



Comptroller General  
of the United States

Washington, D.C. 20548

B-224014.8

February 18, 1987

The Honorable J. A. Traficant, Jr.  
House of Representatives

Dear Mr. Traficant:

We refer to your letter dated December 29, 1986, concerning protests filed with our Office by McDonald Welding & Machine Co., Inc. (B-224014, et al.). These protests were filed against request for proposals (RFP) No. N00140-86-R-0987, issued by the Department of the Navy, Regional Contracting Center, Philadelphia, Pennsylvania, for the procurement of mobile facility vans (MFV).

You disagree with our decision to dismiss McDonald's protests against this RFP, in which, among other things, McDonald argues it is entitled to award under the RFP. You request an explanation as to why we have declined to resolve McDonald's alleged right to award under this RFP.

As a matter of background, 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 two 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 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.

By an amendment to the solicitation, the Navy reduced the quantity to be procured to 820 MFV's and requested 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 waiver of first article testing. 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 the first of its protests 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, by notice dated 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. ¶ 449; McDonald Welding & Machine Co., Inc.--Request for Reconsideration, B-224014.2, Sept. 5, 1986, 86-2 C.P.D. ¶ 269.

On September 11, Gichner Mobile Systems was awarded lot III and on September 19 McDonald filed another 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), in which it not only restated all of the bases in its September 19 protest, but raised 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 the Competition in Contracting Act, 31 U.S.C. § 3553(d)(1)(Supp. III 1985). We retained McDonald's September 19 and October 14 protests for development on the merits and requested that the Navy provide us with reports responsive to them.

On October 22, 1986, however, subsequent to the filing of protests B-224014.4 and B-224014.5, you and 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. 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. The court also 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. Finally, the court ordered that with regard to any future award under lots I/II and lot III the Navy personnel follow the appropriate procurement laws.

Upon receipt of the court's decision, we dismissed McDonald's protest consistent with prior decisions of our Office, and our Bid Protest Regulations, 4 C.F.R. § 21.9 (1986). See McDonald Welding & Machine Co., Inc., B-224014.4; B-224014.5, Dec. 5, 1986, 86-2 C.P.D. ¶ 647. Under the doctrine of res judicata, the court's resolution of the issues in this case was binding on this Office. See Prince George's Contractors,



Inc., 64 Comp. Gen. 647 (1985), 85-2 C.P.D. ¶ 11. Therefore, we saw no purpose for further considering the protest. Prince George's Contractors, Inc., 64 Comp. Gen. 647, supra.

McDonald asserted in a letter dated December 1, 1986, that the court did not "fully address" its protest under B-224014.5, and that therefore there were issues "ready for a decision" by our Office. In our decision of December 5, 1986, supra, however, we had noted that it was clear from McDonald's complaint for injunctive and declaratory relief that its complaint before the court was coextensive with its protests then pending with our Office and that the court had ruled on the matter without expressing an expectation of any further involvement by our Office. Therefore, we concluded there was no basis for further consideration of McDonald's protest.

By two letters of December 11, McDonald requested that we "withdraw" our dismissal of December 5 and proceed with a decision on the merits on McDonald's protest, as amended. We dismissed McDonald's amended protest by notice dated December 12, 1986, because under our Bid Protest Regulations, 4 C.F.R. § 21.3(f), the protest was premature, since it merely anticipated that the contracting activity would improperly perform an act that had not yet been performed, that is, make an improper award or otherwise act inconsistently with the court's decision. As indicated above, the court ruled that the lot III award to Gichner was improper and also that McDonald was not eligible for the award of lot III. The court also stated that in making the awards under the RFP, the Navy should follow appropriate procurement laws. Since the Navy had made no award under lot I/II and the court ordered the Navy to, in effect, take corrective action on the award under lot III, no action adverse to McDonald had been taken and McDonald's protest was premature.

In accordance with 4 C.F.R. § 21.12(a), we also dismissed McDonald's request that we reconsider and "withdraw" our December 5 dismissal, because McDonald's request failed to provide information not previously considered or specify legal error sufficient to warrant reversal of the original decision. McDonald has not requested any further action by our Office.

You suggest that we have not handled McDonald's protests properly. Specifically, you state that McDonald was "forced" to file its court action due to inaction by our Office. We do not think that McDonald was forced to file in court because of inaction on our part. While, as indicated above,



we dismissed as untimely McDonald's protest of August 26, 1986, challenging improprieties in the RFP, we determined that McDonald's protests of September 19 and October 14 essentially challenging the award to Gichner under lot III were timely and we were developing the protests in accordance with our regulations, a prerequisite to a decision by our Office. On October 22, McDonald, subsequent to its filing of these protests and our sending to it notices that we were developing the protests, filed its civil action. We do not believe that our inaction "forced" McDonald to file its civil action. Before McDonald filed in court, we in fact had indicated we would review and decide the propriety of the award of lot III.

You also:

"note that [our] lack of action is reminiscent of the recent 9mm handgun fiasco, involving the exclusion of Smith & Wesson, where your office 'closed its file' on Smith & Wesson's protest, forcing extensive litigation and action by two Congressional committees to confirm the grounds initially set forth in the protest."

Our records show that we closed our file on Smith & Wesson's protest because Smith & Wesson had filed a civil action and the court did not express an interest in our opinion. Our decision to close the file was consistent with well-established precedent of our Office and our Bid Protest Regulations. Our Office has adopted this rule because we do not believe it appropriate for two forums to consider the same matter simultaneously. We have, of course, made an exception where the court has requested our advisory opinion. It is our understanding that the federal district court ruled against Smith & Wesson and that the court's opinion was upheld on appeal. Subsequently, at the request of the Chairman of the House Committee on Government Operations, we investigated the procurement.

In both the Smith & Wesson protest and this one, the protesters, after initially filing their protests with our Office, elected, as they have the right to do, to file a civil action in court. Our Bid Protest Regulations clearly require us to dismiss the protests where the court does not express an interest in our opinion or the court decides the case on the merits. 4 C.F.R. § 21.9 (1986). Since the courts ruled on the merits in both cases, we properly declined to consider the cases further.

Based on this explanation of our actions regarding Smith & Wesson's and McDonald's protests, we believe that these protests were handled properly by our Office in accordance with our Bid Protest Regulations.

We have enclosed copies of our decisions and notices concerning McDonald's protest.

Sincerely yours,

*Wilton F. Hooper*  
for Comptroller General  
of the United States

Enclosures