Goddard

The Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Bethlehem Steel Corporation, Baltimore Marine Division; The American Ship Building Company, Tampa Shipyards, Inc.

**File:** B-231923, B-231923.2

**Date:** November 3, 1988

## DIGEST

1. Protest of solicitation provision stating that industrial mobilization factors may be considered, which was not filed until after closing, is not timely since it was filed after the closing date for receipt of proposals.

2. Revealing the award price of a current contract does not rise to the level of an improper auction.

3. The government is under no obligation to eliminate an advantage which a firm may enjoy because of its incumbency on other contracts unless the advantage has resulted from unfair government action.

4. A contracting agency has a right to cancel a solicitation when sufficient funds are not available, irrespective of disputes concerning the validity of government estimates.

5. Allegations that the Navy should have known prospective mobilization base offerors could not have met known funding limitations do not show bad faith. To show bad faith protesters must make a showing that the agency had a specific intent to harm them.

6. Where Navy amended solicitation allowing previously excluded current producer of oiler ships into the competition, Navy did not violate its earlier policy of preserving the industrial mobilization base because change was necessary due to funding limitation.

## DECISION

Bethlehem Steel Corporation, Baltimore Marine Division (Bethlehem), and The American Ship Building Company, Tampa Shipyards, Inc. (Tampa), protest the award of any contract

under Alternative B of request for proposals (RFP) No. N00024-88-R-2050, issued by the Naval Sea Systems Command, for the design and construction of 3 T-AO 187 class oiler ships.

The protests are dismissed in part and denied in part.

This solicitation, as originally issued, contemplated a single award for seven T-AO ships. Bethlehem states that it advised the Navy that it would not participate in the competition unless Avondale Industries, Inc., was excluded from competing. Bethlehem objected to Avondale's participation because Avondale, as a current builder of T-AO 187 ships, had the advantage of having technical and logistical information which new builders would have to develop at great expense.

The Navy subsequently issued amendment 0002 to provide for the award of two contracts, one contract for a base ship and three option ships under Alternative A and a second contract for one base ship and two option ships under Alternative B. Under both alternatives, award was to be made to the "responsible offeror whose offer conforms to the solicitation, who has submitted a technical proposal that has been evaluated as being acceptable, and who offers the lowest total proposed price," with the exception that the successful offeror under Alternative A would not be considered for award under Alternative B.

This acquisition strategy was supported by a Determination and Finding (D&F) signed by the Assistant Secretary of the Navy, Shipbuilding and Logistics. The D&F stated that "exclusion of the aforementioned source [awardee under Alternative A] will be in the interest of national defense in that the Navy will have established an alternative source of supply, thus assuring that two manufacturers of the ship class are available in case of a national emergency or industrial mobilization." Paragraph 6 of section M of the solicitation also provided that:

> ". . . the government reserves the right to consider the maintenance of an adequate industrial mobilization base in the interests of national defense as a factor in selecting the successful offeror for award of either alternative "A" or alternative "B", or both. If industrial mobilization base considerations became a factor, it will be of greater importance than price."

Also, paragraph 3 of section M listed evaluation factors for award as follows:

> "A. Technical
>
> "B. Price
>
> "Another factor which may be considered is the maintenance of an adequate industrial mobilization base in the interests of the national defense. If industrial mobilization base considerations became a factor, it will be of greater importance than price."

Proposals were received and evaluated under both alternatives and on June 20, 1988, the Navy awarded contract N00024-88-C-2050 to Avondale under Alternative A for one T-AO ship at a fixed price of $109,646,935 with options for three additional ships. The Navy's evaluation of the proposals under Alternative "B" showed that the proposed prices exceeded the funds available for construction of the second basic ship, so that award could not be made.

On June 22 the Navy issued amendment 0004 to make the awardee of Alternative A (Avondale) eligible for award under Alternative B and informed offerors of the award of a contract to Avondale under Alternative A. The Navy also informed offerors that a contract under Alternative B could not be awarded due to budgetary constraints and requested best and final offers (BAFOs) from the offerors. The offerors were also notified that the mobilization base considerations in section M remained in effect.

Bethlehem contends that the evaluation factors in the RFP are unclear, do not accurately set forth the standards the Navy intends to use and include an industrial mobilization base (IMB) factor which, based on the Navy's June 22 notification to offerors, was included without reasonable analysis.

Bethlehem points out that the solicitation states that an IMB factor "may be considered" but contends this does not meet the requirement that only those evaluation factor which will actually be used be stated in the RFP. Bethlehem argues that whether and to what extent the IMB factor will be applied is unclear and that this violates Federal Acquisition Regulation (FAR) § 15.606(e) (FAC 84-16).

The Navy states that the IMB considerations of which Bethlehem complains are not in any way associated with amendment 0004, but rather were included in the solicitation by amendment 0002, issued March 11, 1988. The Navy contends that this protest basis is untimely because Bethlehem should have protested the IMB provisions on or before May 2, 1988, the closing date for receipt of initial proposals. The Navy states that the evaluation criteria in amendment 0002 were either proper or improper when they were issued on March 11, 1988, and amendment 0004, which simply added Avondale as a competitor under Alternative B, had no effect on the IMB factor in awarding a contract.

Bethlehem states that the IMB provision was not troubling to it when Avondale was excluded from the competition on Alternative B because all other potential offerors would presumably have the same value to the government for purposes of the mobilization base. Bethlehem contends, however, that amendment 0004 now requires offerors to guess whether the Navy truly intends to consider IMB factors and if so, what those factors are worth to the government.

Under our Bid Protest Regulations, protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of initial proposals shall be filed prior to the closing date for receipt of initial proposals. Alleged improprieties which do not exist in the initial solicitation, but which are subsequently incorporated into the solicitation must be protested not later than the next closing date for receipt of proposals following the incorporation. 4 C.F.R. § 21.2(a)(1) (1988).

We find this protest basis to be untimely. The IMB provision was not changed by amendment 0004, but remained as originally stated in amendment 0002. While Bethlehem states that it was only the introduction of Avondale into the competition for Alternative B that led to its protest basis, the IMB provision applied to both Alternatives A and B by its specific language. The IMB provision did not become more unclear through the issuance of amendment 0004. Bethlehem had already submitted an offer under the allegedly unclear IMB provision without taking issue with the clause. Therefore, this protest should have been filed prior to the May 2 closing date.

Bethlehem and Tampa both assert that the Navy's amendment of the solicitation to allow Avondale to compete for Alternative B is tantamount to improperly conducting an auction. Avondale's price for the fleet oiler ships has been long known, and its price for the base ship on Alternative A is $109.6 million. In addition, on June 15 it was announced

that the Navy would pay Avondale $216 million to construct two more ships, which were originally scheduled to have been built by another builder, Pennsylvania Shipbuilding Company (PSC), in financial difficulties, but which are now assigned to Avondale. All offerors thus know Avondale has proposed to build these ships in the $108-$110 million price range. Bethlehem asserts that the only reason for amending the solicitation to make Avondale eligible for award of Alternative B is that the Navy wishes to stimulate an auction in which other offerors bid against Avondale's price.

The Navy's actions here were confined to releasing contract prices. We have held that quoting the price of a current contract does not rise to the level of an improper auction technique within the meaning of FAR § 15.610(d)(3). Pantel Assocs., B-230793, June 17, 1988, 88-1 CPD ¶ 581. Accordingly, we find that the Navy's actions did not constitute an illegal auction.

Tampa also alleges that the discussions the Navy held with Avondale relating to the assignment to it of two ships from PSC which involved detailed and complex terms and conditions were improper discussions in the context of the Alternative B procurement. Tampa concludes that Avondale is in an advantaged position in that it knows exactly what terms the Navy wants and will accept. Since no other offeror on this RFP had the opportunity for such dealings with the Navy during the pendency of this procurement and within 1 month of BAFOs, Tampa asserts that Avondale has been given an unfair advantage.

The Navy responds that the price of the assigned vessels was negotiated between PSC and Avondale. The Navy states that the only negotiation between it and Avondale in connection with the assignment was negotiation of certain provisions relating to transfer of subcontracts and purchase orders from the PSC contract to the Avondale contract.

We agree with the Navy that the negotiations it had with Avondale on the PSC assignment were not discussions under this procurement. There is no evidence that the price of the assigned vessels was negotiated. The mere fact that the Navy had to negotiate the terms and conditions of the assignment does not mean that discussions were held with Avondale under this procurement.

Tampa asserts that not only does Avondale have a natural competitive advantage associated with performing prior contracts but because of the PSC assignment and the award on

Alternative A, Avondale may submit a BAFO that allows it to spread fixed costs over nine ships, not just three ships, as other offerors must do, thus reducing its cost per ship.

Our Office has held that the government is under no obligation to eliminate an advantage which a firm may enjoy because of its particular circumstances, including the award of other contracts by the government, unless the advantage has resulted from unfair action on the part of the government. Nuclear Metals, Inc., 64 Comp. Gen. 290 (1985), 85-1 CPD ¶ 217. There is no showing here that Avondale has an unfair advantage or that its receipt of prior contracts is somehow unlawful.

Bethlehem also contends that FAR § 15.606(a) only permits amendment of a solicitation when there is a change in the government's requirements, but the Navy amended this RFP based solely on a modification of acquisition strategy. Bethlehem asserts that the Navy originally solicited offers under Alternative B in bad faith because it did not properly evaluate the specific costs which new T-AO 187 shipbuilders would incur and which Bethlehem estimates would have been $50-$60 million, thus requiring a price of at least $150-$160 million for an industrial mobilization builder. Bethlehem states that the Navy knew that new T-AO 187 shipbuilders have no available technical data package, no learning curve, no savings available on machinery procurement due to multiple purchase, no existing jigs and tooling, and no existing integrated logistics support. Tampa alleges that the Navy's action in amending the solicitation to allow Avondale to compete is clear and convincing evidence that the Navy breached its duty of good faith with Tampa and violated its implied contract with Tampa that the Navy would fairly consider its proposal. Tampa asserts that amendment 0002, which precluded the winner of Alternative A from competing on Alternative B, was issued as a pretense to garner numerous proposals despite the Navy's own D&F justifying an alternate industrial base.

The Navy amended the RFP because all of the offers on Alternative B exceeded the Navy's budgeted price for the procurement. We have held that a contracting agency has a right to cancel a solicitation when sufficient funds are not available, irrespective of disputes concerning the validity of the government estimates. Grace Industries, Inc., B-228097.2, Mar. 1, 1988, 88-1 CPD ¶ 209. Since the Navy could have canceled this solicitation because of insufficient funds, we do not see how the protesters are prejudiced by the amendment of the solicitation which allowed Avondale into the competition. A cancellation of the RFP followed by a new RFP for the same requirement in

which Avondale would have been allowed to compete would have achieved the same purpose as the amendment in question here. Moreover, FAR § 15.606(a) does not purport to limit the reasons an agency may amend a solicitation; it only states when amendments are required.

Regarding the argument that the Navy acted in bad faith by not properly estimating the cost to a new shipbuilder to compete, the Navy contends that it reasonably thought it could make a split award of two contracts for the T-AO ships within its existing budget. Moreover, it contends that the offerors knew the exact amount, $256.4 million, that Congress had appropriated for the two basic T-AO ships. The Navy asserts that the offerors knew that a certain percentage of the $256.4 million had to be set aside for other expenses, such as government furnished equipment, and accordingly the offerors, knowing Avondale's pricing history on previous T-AO contracts, would know the approximate amount of funding available for award of a contract under Alternative B. The protesters counter that they assumed the Navy would supplement the insufficient funds available for the split award.

Where bad faith on the part of an agency is alleged, the protester must present supporting factual evidence; contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be a showing that the agency had a malicious and specific intent to harm the protester. Air Tractor, Inc., B-228475, Feb. 5, 1988, 88-1 CPD ¶ 115. The protesters mere allegations that the Navy should have known they could not have met the known funding limitations for the T-AO program do not rise to the level of proving bad faith. The Navy points to three recent examples in which the Navy's estimates for construction of various vessels far exceeded the actual award price. In view of the results of these procurements, which show the inaccurate nature of estimates, the Navy decided that a split award could be made within the Navy's T-AO budget.

Moreover, the Navy disputes the protester's allegations that the Navy solicited offerors written comments as to how the acquisition strategy should be changed once the Navy knew they would not compete against Avondale in the original version of this procurement calling for a single award. The protesters contend that since the Navy knew they would not compete against Avondale, the Navy lured them into making offers when it amended the RFP to preclude Avondale from Alternative B.

The evidence submitted by the protesters, interested parties and the Navy conflicts as to whether the Navy or the offerors first pressed for a split award. We note that Bethlehem's initial protest letter stated it made inquiries of the Navy about the single award and only in its subsequent comments did it assert the Navy first solicited its input. We find, in any event, that even if the Navy first suggested that the RFP could be amended to allow offerors to compete, this would not amount to bad faith on the Navy's part. The Navy might have known that the offerors could not beat Avondale on price, but the Navy could reasonably have expected competitive prices from the offerors which would meet the Navy's budget.

In any event, the offerors have not shown bad faith on the Navy's part or that the Navy failed to properly consider their offers.

Tampa also protests that allowing Avondale to compete for Alternative B is contrary to the national defense interest as stated in the Navy's original D&F justifying the use of the IMB factor.

The Navy issued a Justification and Approval (J&A) supporting the change in acquisition strategy which stated:

> "Due to budget constraints, it is not in the best interest of the government to continue to provide for the exclusion of Avondale Industries, Inc. as a potential offeror for the remaining three ships covered by the solicitation. However, it is in the government's best interest to provide for the possibility of award of a contract to other than the acceptable low priced offeror in order to provide for an adequate mobilization base. The present solicitation will be amended to permit consideration of Avondale Industries, Inc., as a potential offeror and the solicitation will specifically reserve the right to award a contract to other than the acceptable, low price offeror, if the interest of national defense and industrial mobilization so dictates."

The J&A and the facts as related previously in this decision, show that the circumstances surrounding this procurement changed following the submission of initial offers under Alternative B. It was within the discretion of the Navy to determine how best to meet its industrial mobilization needs, which our Office will only question if the evidence convincingly demonstrates that the agency has

abused such discretion. Minowitz Manufacturing Co., B-228502, Jan. 4, 1988, 88-1 CPD ¶ 1. In view of the changed circumstances due to the funding, we cannot say this was such an abuse of discretion.

Finally, Tampa asserts that amendment 0004 is the result of the Navy's unlawful diversion of funds from this procurement to the Navy's procurement of two ships being built by Avondale because of PSC's financial difficulties.

Tampa's assertion that the Navy diverted funds from this procurement to the PSC/Avondale assignment is unfounded. The Navy has demonstrated that no fiscal year (FY) 88 shipbuilding and conversion appropriations were used either for the restructuring of PSC's contract or for the assignment of the two T-AO ships to Avondale. Rather, FY '85, '86 and '87 funds were used for those purposes.

The protests are dismissed in part and denied in part.

James F. Hinchman
General Counsel