



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Mills Manufacturing Corporation--
Reconsideration

File: B-250214.2

Date: March 16, 1993

Stephen W. Woody for the protester.
Vera Meza, Esq., and Capt. Brian E. Toland, Department of the
Army, for the agency.
C. Douglas McArthur, Esq., and Christine S. Melody, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

Maximum order limitation in requirements contract is for the purpose of permitting agencies to explore the possibility of securing lower prices for quantities exceeding the order limitation, and protester who contends that agency's desire for a lower price constitutes bad faith motive for not waiving limitation fails to state a valid basis of protest.

DECISION

Mills Manufacturing Corporation requests that we reconsider our October 15, 1992, decision dismissing its protest against the terms of invitation for bids No. DAAK01-92-B-0157, issued by the Department of the Army for cargo parachutes.

We affirm the dismissal.

We dismissed the protest as untimely because it was filed on September 4, more than 10 working days after the protester initially received actual or constructive knowledge of adverse agency action on its agency-level protest, which occurred when bids were opened on August 4.

The protester contends that in requiring parties to file within 10 days of adverse agency action, instead of allowing them to await a written response to agency-level protests, our Bid Protest Regulations conflict with Federal Acquisition Regulation (FAR) §§ 33.102(c)(1), 33.103(a)(1), which encourage parties to seek resolution within agencies before filing protests with our Office or the General Services Board of Contract Appeals. Further, the protester contends that the agency protest procedures applicable here provide

that parties filing protests agree not to file with our Office, pending resolution of the agency-level protest. The protester argues that it did not know that our rules treated bid opening as adverse agency action; further, the protester contends that it spoke to an attorney at the contracting agency after bid opening, who advised Mills that bid opening would not prejudice the protester's interests.

As stated in our original decision dismissing the protest, our Bid Protest Regulations are designed not only to give parties a fair opportunity to present their cases, but also to resolve protests expeditiously. The expeditious resolution of protests is not furthered by a protester's continued pursuit of its protest once it has received initial notice that its protest has been denied; our regulation, 4 C.F.R. § 21.0(f), specifically provides that the opening of bids constitutes adverse agency action, such that a protester must decide within 10 days whether to pursue its protest with our Office. These regulations are published in the Federal Register, protesters are charged with constructive notice of their contents, and the protester's claims of unfamiliarity with them does not excuse an untimely filing. Bio-Rad, B-239832, June 21, 1990, 90-1 CPD ¶ 577.

To the extent that the protester asserts that counsel for the agency in effect advised it that bid opening should not be considered adverse action on the agency-level protest, the agency disputes the protester's version of its conversation with the agency attorney. The attorney states that the protester's only procedural concern was in halting any progress towards award to its competitor; in this respect, the attorney has provided a sworn statement that he informed Mills only that the agency would make no award until it issued a written decision, since this was Mills's sole concern. Although this statement is consistent with Mills's actions before our Office, we find it unnecessary to resolve this factual dispute, since it is apparent that regardless of whether the protest was timely, Mills does not state a valid basis of protest. 4 C.F.R. § 21.3(m).

The procurement at issue is for 787 parachutes, plus a first article. Mills has a requirements contract for the same parachute, with a maximum order limitation of 125 per order, within a 120-day period. The protester asserts that the agency should waive the maximum order limitation under its requirements contract, and that the procurement of a quantity in excess of that limitation, in order to achieve a lower price through a competitive solicitation, constitutes

bad faith. That contract contains the standard FAR § 52.216-21(e), Delivery-Order Limitations clause, modified as follows:

"(b) . . . The Contractor is not obligated to honor--

(1) Any order for a single item in excess of 125;

(3) A series of orders from the same ordering office within 120 days that together call for quantities exceeding the limitation . . . above.

(c) If this is a requirements contract . . . the [g]overnment is not required to order a part of any one requirement from the [c]ontractor if that requirement exceeds the maximum-order limitations in paragraph (b) above.

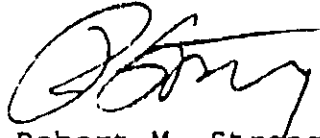
(d) Notwithstanding paragraphs (b) and (c) above, the [c]ontractor shall honor any order exceeding the maximum order limitations in paragraph (b), unless that order (or orders) is returned to the ordering office within 30 days after issuance, with written notice stating the [c]ontractor's intent not to ship the item (or items) called for and the reasons. Upon receiving this written notice, the [g]overnment may acquire the supplies or services from another source." [Emphasis in original.]

Mills contends that the language of paragraph (d) effectively provides the contractor a right of first refusal for any orders in excess of the maximum order limitation; the agency must give a contractor the opportunity to honor the requirement, even where as here it would have to make an award to Mills at a higher price than the low bid under the solicitation.

The express purpose of the maximum order limitation is to permit an agency to explore the possibilities of securing lower prices for the greater quantities exceeding the order limitation. Liebert Corp., 70 Comp. Gen. 448 (1991), 91-1 CPD ¶ 413. An agency has great discretion in deciding whether to combine separate orders into one requisition exceeding the maximum order limitation; placing limitations on that discretion would decrease the effectiveness of the clause. 49 Comp. Gen. 437 (1970). Further, paragraph (c)

of the clause expressly states that the government is not required to break out portions of the requirement for procurement under the protester's contract. See also Transmission Structures Ltd., B-230855.2, July 14, 1988, 88-2 CPD ¶ 50. The agency's desire to obtain a lower price for the larger quantity does not constitute bad faith and provides no basis for requiring the agency to cancel the solicitation and obtain its requirements through the protester's contract.

The dismissal is affirmed.

A handwritten signature in black ink, appearing to read 'R. Strong', is positioned above the printed name.

Robert M. Strong
Associate General Counsel