



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: McDonald Welding & Machine Co., Inc.

File: B-224014.4; B-224014.5

Date: December 5, 1986

DIGEST

GAO will not further consider protests where after a court of competent jurisdiction requests a GAO advisory opinion on the matter, the court issues a decision addressing the merits of the protests.

DECISION

McDonald Welding & Machine Co., Inc. (McDonald), by two separate submissions, protests the award of a contract to Gichner Mobile Systems (Gichner), under request for proposals (RFP) No. N00140-86-R-0987, issued by the Department of the Navy, Regional Contracting Center, Philadelphia, Pennsylvania (Navy) for the procurement of mobile facility vans (MFV's).

We dismiss the protests.

The RFP was originally issued on February 13, 1986, for 1,024 MFV's with an option to purchase an additional 1,024. The solicitation provided for the submission and approval of a first article prior to full production. The RFP stated that the first article requirement could be waived by the Navy for offerors which had previously passed first article testing and had successfully produced the vans. The RFP solicited offers based on 2 lots - lot I was for offers for the total production quantity (1,024 units) with first article submission included and lot II was for offers for the full quantity where first article submission would be waived. Award was to be made for either lot I or lot II.

By April 18, 1986, the closing date for receipt of offers, 12 proposals were received. Subsequently, the Navy determined that it had an urgent requirement for 337 MFV's and that the total requirement should be reduced from 1,024 vans to 820 vans. Due to the urgent need for 337 vans, the Navy decided to restrict award for that quantity to those firms eligible

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for first article waiver. The Navy prepared a justification and received approval for other than full and open competition for the procurement of the 337 vans.

The Navy amended the solicitation and reduced the quantity to be procured to 820 MFV's. The amendment solicited offers on three lots. Lot III was for the 337 urgently needed vans and was restricted to those firms eligible for first article waiver based upon the prior passing of similar first article test requirements. Lots I and II solicited offers for the remaining 483 vans. Lot I requested a price for the 483 units with first article testing required and lot II solicited a price for the same 483 units based upon a first article waiver. The amended solicitation contemplated the award of lot III and either lot I or lot II. The amendment stated that lot III may be awarded separately. Closing date for submission of offers under the amended RFP was August 25, 1986.

On August 26, 1986, McDonald filed a protest with our Office, contending that the amended award structure, which restricted lot III to offerors with vans which have previously passed first article testing, unduly restricted competition. However, because the protest dealt with alleged improprieties incorporated into the solicitation and was filed after the closing date for receipt of proposals (August 25), on August 26, we dismissed the protest as untimely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1) (1986). Twice McDonald requested reconsideration of our decision dismissing its August 26 protest and both times we affirmed our dismissal. See McDonald Welding & Machine Co., Inc.--Request for Reconsideration, B-224014.3, Oct. 23, 1986, 86-2 C.P.D. ¶ ____; McDonald Welding & Machine Co., Inc.--Request for Reconsideration, B-2243014.2, Sept. 5, 1986, 86-2 C.P.D. ¶ ____.

On September 11, Gichner was awarded lot III and on September 19 McDonald filed a protest (B-224014.4). McDonald argued that the September 11 award of a contract for lot III under the RFP was made at a price substantially in excess of the McDonald offer thereby allegedly violating the stated award criteria which established overall cost as the basis for award. In addition, McDonald contended that Gichner was not an eligible source under the conditions specified in the RFP. Finally, McDonald argued that award was made on lot III separately and that the RFP did not permit the separate award of lot III.

On October 14, McDonald filed an additional protest (B-224014.5) restating all of the bases in its September 19 protest and also raising additional protest bases. For example, McDonald argued that the Navy permitted Gichner to perform under the awarded contract in violation of the stay provisions of Competition in Contracting Act, 31 U.S.C. § 3553(d)(1)(Supp. III 1985).

On October 22, 1986, subsequent to filing protests B-224014.4 and B-224014.5, McDonald filed a civil action (No. C86-4486Y) in the United States District Court for the Northern District of Ohio, Eastern Division, seeking injunctive relief. By order dated October 28, 1986, the court requested an advisory opinion on McDonald's protests filed with our Office. The court's order stated that the case would simultaneously be considered on two levels, namely (1) before our Office and (2) on an expedited basis on the merits before the court.

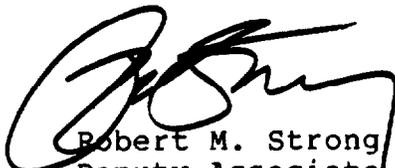
On November 28, 1986, while we were processing our advisory opinion, the court issued its decision on the merits addressing the issues protested to us. The court found that the restriction of the award of lot III to offerors which were eligible for first article waiver was proper. The court concluded that the lot III contract award to Gichner was illegal and thus null and void because Gichner was not eligible for a first article waiver. However, the court dismissed McDonald's claim that McDonald was entitled to award of the lot III contract because the court found that McDonald was an ineligible bidder under the terms of the lot III solicitation, because McDonald had not yet passed first article test requirements. Finally, the court determined that the Navy violated the stay provisions of 31 U.S.C. § 3553(d) by not staying the performance of the lot III contract with Gichner while McDonald's protest was pending before us.

Under the doctrine of res judicata, the court's resolution of the issues in this case are binding on this Office. See Prince George's Contractors, Inc., 64 Comp. Gen. 647 (1985), 85-2 C.P.D. ¶ 11. Therefore, we see no purpose for further considering the protest. Prince George's Contractors, Inc., 64 Comp. Gen. 647, supra.

McDonald has filed a letter with our Office dated December 1, 1986, in which it asserts that the court did not "fully address" its protest B-224014.5, and that therefore there are issues "ready for a decision" by our Office. It is clear, however, from McDonald's complaint for injunctive and

declaratory relief that its complaint before the court was co-extensive with its protests then pending with our Office and that the court has ruled on the matter without in any manner expressing an expectation of any further involvement by our Office. Therefore we will not address this matter further. Leary Marine Ltd., B-209672, Feb. 3, 1983, 83-1 C.P.D. ¶ 124.

The protests are dismissed.



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General Counsel