



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Constructive Solutions, Inc.

File: B-278227

Date: January 9, 1998

William E. Coons, Ph.D., for the protester.

Alton E. Woods, Esq., and James L. Weiner, Esq., Department of the Interior, for the agency.

Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency had a compelling reason to cancel solicitation after bid opening where an ambiguity in the solicitation apparently caused several bidders, including protester, to include the price for only one alternative under a line item, rather than both alternatives, as the agency intended, and where the agency needed prices for both alternatives as part of the determination of which alternative met its needs.

DECISION

Constructive Solutions, Inc. (CSI) protests the decision to cancel invitation for bids (IFB) No. NOO-97-31, issued by the Bureau of Indian Affairs (BIA), Department of the Interior, for environmental cleanup work at the Kaibeto Boarding School in Kaibeto, Arizona.

We deny the protest.

The IFB contemplated the award of a contract to furnish all materials, labor, equipment and supervision for the removal of underground storage tanks (UST), aboveground storage tanks (AST), and disposal of contaminated soil. The first sentence in the bid schedule stated that "[a]ll of the bid proposals for the items below is required." Below this sentence, the schedule contained the following three items:

Item No.

Bid Amount:

1. Remove and dispose of all USTs and ASTs, and related appurtenances, pipes, supply and return lines in accordance with applicable Federal, State and Tribal regulations.

\$_____

2. Remove all contaminated soil testing 100 PPM [parts per million] or greater (approximate quantity [+ or -] 1,500 cubic yard) and haul it off to an approved landfill for remediation and disposal. \$_____

OR

Bio-remediate approximately [+ or -] 1,500 cubic yards of contaminated soil at a place designated by the Contracting Officer within the school compound. The soil must be remediated until TPH [total petroleum hydrocarbon] levels are less than 100 PPM. The process may not take more than six months. \$_____

3. Take additional soil samples for TPH (EPA Method 8015 modified for diesel) cost per sample. \$_____

Ten bids were received. Four of the bids, including CSI's, failed to include prices for both options under item 2. The contracting officer reportedly intended the first sentence of the schedule--"[a]ll of the bid proposals for the items below is required"--to make clear that BIA intended bidders to price all items, including both options in item 2. In light of several of the bidders' failure to do so, she concluded that the IFB was ambiguous and that the ambiguity had led several bidders (including the protester) to submit what the agency considered nonresponsive bids. Thereafter, for this and other reasons, BIA canceled the solicitation.

CSI argues that the cancellation was improper. Regarding the option prices under item 2, CSI maintains that the IFB in fact clearly did not require prices for both options. According to the protester, since the first sentence in the schedule refers to "items" rather than "options" or each "bid amount," only one price per line item was necessary. CSI concludes that cancellation was not justified by any confusion regarding item 2, and that it should receive the award as the low bidder.

An agency generally may cancel an IFB after bid opening and exposure of prices only where there is a compelling reason to do so. Federal Acquisition Regulation § 14.404-1(a)(1); City Wide Press, Inc., B-231469, Aug. 10, 1988, 88-2 CPD ¶ 127 at 2. Whether cancellation is warranted is a decision for the contracting agency, whose determination we will not disturb unless it is shown to be unreasonable. Id. at 2-3. In this regard, we generally consider cancellation after bid opening to be appropriate when an award under the solicitation would not serve the government's actual needs. Berendse & Sons Paint Co., B-262244, Nov. 21, 1995, 95-2 CPD ¶ 235 at 3.

Here, BIA's decision to cancel the solicitation is unobjectionable. The agency explains that, in a last-minute change to the IFB before it was issued, the second (bioremediation) alternative was added to item 2. This change apparently reflected an intent to use the alternative prices as one of the considerations in determining which of the two methods to select, although the IFB did not clarify how the agency would do so or, indeed, how the agency would take into account any factor except price in the context of an invitation for bids. In any event, the failure of several of the bids, including CSI's, to include prices for both item 2 alternatives made clear to the agency that its solicitation was ambiguous and did not provide the agency a basis to select an offer that would satisfy its needs. We agree that the solicitation was ambiguous in this regard; it also appears deficient in not making clear how the agency would have selected a firm for award even if all bidders had included prices for both item 2 alternatives. Under these circumstances, and because of the doubt that award under the solicitation would have served the government's actual needs, the cancellation was proper.

CSI also argues that certain statements by the contracting officer in connection with the cancellation are untrue and evidence agency bad faith--for example, the statement that the "procurement was still under review" prior to the cancellation, when an awardee actually had been selected, and the statement that the cancellation was underway before BIA learned CSI was contemplating a protest. To establish bad faith, a protester must present virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. South Texas Turbine Supply, B-272163, Sept. 5, 1996, 96-2 CPD ¶ 105 at 4. Even if we were to assume, arguendo, that the protester is correct in its claim that the contracting officer's statements were untrue, they in no way constitute evidence of an intent to injure CSI. As we have concluded above, the cancellation was proper based on the fact that award under the IFB will not meet the agency's needs; there has been no showing that the deficiency in the competition which led to this conclusion resulted from agency bad faith.

The protest is denied.

The Comptroller General
of the United States