175; Power Energy Industries, B-209705, July 5, 1983, 83-2 C.P.D. ¶ 52. The two cited cases do not apply to MBI's situation, however. In Stewart-Thomas Industries, the contracting agency did contact the former contractor and canceled the solicitation after assurances from the former contractor that it could offer a price lower than the low bid. Unlike the situation here, the agency contacted the former contractor to establish that the prices it had bid previously--there had been a number of relatively recent purchases of the item--were still realistic; if the prices were not realistic, the agency intended a further study of all past prices to see if they were still valid. In addition, the agency had the benefit of the two low prices on the resolicitation of the canceled procurement, which were in the same range as the former contractor's, to show that the former contractor's price was in fact still realistic. Similarly, in Power Energy Industries, the contracting agency was able to compare a price quote after opening from a company that had failed to bid with the government estimate prepared before bid opening. We found that the 1-percent difference between the company's quote and the government estimate provided an adequate basis for canceling the solicitation because the bids submitted were unreasonably high. Thus, in each cited case there was independent verification for the post-bid opening quote, which simply was not the case here.

Concerning the efficacy of Honeywell's $125.00 quote irrespective of the item's procurement history, the Navy, as part of the report it submitted in response to MBI's protest, has submitted a comparison of the Forway Industries buy of 12 guidance shields at $250.00 with a projected cost for a buy of 272 guidance shields. After noting the difficulty of making a comparison between a buy of 12 units to a buy of 272 units, the Navy's price analyst states:

> ". . . From Feb. 81 to Sept. 84, metal and metal products increased only 8.3%. Noting that the primary metal is copper (shield), copper prices depending on the index reviewed declined 30% for refined copper to 14.297 for copper rod to zero percent for copper sheet and strip. Based on a break even or slight reduction in material cost for 12 units (assuming a buy of 12 units), I would have looked for quantity impact on material for 272 units."

Using a "90 percent to 95 percent curve applied to historical cost," the analyst concludes that a reasonable cost for the purchase of 272 guidance shields would be $154.00 per shield on a 90 percent price reduction curve and $123.00 on a 95 percent price reduction curve.

While we do not question the assumption that the production of larger quantities will result in lower unit production costs, we do not believe the Navy's price analysis provides a sufficient basis to reject MBI's bid. The analysis does not include any inflation costs on the belief that reduced copper costs offsets any other price escalations. As stated by the Navy's price analyst, however, the cost of copper sheet did not decline at all from February 1981 to September 1984--as noted above, MBI alleges that the cost of raw copper is incidental in comparison to the cost of the fabricated copper sheet that is a component of the guidance shields, a position the Navy does not rebut. Further, the Navy's price analysis makes no mention of any increase in the cost of the plastic used in making the guidance shields; according to MBI, the cost of plastic has increased nearly 13 percent since 1981. Also, MBI alleges that the guidance shield is 30 percent plastic in that it consists, in part, of an "insulator" that is approximately 66-5/8 inches of plastic sheet. Again, the Navy does not rebut MBI's allegations. Finally, we note that the Navy's price analysis does not consider whether there has been an increase in the cost of labor involved in the manufacture of the guidance shields. Under the circumstances, we do not believe the Navy's analysis is sufficiently complete to support a finding that MBI's bid price of $250.00 per shield was unreasonably high, particularly since the price appears entirely consistent with the actual procurement history of the item as well as the government estimate of $270.00 per shield.

As to the Navy's professed failure to solicit Honeywell, we have held that the failure of a firm to enter a competition does not prevent award and require resolicitation so long as the agency has made a significant effort to obtain competition, a reasonable price was obtained, and no deliberate attempt was made to exclude the protesting firm from competition. Resource Engineering, B-216986, Nov. 30, 1984, 84-2 C.P.D. ¶ 615. This is so even where only one bid or offer is received. Vigilantes, Inc., B-213010, Feb. 8, 1984, 84-1 C.P.D. ¶ 158.

It is true, as pointed out by the Navy, that in Power Energy Industries, B-209705, supra, we stated that the inability of one of an obviously limited number of item sources to bid might support cancellation. In that case, however, the excluded bidder had received a solicitation but had failed to bid because of improper agency advice regarding an extension of the bid opening date and because of the nonreceipt of an amendment concerning the new bid opening date. Here, in contrast, it was not the Navy's fault Honeywell did not bid. There is no evidence that addressing the IFB to the wrong Honeywell division, as opposed to the failure of the firm's internal distribution system to route the IFB in time, precluded the firm from bidding. In addition, the IFB was synopsized in the Commerce Business Daily after issuance and weeks before bids were due. Publication of a synopsis in the Commerce Business Daily constitutes constructive notice of a solicitation and its contents. ERA Helicopters, Inc., B-210966, July 12, 1983, 83-2 C.P.D. ¶ 82. Therefore, even assuming that addressing the IFB to the wrong division of Honeywell can be construed as a failure to provide Honeywell of actual notice of the IFB, it is clear that Honeywell did legally have constructive notice of the IFB and its contents. See Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 C.P.D. ¶ 302.

Accordingly, we believe Honeywell's failure to bid does not support cancellation, and that the Navy's analysis of MBI's price is incomplete. We therefore are recommending to the Navy that it reevaluate the reasonableness of MBI's bid price in light of our decision, and reinstate the IFB and award to MBI if the reevaluation shows that MBI's price is reasonable.

The protest is sustained.

Harry R. Van Cleve
for Comptroller General
of the United States