

7360  
DECISION



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

FILE: B-190759

DATE: August 14, 1978

MATTER OF: ITE Imperial Corporation, Subsidiary of  
Gould, Inc.

DIGEST:

1. No formal contract arose from discussions between protester and Department of Energy (DOE) concerning protester's capability to meet solicitation's delivery date. Further, Government not estopped to deny the existence of contract since DOE statement to protester that it was apparently in line for award should not reasonably have led protester to act on such statement.
2. Evidence showed that one of two protested solicitations was properly canceled subsequent to bid opening because specifications no longer reflected DOE's actual needs. Site requirements for solicited electrical equipment necessitated number of outdoor motor control centers be increased from 4 to 11 and that overall configuration of these centers be changed.
3. While DOE determination after preaward survey that protester was nonresponsible because of inability to meet delivery schedule appears reasonable in view of our interpretation of provision of solicitation concerning Government approval of shop drawings, it is unnecessary to decide issue because of unreasonably high bid price.
4. Disparity in time of bid acceptance between 14 days set forth on initial solicitation cover letter and 60 days set forth in amendment to solicitation not an adequate basis itself for cancellation since disparity so obvious that bidder should have sought clarification prior to submitting bid if in doubt as to intended bid acceptance period.

5. Cancellation of solicitations because remaining bidders' bids held unreasonably high in comparison to nonresponsive bidders' bids proper since this Office's past decisions have held that bid of nonresponsive bidder is relevant to determination what is reasonable bid price. Protester's bid on one of canceled solicitations was approximately \$132,000 higher than bid of one nonresponsive bidder.
6. Since bids of protester were obviously unreasonably high in comparison to other bids, there was no actual need for DOE to conduct preaward survey to ascertain protester's ability to meet delivery date under canceled solicitations.
7. Award under RFP resolicitation of one of canceled IFB's required to be made in accordance with criteria stated in RFP. Criteria was that price alone determined awardee provided low offeror could meet delivery requirements. Since DOE found Midco's offer acceptable and Midco capable of meeting all solicitation requirements, award to Midco as low offeror was proper. Therefore, protester has no basis to challenge award since it was not low offeror.

ITE Imperial Corporation, a subsidiary of Gould, Inc. (Gould), protests the Department of Energy's (DOE) cancellation of invitations for bids (IFB) Nos. CR-13-70366 and CR-13-70367. These two solicitations were for the supply of electric power distribution and control equipment at oil storage sites in Texas and Louisiana, respectively. The delivery date for both IFB's was January 17, 1978.

The bids on 70366 were opened on October 17, 1977. The nine bids received were as follows:

Midco Control Systems, Inc. (Midco)	\$301,569
Sierra Switchboard Company (Sierra)	391,006
Allis-Chalmers	398,614
Powell Electrical Manufacturing Company (Powell)	413,840
Research Service and Engineering Company, Inc. (RS and E)	445,102

Gould	\$ 496,417
General Electric Supply Company	499,813.24
Abbott Power Corporation (Abbott)	587,272
Powercon Corporation	1,615,900

Bids on 70367, also opened on October 17, 1977,  
were:

Sierra	\$424,206
Abbott	437,290
Midco	490,919
RS and E	519,300
Allis-Chalmers	524,181
Powell	542,930
Gould	622,826
General Electric	643,968
Powercon	814,200

Shortly after bid opening a total of four protests and three alleged mistakes in bid were filed with the contracting officer. On October 19, 1977, Abbott informed the contracting officer's office it had made mistakes in bid on these two protested solicitations in that in preparing its estimates it inadvertently interchanged some of the specifications. Abbott stated that its offer should have been \$462,000 on 70366 and \$562,562 on 70367. Abbott requested that it be awarded both contracts at the corrected prices inasmuch as it believed all other bidders to be nonresponsive.

On October 21, 1977, Sierra asserted that it had made a mistake in bid on 70367 because it had omitted the cost of multiple quantities of certain switchgear, starters and circuit breakers. In a letter of October 27, 1977, to the contracting specialist for the procurement, Sierra claimed that the effect of the omissions placed its bid at \$110,000 less than it should have been. Sierra also indicated in this

letter that it had similar errors of omission in 70366, but, nevertheless, was ready and willing to accept orders by the Government at its bid price. Sierra requested withdrawal of its bid on 70367, however.

The procuring activity within DOE discovered discrepancies in Midco's bid on 70366. Although the unit price breakdown in Midco's bid totaled \$301,569, the total price of its bid was \$322,744. Consequently, the contracting officer requested Midco to verify its intended bid price. In a letter dated November 2, 1977, Midco explained that an error of \$21,175 had been made because the markup on the Outdoor Medium Voltage Switchgear had not been added in the transfer of this unit price to the bid form. Midco indicated that its total bid price for this solicitation was \$322,744.

Protests under the two solicitations were also made by Abbott, Gould, RS and E, and Powercon. In general, each of these protests related to the alleged ineligibility of the other bidders for award and contained assertions that the protester had the right to the award. The primary issue raised in these protests concerned Midco's compliance with Clause 44 of both IFB's General Provisions which provided that descriptive literature as specified in the solicitation was to be furnished as a part of the bid before the time set for opening of bids. Since Midco failed to provide such descriptive literature, these protesters contended that both of Midco's bids were nonresponsive.

With regard to the bids of Allis-Chalmers and Powell, these two companies took exception in both solicitations to the delivery schedule, liquidated damages clause, Government warranty provisions, and other material IFB requirements. Thus, both companies were immediately eliminated from consideration because their bids were considered nonresponsive.

Although none of the above protest and bid correction requests had been finally resolved, the contracting officer believed that awards under both IFBs would likely be made to Midco. Midco would still be the low bidder on 70366 if its correction of bid were allowed. Midco would become the low bidder on 70367 if the bids of Sierra and Abbott were withdrawn, as recommended by him because of their mistakes in bid. As to the alleged nonresponsiveness of Midco's bids, the contracting officer concluded that the IFB's descriptive data was not necessary either for ascertaining prior to

award whether the bidder's product met IFB specifications or for establishing precisely what the bidder proposed to furnish. Thus, the data requirements for these procurements were held not to relate to bid responsiveness so that the data requirements could be waived.

In anticipation of awards to Midco, Midco's corporate parent, the Midcontinent Company, was requested on November 9, 1977, to guarantee Midco's performance on the IFB's. By letter dated November 11, 1977, Midcontinent limited the requested guarantee by stating that it could not guarantee delivery by January 17, 1978, but instead would guarantee delivery at such dates as Midco and DOE subsequently agreed on. Also, on November 11, 1977, Midco telexed that the January 17, 1977, delivery date was an inoperable date and that it was impossible to state what the exact delivery date would be. Midco indicated that the delivery date had now probably slipped to mid-February.

Midco asserted that it was unable to meet the delivery schedule because of the delay by DOE in making an award under the solicitations. Further, Midco contended that its bid was firm for only 14 days from bid opening. Midco pointed out in the November 11, 1977, telex that paragraph 4 of the cover letter for both IFB's specifically stated that bids were considered firm for 14 calendar days. However, amendment No. 3 to each IFB had revised the General Provisions for each so as to provide that bids were firm for 60 days.

After consulting with DOE technicians, the contracting officer concluded that Midco was in fact incapable of meeting the January 17, 1978, delivery schedule. The delivery date provision, moreover, could not be changed after bid opening and prior to award in formally advertised procurements because this provision was a material contract requirement. See Memory Display Systems Division of the EdnaLite Corporation, B-187591, January 28, 1977, 77-1 CPD 74, and the cases cited therein. As a consequence, the contracting officer felt that he could not in good faith find Midco to be a responsible bidder. Nor could he legally negotiate a new delivery date with Midco since he would be altering the delivery date subsequent to bid opening.

The contracting officer then contacted the other bidders on these two solicitations to ascertain their ability to meet the delivery date. Sierra and Abbott stated that they could

no longer meet the IFB's delivery date. RS and E asserted on November 17, 1977, that it could meet the delivery date. A review of an onsite preaward survey done prior to November 17, 1977, revealed, however, that RS and E lacked the resources and facilities to meet the delivery date. This survey stated that consideration should be given RS and E only if the delivery schedule were such as to permit it 4 months' minimum manufacturing time. In addition, a number of suppliers of components to RS and E indicated that they could not furnish their equipment in time for RS and E to meet the January 17, 1977, delivery date.

DOE procurement officials also contacted Gould on November 17, 1977, to ascertain that company's ability to meet the delivery date. Gould asserted that it was capable of meeting the required delivery schedule. Gould was then requested to provide the manloading and production flow charts with which to support this assertion. On November 28, 1977, DOE representatives held a meeting with Gould at which time Gould presented the requested charts. Gould told the DOE representatives that it was the only bidder that had complete control over the manufacture of the major components of the solicited electrical equipment and thus could effectively meet what had by that time become a very tight delivery schedule. In other words, Gould asserted that it would if awarded these contracts not be subcontracting any of the work.

Gould's charts were predicated on being awarded the contracts by December 1, 1977. Further, DOE determined that Gould's ability to meet the January 17, 1978, delivery date was for the most part based on Gould allowing the Government only 2 days to review the shop drawing instead of the 14 DOE believed to be called for by the IFB's specifications. Finally, Gould's charts allowed 2 weeks for the manufacture and assembling of components whereas the other bidders had indicated a minimum of 4- to 6- week manufacturing cycle.

In view of the foregoing, DOE concluded that Gould could not meet the required delivery date. The most significant aspect of this conclusion was DOE's belief that by allowing the Government only 2 days for review of shop drawings, Gould was not complying with paragraph VI of the IFB's special conditions. It was DOE's opinion that this paragraph gave the Government a total of 14 days to review shop drawings. Moreover, DOE also believed that other responsive bidders might possibly have been able to meet the January 17, 1978, delivery date had the IFB's indicated only 2 days for the review of shop drawings.

In addition to the conclusion that Gould was not capable of meeting the delivery schedule, DOE concluded that the bids of General Electric, Powercon and Gould were unreasonably high. This was based on a comparison of these bids with those of Midco, Sierra, and RS and E under the two solicitations.

On November 25, 1977, 3 days prior to DOE's meeting with Gould regarding its ability to meet the IFB's delivery date, Midco filed a protest with us (also referenced by us as B-190759) contending that it was impossible for any bidder to deliver the power distribution and control equipment called for under the IFB's because of the length of the delay by the Government in making awards. Midco alleged that the fastest delivery date then attainable was February 28, 1978. In its protest letter Midco elaborated on this allegation by stating that between 6 to 8 weeks would be needed to obtain the necessary components because the equipment called for by the IFB's was such that most components would not be in a bidder's factory stock. After the components were obtained, it would require an additional 3 weeks, in Midco's opinion, for final assembly, painting of the structure, and complete quality control testing. Midco requested a decision from us recommending that DOE withdraw the IFB's and readvertise for the subject contract goods on either a formally advertised or negotiated basis.

On December 1, 1977, representatives of the Strategic Petroleum Reserve Office (SPRO) of DOE informed the contracting officer that certain changes had to be made in the technical specifications on IFB 70366 in order to satisfy the site requirements at the Texas oil storage facility. The IFB provided for four low voltage motor control centers in the electrical equipment but SPRO had determined that 11 motor control centers, of a different configuration, were required. In addition, the SPRO personnel informed the contracting officer that the delivery date could be slipped to some time in March 1978 on IFB 70366 and May 1978 on IFB 70367.

The contracting officer formally canceled both of the IFB's on December 8, 1977. In anticipation of the cancellations, Gould in a telegram received by us on December 7, 1977, protested the proposed cancellations based on informal notification from the contracting officer on December 6, 1977. In view of the fact that DOE had canceled the IFB's, Midco in a letter dated December 8, 1978, received by us on the same date, withdrew its protest with us and we subsequently closed our file concerning that protest.

The requirements of 70366, as modified to include the technical changes requested by the SPRO, were resolicited on December 9, 1977, in request for proposals (RFP) EL-78-R-01-2827. The RFP was issued to only the nine firms that had bid on the canceled IFB plus Westinghouse Electric Corporation, which had submitted a "no bid" under the IFB but had requested that it be allowed to bid if the delivery date was changed. The resolicitation was handled as a negotiated procurement and competition was limited because DOE had determined the delivery schedule was such that it did not allow for any delay that might occur if a formally advertised procurement was used.

The RFP required delivery of the electrical and power distribution equipment on March 15, 1978, if award was made by December 31, 1977. The RFP provided that award would be made to the lowest, responsible offeror meeting the delivery date. On the closing date for the receipt of proposals, December 22, 1977, DOE received the following price proposals:

Midco	\$487,964
Gould	488,230
RS and E	515,118
General Electric	558,110
Sierra	603,432
Westinghouse	614,212
Abbott	614,552

The Procurement and Contracts Management Directorate of DOE approved in writing the award of a contract under the RFP prior to the resolution of Gould's protest with us. The basis for immediate award was that the equipment was urgently needed by March 15, 1978, because an additional 2 months would be needed for the installation and checking out after delivery. The equipment is an integral part of the oil injection and withdrawal system at the Texas oil storage facility. On December 30, 1977, Midco received the award on the basis of its initial price proposal.



In a telegram received by us on January 12, 1978, Gould protested DOE's decision to award to Midco. Gould alleged, as it did in its December 7, 1977, telegram, that on November 18, 1977, DOE advised it that it was the low, responsive bidder for the "job." Gould further alleged that the contracting officer had given no explanation as to why the requirement had been resolicited; that Midco after seeing the other bid prices had the advantage because of the resolicitation of raising its price approximately 44 percent; and that there were no significant changes in the equipment required under the RFP from the equipment required under the canceled IFB. Gould also contended that overall an award had to be made which was most advantageous to the Government not just one to the lowest bidder, especially where the price differential between bidders was so small. Since it manufactured the electrical equipment required, Gould concluded that it was able to meet delivery requirements better than Midco which was not a principal supplier of that type of equipment.

The electrical equipment requirement under IFB 70367 was resolicited on January 6, 1978, under IFB EL-78-B-01-7110. The delivery date under this IFB was May 22, 1978, if award were made by January 21, 1978. If award was not made by that date, the IFB provided for the delivery date to be extended 1 day for each day award is delayed. At the bid opening date, February 21, 1978, Gould's submitted bid of \$622,826 placed it as the 12th low bidder. Gould's bid price on the resolicitation was exactly the same as its bid price on canceled IFB 70367.

Gould has not made any contentions specifically concerning the 70367 resolicitation itself other than to protest the cancellation itself and to assert that it was informed on November 17, 1977, by the contracting officer that it was the low bidder on this canceled IFB. Gould asks that IFB EL-78-B-7110 be canceled and award be made to it under the original IFB. On June 16, 1978, the Procurement and Contracts Management Directorate in DOE approved in writing the award of a contract pending the resolution of Gould's protest with us. The decision to award pending protest was made because of a soon to be made award of the construction contract under which the electrical equipment will be installed and because of DOE's need to make the Louisiana oil storage site operable by November 1, 1978.

The issues, as we see them, and our conclusions concerning them, follow.

Whether the Government is Estopped to Deny the Existence of a Contract with Gould

The record does not show that any formal contracts were entered into between the Government and Gould. In order for a contract to result, the contracting officer must unequivocally express an intent to accept an offer. Laurence Hall d/b/a Halcyon Days, B-189697, February 1, 1978, 78-1 CPD 91. Acceptance of a contractor's bid by the Government must be clear and unconditional and it must be evident from the facts that both parties intended to make a binding agreement at the time of the acceptance of the contractor's bid. See 21 Comp. Gen. 605, 609 (1941); Laurence Hall d/b/a Halcyon Days, supra. Here, it is clear that no formal contracts with Gould ever came into existence, especially in view of the fact that no award documents were executed. Hence, Gould's offer was never accepted by the Government. Cf. Donald Clark Associates, B-184629, March 24, 1978, 78-1 CPD 230.

The Government may be estopped from denying a contract exists with a bidder if the following elements are present:

- (1) The Government knows the facts;
- (2) The Government intends that its conduct shall be acted on or the Government so acts that the bidder has a right to believe that the Government's conduct is so intended;
- (3) The bidder is ignorant of the true facts; and
- (4) The bidder relies on the Government's conduct to his injury.

See Emeco Industries, Inc. v. United States, 202 Ct. Cl. 1006 (1973); Fink Sanitary Service, Inc., 53 Comp. Gen. 502, 506 (1974), 74-1 CPD 36.

Gould alleges that it was clearly advised by the contracting officer's office that it was the low, responsive bidder. Because of this, Gould made the "great effort and expense" necessary in order to comply with DOE's delivery

requirement of January 17, 1978, under the canceled IFB's. Gould indicates that it adjusted its manufacturing schedules and made certain equipment available in anticipation of having to perform the required contract work.

The record does indeed indicate that at one point certain representatives of DOE informed Gould it was apparently in line for award. However, the record also indicates that Gould was never told that it would receive any awards. Further, the representative of Gould at the November 28, 1977, meeting with DOE was expressly informed that the material Gould had submitted regarding its ability to meet the January 17, 1978, delivery date would be analyzed by DOE to determine whether Gould could affirmatively meet that date.

In view of the foregoing, we do not think that DOE acted in any manner which led Gould to reasonably believe that contracts existed between it and the Government. Consequently, the Government is not estopped from denying the existence of a contract with Gould.

#### The Propriety of the Cancellations

Gould states that the reason that it is protesting is that notwithstanding the fact that it was advised that it was the low bidder on 70366, the award made upon resolicitation under RFP EL-78-R-01-2827 was made at a price only \$8,452 lower than Gould's original bid and only \$266 lower than Gould's price offer under the RFP. Gould takes exception to the propriety of DOE's procurement procedure because a negotiated contract was placed with a firm (Midco) that allegedly was not a national manufacturer of the required electrical equipment at a price only \$266 (.005 percent) less than Gould's.

Cancellation of an IFB after bid opening but prior to award is proper where the specifications no longer represent the Government's legitimate needs. Cottrell Engineering Corporation, B-183795, September 22, 1975, 75-2 CPD 165. On the other hand, where the specifications do reflect the Government's legitimate needs and only minor changes are contemplated, cancellation is not necessary. See Patty Precision Products Company, B-188469, July 25, 1977, 77-2 CPD 44. Each decision to cancel must stand on its own facts. Edward B. Friel, Inc., 55 Comp. Gen. 231, 240 (1975), 75-2 CPD 164.

Deciding whether to cancel a solicitation within each particular factual setting presented is basically a matter for the sound judgment and discretion of responsible agency officials. Therefore, a decision to cancel is subject to objection upon review by our Office only if it is clearly shown to be without a reasonable basis. Semiconductor Equipment Corporation, B-187159, February 18, 1977, 77-1 CPD 120. DOE contends that the changes that had to be made in the technical specifications for 70366 were major ones. Without these changes the specifications would not meet the electrical power equipment needs for the Texas oil storage facility.

From the record, we believe that DOE decision to cancel 70366 was reasonable. In support of its position that there were no changes in the equipment required under the RFP from that required under the canceled IFB, Gould makes a rather generalized argument that the "complement of equipment was comparable." Whether the equipment called for under the amended technical specifications was comparable is primarily a matter concerning technical judgment. Gould attempts to buttress its argument by repeatedly referring to the effect these changes had on the bid price. As to the technical ramifications of these specification changes, Gould alleges that it is very customary to change motor control frames to suit site requirements after a contract is entered into so that DOE could have simply handled the problem by issuing change orders under the contract.

The record shows that the canceled (70366) IFB's specifications provided for four outdoor low voltage motor control centers and that the site requirements necessitated that the number of outdoor low voltage motor control centers be increased by seven. Equally as important, the "configuration" of these centers had to be changed. Thus, we find it extremely difficult to agree with Gould's point of view that the matter could simply have been handled by the issuance of change orders after award. Bidders were required to be made aware of these changes in order for them to compete on an equal basis.

With regard to the fact that Midco increased its price by \$165,220, we note that RS and E, General Electric Supply Company, Sierra, and Abbott also significantly increased their bids on the resolicitation, although not to the extent of Midco's increase. Gould was the only bidder to lower its price, from \$496,417 to \$488,230. Gould's price reduction

was, however, as Gould admits, mainly because of the RFP's longer projected delivery cycle rather than because of the technical changes themselves. In any event, we are also unable to agree with Gould that these changes should not have resulted in an appreciable change in any bidder's originally quoted price.

We also think DOE's determination that Gould's bid was unreasonably high provided an additional rationale for cancellation since it was proper for DOE to compare Gould's bid with those of Midco, Sierra, and RS and E. Further, we think that Gould's argument that it is a regular manufacturer of the class of equipment cuts against it here. If indeed Gould had the facilities within its own organization to provide all components for the equipment without subcontracting, then it should have been able to initially submit a lower bid than a bidder such as Midco which had to subcontract for many of the electrical equipment components.

Concerning IFB 70367, Gould contends that there was no compelling reason to cancel on the basis of extending the delivery date from January 17, 1978, to May 1978, especially since the total manufacturing cycle was only extended by 2 days (90 days under the original solicitation). Furthermore, Gould alleges that the contracting officer improperly determined that it was nonresponsible because of an inability to meet the delivery schedule. While it admits that its production charts showed approximately 2 to 4 days for the Government's approval of its drawings, Gould contends that this merely was the most expeditious way to save time and that Gould informed DOE many times at the November 28, 1978, meeting that it would live up to all the requirements of the IFB with no exceptions taken. Finally, Gould alleges that it is readily apparent from its charts that the 14 days requested in the IFB for drawing approval could have been allowed without any delay in production. In this regard, Gould states that it is common for drawing approval not to be received until well into the manufacturing cycle.

One of the bases for DOE's cancellation of 70367 was because it appeared highly improbable after review of the various responsive bidders' capabilities that any one of them could meet the January 17, 1978, delivery date where award had not been made after approximately 60 days from bid opening. In addition, DOE believed that a number of the bidders seemed to have been misled by the statement

in the IFB cover letter that the bid acceptance period was only 14 days, despite the fact that a complete perusal of both IFB's and the amendments thereto should have shown that 60 days was the actual bid acceptance period. Consequently, DOE concluded that the wide disparities in bids were due to the fact that the bidders had either gambled that the Government would make an immediate award or had factored possible liquidated damages into their bid prices.

The bid acceptance period is a material requirement of a solicitation. McNamara - Lunz Warehouses, Inc., Central Moving and Storage, Inc., B-188100, June 23, 1977, 77-1 CPD 448. This is not to say, however, that the above-mentioned "disparity" in bid acceptance periods was an adequate basis upon which to cancel 70367. If there was any ambiguity resulting from the disparity here as to the required bid acceptance period, we believe that each bidder, and in particular Midco, should have sought clarification prior to submitting a bid. See McNamara-Lunz Vans and Warehouses - Reconsideration, B-188100, August 26, 1977, 77-2 CPD 149. Further, this course of action would have been especially appropriate here because each bidder acknowledged amendment No. 3, which specifically changed the bid acceptance period to 60 days.

The determination of a prospective contractor's responsibility is a matter left primarily to the contracting officer and will not be questioned by our Office unless it is shown by clear and convincing evidence that the finding of nonresponsibility was unreasonable or not based upon substantial evidence. SA Industries, Inc., B-189025, August 15, 1977, 77-2 CPD 117. With respect to Gould, the contracting officer's finding of nonresponsibility was based almost entirely on the conclusion that Gould could meet the delivery date only by allowing the Government 2 days instead of 14 to review contract drawings. Paragraph VI of the IFB's Special Conditions provides:

"The contractor shall submit to the contracting officer for approval the number of shop drawings called for under the specifications. These drawings shall be completed and detailed. If approved by the contracting officer, each copy of the drawings shall be identified as having received such approval by being so stamped and dated. The contractor shall make any corrections required

by the contracting officer. If the contractor considers any correction indicated on the drawings as constituting a change to the contract drawings or specifications, notice as required under the clause entitled 'changes' will be given to the contracting officer. One complete set of drawings will be returned to the contractor within fourteen (14) days after receipt by the contracting officer. If the Government has not approved the drawings within the time specified, delivery will be extended one day for each day of delay. The approval of the drawings by the contracting officer shall not be construed as a complete check, but will indicate only that the general method of construction and detailing is satisfactory. Approval of such drawings will not relieve the contractor of the responsibility for any error which may exist as the contractor shall be responsible for the dimensions and design of adequate connections, details, and satisfactory construction of all work." (Emphasis added.)

The above-quoted paragraph makes direct reference to the time within which shop drawings will be approved, but states only that the Government will return such drawings within 14 days after receipt from the contractor. However, considering the language of the paragraph as a whole, we believe the reasonable interpretation is that the Government does have 14 days to approve drawings without having to extend the time for delivery. Moreover, the record indicates that Gould's delivery schedule was contingent on having the Government approval of its drawings in 2 days. Since it was highly unlikely that the Government could approve in 2 days, the contracting officer may well have concluded that Gould would be unable to meet the January 17, 1978, delivery date.

In any event, we do not believe that it is necessary to discuss further the reasonableness of the contracting officer's determination that Gould was nonresponsible since we find that cancellation of IFB 70367 was proper for the reasons discussed below concerning unreasonably high bid price.

#### The Reasonableness of Gould's Bid Price

An IFB may be canceled after bid opening if the prices on all otherwise acceptable bids are unreasonable. Federal Procurement Regulations (FPR) § 1-2.404-1(b) (1964 ed. amend. 121). In this case, DOE determined that in view of the low

prices bid by Midco, Sierra and RS and E; the bid prices of Gould, General Electric and Powercon were unreasonably high. Gould challenges this determination by arguing that the price comparison that DOE made was with companies which were not regular manufacturers of the class of equipment being solicited. Moreover, Gould contends that the award price to Midco on the RFP resolicitation of IFB 70366 was at the "unreasonably high level" which Gould had originally bid.

Contracting officers are clothed with broad powers of discretion in deciding whether an invitation should be canceled. Support Contractors, Inc., B-181607, March 18, 1975, 75-1 CPD 160. Furthermore, we have held in the past that the bid of a nonresponsive bidder is relevant to the determination of what is a reasonable price. See Hercules Demolition Corporation, B-186411, August 12, 1976, 76-2 CPD 173. In this regard, we have upheld the rejection of all bids and resolicitation where the only responsive bid was lower than the Government's original estimated cost, but the amount of the low bid which was unacceptable provided support for rejection of the responsive bid. B-164931, September 5, 1968.

DOE determined that Gould's bid was unreasonably high on 70367. The bid of the low bidder, Sierra, was initially \$424,206. Because of certain mistakes in bid, Sierra alleged that its bid should have been \$562,562. Nevertheless, the bid of the third low bidder, Midco, was \$490,919, upon which no bid correction was requested. Gould's bid, again, was \$622,826 or approximately \$132,000 higher than Midco's. Further, we note that the award price on the resolicitation of 70367 was \$490,000 also. Therefore, we conclude that DOE's determination that the Gould bid was unreasonably high had a substantial basis in fact.

We also note that DOE performed a preaward survey on Gould to ascertain its ability to meet the January 17, 1978, delivery date for both the IFB's despite the fact that Gould's bids were obviously much higher than several of the other bidders. Therefore, since Gould's bids were so high we question the necessity of the preaward survey. Cf. Seal-O-Matic Dispenser Corporation, B-187199, June 7, 1977, 77-1, CPD 399.

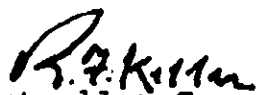


The Award to Midco Under the RFP

With regard to IFB 70366 and the RFP resolicitation of the requirements of that IFB, Gould argues that it is the "truly responsive bidder" because it manufactures the equipment solicited and is thus more capable of meeting delivery requirements and supporting its warranties. Gould further contends that award under the RFP was required to be most advantageous to the Government and not just to the lowest bidder, especially where the price differential between the two low bidders is so small. Since Gould is more capable of meeting the contract delivery requirements, DOE should, therefore, have made an award under the RFP to it.

DOE states that award had to be made in accordance with the criteria set out in the RFP. The criteria was such that price would be the sole factor which determined the awardee provided the low offeror could meet delivery requirements. Midco was the low offeror under the RFP. The record shows DOE found that Midco's offer was acceptable and that the company was capable of meeting all solicitation requirements. Consequently, award to Midco was proper. The fact that Gould may be more capable of performing than Midco is irrelevant. What is relevant is that Gould was not the low offeror and, therefore, was not entitled to award under the terms of the RFP.

Accordingly, Gould's protest is denied.

  
Deputy Comptroller General  
of the United States