Moorhouse

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Alden Electronics, Inc.--Reconsideration

File: B-224160.2; B-224161.2

Date: March 12, 1987

DIGEST

1. Prior decision upholding an agency's post-bid opening cancellation of an invitation for bids in part on the ground that the protester was not materially harmed by the action since it was the apparent low bidder under the resolicitation is affirmed upon reconsideration where, even though events subsequent to the decision now reveal that the protester was in fact prejudiced, the agency's original decision to cancel nevertheless remains justified upon reexamination of the record.

2. Where the post-bid opening cancellation of an invitation for bids was consistent with governing legal requirements, an impermissible auction has not been created upon resolicitation, and the fact that lower bids may have been submitted under the successor invitation generally has no bearing upon the propriety of the original cancellation.

3. An agency properly may justify a cancellation on a subsequently enunciated basis if that basis would have supported the action had it been raised initially.

DECISION

Alden Electronics, Inc. requests reconsideration of our decision in Alden Electronics, Inc., B-224160 et al., Nov. 13, 1986, 87-1 CPD ¶ ____, in which we denied Alden's protest against the post-bid opening cancellation of Federal Aviation Administration (FAA) invitation for bids No. DTFA11-86-B-00053 (IFB -00053), under which Alden was the low evaluated bidder, and the addition of the deleted items--weather graphics display systems--to invitation for bids No. DTFA07-86-B-00094 (IFB -00094), another FAA procurement for such systems.

We denied the protest in part because Alden was the apparent low bidder under the successor invitation and, therefore, the firm had made no credible showing that it was prejudiced

038361 / 132482

by the earlier cancellation. (We did note, however, that the bids under IFB -00094 had yet to be evaluated to determine life cycle cost present value, an analysis which ultimately would determine the firm entitled to the award.)

We denied the protest as well because, by regulation, an invitation for bids may be canceled after bid opening if such action clearly is in the public's interest. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1(c)(9) (1986). In this regard, we were not persuaded by Aldēn's argument that the agency's only real reason for canceling IFB -00053 was the expectation of more favorable prices if the systems originally sought under that invitation as one firm requirement plus two options on either a purchase or lease basis were resolicited as three immediate buys on a purchase-only basis, which was not a legally sufficient ground to justify the cancellation. Accordingly, we rejected Alden's corollary assertion that the cancellation had ultimately resulted in an improper auction situation among the bidders under IFB -00094.

Alden now requests reconsideration of our prior decision on the ground that events subsequent to the decision now obviate our conclusion that Alden was not materially harmed by the agency's cancellation of IFB -00053. In this regard, Alden advises this Office that, in fact, it was not the low evaluated bidder under IFB -00094 after its submitted bid had been analyzed to determine life cycle cost present value. As a result, the contract was awarded to another firm.

In addition, Alden urges that we factually erred in our prior decision by determining that the firm's average per system price under IFB -00094 was higher than its average per system price under IFB -00053. We believed that this circumstance effectively refuted the firm's contention that the cancellation had led to a prohibited auction situation since evidence was lacking that Alden had been forced to lower its system prices significantly in order to remain competitive.

Alden now urges that its average per system price under IFB -00094 was higher than under IFB -00053 because the two additional weather graphics systems (one firm buy plus one option) being acquired under IFB -00094 had several more work stations than those systems originally sought under IFB -00053 and, therefore, were more expensive to the extent of raising the firm's average per system price above that for IFB -00053. The firm insists that a reexamination of its bid prices will show that it was compelled to participate in an improper auction due to the agency's unjustified post-bid opening cancellation of the earlier invitation.

Accordingly, Alden requests reconsideration on the principal ground that it was prejudiced by the cancellation, and the firm reasserts its original challenge to the propriety of that action.

We affirm our prior decision.

Our decision did not wholly turn upon the firm's failure to establish that it was materially harmed by the cancellation, an action which, as indicated in our decision, we found no compelling reason to question. Rather, since it was obvious that the fundamental underpinning of any viable protest--a showing of prejudice--was lacking due to Alden's status as the bidder apparently in line for award under IFB -00094, we saw no need to set forth a specific legal analysis of the agency's cancellation decision. Hence, although Alden now makes a showing of prejudice to the extent that, as the firm emphasizes, it ultimately "lost" the successor procurement, this changed circumstance does not necessarily affect our original view that the cancellation itself was proper.

The FAA contracting activity initially advanced several reasons to justify the cancellation after bid opening, the most significant of which was the new availability of funds to purchase all three systems sought under IFB -00053 instead of awarding a contract, as originally contemplated absent such funding, for the purchase or lease of one system plus options to purchase or lease the remaining two systems. The activity decided that the immediate acquisition of all three systems on a purchase-only basis would prove to be more economical, and, accordingly, canceled IFB -00053 and added those three items to the two systems being acquired by another FAA contracting activity under IFB -00094.

We continue to reject Alden's argument that the contracting activity had no reason to expect that lower prices would result from a resolicitation of the three systems as firm buys except through the creation of an improper auction situation among the bidders. In this regard, Alden contends that because all bidders bid the same price for the two optional systems under IFB -00053 as well as for the one firm requirement under that invitation, and because the invitation appeared to indicate that the options would likely be exercised by the government, the activity could not legitimately believe that the bidders had provided other than their best competitive prices.

However, the fact that the bids as submitted under IFB -00053 were all level-priced does not establish that the activity knew or should have known that better prices could be

obtained only through an auction. The activity not only determined that resoliciting all three systems as immediate buys would produce more advantageous bid prices than soliciting one firm requirement with two options, but also that acquiring the systems on a purchase-only basis, without the lease option provided under IFB -00053, would prove to be a more feasible procurement approach by eliminating the potential for confusion in the preparation of bids caused by the complexity of the leasing provisions in the IFB. Hence, we remain of the opinion that the decision to cancel was consistent with the FAR, 48 C.F.R. § 14.404-1(c)(9), supra, providing for the post-bid opening cancellation of an invitation if circumstances dictate that such an action is clearly in the public's interest. See Exquisito Services, Inc., B-222200.3, July 17, 1986, 65 Comp. Gen. ____, 86-2 CPD ¶ 78.

The thrust of Alden's protest has been the allegation that the ultimate result of the cancellation was the creation of a prohibited auction situation. However, it is well settled that an impermissible auction has not been created upon resolicitation where the original post-bid opening cancellation of an invitation was in accordance with governing legal requirements. Emerson Electric Co., B-221827.2, June 4, 1986, 86-1 CPD ¶ 521; Arlandria Construction Co., Inc., B-195044 et al., Apr. 21, 1980, 80-1 CPD ¶ 276. Moreover, to the extent Alden argues that the significantly lower bid prices obtained under IFB -00094 than under IFB -00053[1/] demonstrate the actual existence of an auction, it has also been our view that the results of a resolicitation generally have no bearing upon the propriety of the original cancellation. Brink Construction Co., B-219413 et al., July 11, 1985, 85-2 CPD ¶ 43; Warfield & Sanford, Inc., B-206784, June 23, 1982, 82-1 CPD ¶ 620.

Because of the potential harm to the integrity of the sealed bidding system, contracting agencies, in exercising their broad discretion to cancel solicitations, must have cogent

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1/ Because of Alden's present assertion that the two additional systems sought under IFB -00094 were more expensive due to their greater number of work stations--a fact neither made known nor apparent to us at the time of our decision--we have reexamined the firm's average per system price under that invitation absent any consideration of its prices for those two additional systems. We find that Alden's average per system price of approximately $101,000 under IFB -00094 for the three original systems is only slightly less than its average per system price of some $103,000 for the same three systems under IFB -00053.

and compelling reasons to do so when bids have already been opened. Engineering Research Inc., 56 Comp. Gen. 364 (1977), 77-1 CPD ¶ 106; Magnolia Inn, B-216607, Mar. 1, 1985, 85-1 CPD ¶ 257. At the same time, however, the determination as to whether such reasons exist is an administrative one that will not be disturbed by this Office unless the protester can convincingly show that the agency's decision was arbitrary, capricious, or not supported by substantial evidence. Id. at 3; McGregor Printing Corp., B-207084 et al., Sept. 20, 1982, 82-2 CPD ¶ 240. In our view, Alden has not met its burden to demonstrate that the contracting activity acted unreasonably in primarily determining that the cancellation of IFB -00053 and the addition of those three items to IFB -00094 as firm requirements rather than as one buy plus two options would result in better prices consistent with the public's interest.

With regard to Alden's assertion that the contracting activity advanced reasons other than anticipated savings to justify the cancellation, such as changed technical requirements, only after the fact, it is well settled that an agency properly may determine to cancel a solicitation after bid opening no matter when the information precipitating cancellation first surfaces. International Trade Overseas, Inc., B-221824, Apr. 1, 1986, 86-1 CPD ¶ 310; Chrysler Corp., B-206943, Sept. 24, 1982, 82-2 CPD ¶ 271. In other words, an agency may justify a cancellation on a subsequently enunciated basis if that basis would have supported the action had it been raised initially. Auchter Industries, B-220929.2 et al., Jan. 24, 1986, 86-1 CPD ¶ 86. Thus, to the extent that the contracting activity's other grounds for the cancellation may have been advanced later, that in itself is not improper, nor has Alden convincingly argued that those other grounds lack any reasonable degree of validity. See International Trade Overseas, Inc., B-221824, supra.

In this regard, we note that IFB -00094 as issued contained certain specifications for the systems which were not present in IFB -00053, and which the FAA ultimately deemed necessary to meet its minimum needs. Those changed operational requirements, including the ability of the systems to display such apparently safety-related graphic information as current winds aloft and maximum windshear, do not, in our view, constitute only minor specification differences that would not justify the cancellation. We cannot legally object to the FAA's consolidation of two procurements under a single solicitation for the same total number of items which more properly describes its acquisition needs. See the FAR, 48 C.F.R. §§ 14.404-1(c)(1) and (2).

Accordingly, Alden has not shown in its request for reconsideration that our prior decision contains errors of fact or of law to warrant its reversal or modification. See Dept. of Labor--Reconsideration, B-214564.2, Jan. 3, 1985, 85-1 CPD ¶ 13.

Our prior decision is affirmed.

Harry R. Van Cleve
General Counsel