29186

DECISION

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

FILE: B-214973 **DATE:** August 29, 1984

MATTER OF: M. Pashelinsky & Sons, Inc.

DIGEST:

GAO dismisses as academic protest of third low bidder against allegedly unduly restrictive specification, where bids opened after the protest was filed show that the protester is not the low bidder and would not be in line for award even if its protest were sustained and the specification rewritten to its satisfaction.

M. Pashelinsky & Sons, Inc. (MPS), protests the Defense Logistics Agency (DLA) issuance of an amendment to invitation for bids (IFB) No. DLA200-84-B-0305 issued by DLA's Defense Property Disposal Service, Battle Creek, Michigan, for precious metal recovery services.

The protested amendment has two aspects: (1) it grants contractors more time during any given day to work on the contract and (2) it reduces the overall duration of contract performance from 170 days to 40 days. MPS contends that the amendment was improperly issued, that DLA improperly proceeded with the bid opening despite MPS's protest to DLA, and that the reduction of the contract term is unduly restrictive of competition. MPS also claims bid preparation costs.

We dismiss the protest as academic and deny the claim.

DLA's precious metal recovery program uses two kinds of contracts. One contract is for the processing/recovery (melting down and pouring into bars and ingots) of electronic scrap (here, 400,000 pounds of circuit boards, chassis parts, etc.) containing precious metals (here, $3 million in silver, gold and platinum). The second contract provides third-party commercial surveillance of the electric scrap while the first contractor has possession of it. For any given project, the two contracts are procured separately; however, DLA normally correlates the performance of the two contracts by requiring both contractors to abide by a mandatory 8-hour day. This protest grows out of DLA's decision to abandon, on an experimental basis, the mandatory 8-hour day.

029873

MPS is a small business located in a labor surplus area (LSA). MPS's processing capability is limited to one 8-hour shift per day. MPS does not object to others being allowed to work up to 24 hours a day. It does object to the reduction in the overall duration of performance which effectively precludes a firm of limited capacity from bidding the requirement. Although MPS submitted a responsive bid, MPS admits that it cannot complete the contract within 40 days.

DLA argues that we should dismiss MPS's protest as academic since, even if sustained, it would not result in an award to MPS. In support of its argument, DLA reports that two bids far lower than MPS's bid were received (Amtech $440,000 and Sabin $486,800; MPS bid $714,800). We agree.

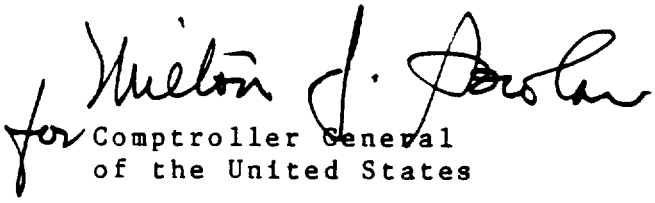
DLA has informally advised that Amtech is not eligible for an award because the Small Business Administration refused to issue a certificate of competency and that Sabin is eligible. In response to the amendment, Sabin dropped its price from $664,000 to $486,800. MPS argues that Sabin's preamendment bid ($664,000) should be the basis of any comparison to MPS's bid for purposes of ascertaining whether the protest, if sustained, might result in an award to MPS. MPS points out that the difference between Sabin's bid and MPS's in this context is only $50,800. MPS believes that, if the IFB's LSA differential and freight differentials are applied to this sum, MPS rather than Sabin becomes the apparent low bidder.

We note that MPS is not protesting the relaxation of the mandatory 8-hour requirement which is the portion of the amendment which enabled Sabin to drop its price. It follows that if the protest were sustained, it would not affect the ability of Sabin to avail itself of the economics of scale apparently inherent in 24-hour processing. For this reason, it is doubtful that, even if MPS prevailed and the 40-day performance restriction were removed, Sabin would have maintained its initial $664,000 price. If it is assumed that Sabin would drop its price, the difference between MPS and Sabin grows from $50,800 to $228,000. We asked DLA for the LSA and freight differentials applicable to Sabin's bid. They were: LSA $10,700; freight $15,994. We added these figures to Sabin's bid and arrived at an evaluated bid price of $513,494, which is still $201,306 lower than MPS's.

Under these circumstances, the protest is academic and no purpose would be served by our review of the matter because MPS would not be in line for award even if its protest were sustained, and resolicitation would serve no useful purpose. Somers Construction Company, B-209843.2, Oct. 25, 1983, 83-2 C.P.D. ¶ 490.

In view of our conclusion, MPS is not entitled to the recovery of its bid preparation costs. Jarrett S. Blankenship Co., B-213473, June 25, 1984, 84-1 C.P.D. ¶ 662.

The protest is dismissed and the claim denied.



for Comptroller General
of the United States