

DECISION



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

FILE: B-181478

DATE: December 23, 1974

MATTER OF: Barnegat Bay Dredging Co. Incorporated

DIGEST:

1. Cancellation of IFB for maintenance dredging in Federal navigation project is not subject to question where essential condition to performance of contract--furnishing of disposal sites by State of Delaware for deposit of dredged material--had not been effected and no funds are available.
2. Expiration of bid acceptance period alone is not notification of adverse agency action after protest against cancellation of IFB by sole bidder to agency since such expiration does not necessarily preclude award if bidder willing to accept contract.

Invitation for bids (IFB) DACW61-74-B-0085 was issued on March 12, 1974, by the Department of the Army, United States Army Engineer District, Philadelphia, Pennsylvania (Army) for maintenance dredging in the Federal navigation project in the Indian River Inlet, Bay and Waterway from Indian River Inlet to Rehobeth Bay.

Section F-11 of the IFB stated that disposal areas for the deposit of material dredged from the Indian River would be provided by the State of Delaware.

At bid opening on March 28, 1974, only one bidder, Barnegat Bay Dredging Co. Incorporated (Barnegat), submitted a bid. The IFB provided for a 60-day bid acceptance period which would expire on May 27, 1974. However, no award was made during this period and the IFB was canceled, according to the determination and findings of the contracting officer, as follows:

"The one bid received was from Barnegat Bay Dredging Co., Inc., Harvey Cedars, N.J. in the amount of \$89,800.00. This bid exceeded the Government Estimate of \$73,560.00 by 22%. At the time the solicitation was issued, the Government had every reason to

believe that the State of Delaware would provide the necessary disposal area to complete the work. Subsequent to bid opening, every attempt was made to obtain necessary clearances for the required disposal area. Since it has become evident that the State will not now provide this disposal area, it is clearly evident that this work cannot be performed and, accordingly, it is considered to be in the best interest of the Government to cancel the solicitation. Therefore, pursuant to ASPR 2-404.1(b)(viii) the solicitation is cancelled. It is proposed to readvertise the work at some future date."

Barnegat protested this action by the contracting officer alleging that since it was obligated for 60 days to fulfill its commitment to the Army, it was unable to submit bids on three other projects. It argues that since it is a small business which depends 100 percent on Federal and State contracts to survive, and since few such contracts are advertised each year, the Army had severely jeopardized its business by canceling the project at the end of the bid acceptance period without any previous forewarning and deprived the bidder of the opportunity to extend its bid acceptance period. Finally, Barnegat argues that, since the project will eventually be readvertised, its bid should have been accepted or should now be accepted pending the obtaining of the requisite disposal sites.

The contracting officer recommended in a report to our Office that the protest be dismissed as untimely under our Interim Bid Protest Procedures and Standards (4 C.F.R. part 20 (1974)). However, the basis of the protest did not arise upon expiration of the bid acceptance period on May 27, 1974, as argued by the contracting officer, but on June 3, 1974, when the Army informed Barnegat that no award would be made. By letter dated May 24, 1974, to the contracting officer Barnegat, after receiving indications from contracting officials that the IFB might be canceled, had requested that award be made. We construe this letter to be a protest to the contracting agency against a possible IFB cancellation. Therefore, Barnegat's June 10, 1974, mailgram protesting to GAO the cancellation of the IFB was timely filed within 5 working days of notification of adverse agency action, the June 3 letter, and, therefore, the protest will be considered. In this regard, the failure of the agency to make award prior to the

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expiration of the bid acceptance period should not be considered to have been adverse agency action on Barnegat's protest since such expiration alone did not necessarily preclude an award if Barnegat were willing to accept the contract. See 46 Comp. Gen. 371, 372, 373 (1966).

Armed Services Procurement Regulation § 2-404.1(b)(viii) (1973 ed.) provides that cancellation of an IFB is permitted where it is clearly in the best interest of the Government to do so. Moreover, the provisions of the IFB reserved to the Government the right to reject any or all bids. In this connection, our Office has consistently held that there necessarily is reserved in the contracting officials a substantial amount of discretion in determining whether or not an invitation should be canceled and, therefore, we will not object to the cancellation of an invitation unless there has been a clear showing of abuse of administrative discretion. 49 Comp. Gen. 584, 586 (1970); B-179338, December 21, 1973; B-174168, January 17, 1972; B-176263, August 29, 1972.

The record bears no evidence of any abuse of administrative discretion by the contracting officer. The obtaining of the soil disposal sites from the State of Delaware was a condition to the performance of the contract, which the Army could not effect. Moreover, we have recently been advised by the Army that there are no plans to readvertise the procurement since no resolution has been reached with the State of Delaware and no funds are available.

Accordingly, we find no legal objection to the contracting officer's decision to cancel the IFB, and, the protest is denied.

Acting


Comptroller General
of the United States