

DECISION



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

FILE: B-183381

DATE: July 6, 1976

MATTER OF: Michael O'Connor, Inc.
Free State Builders, Inc.

DIGEST:

1. Where agency's decision to terminate contract for convenience of Government arises out of pending protest against contract award, there is sufficient connection between termination and subject matter of protest to justify review by GAO of propriety of award.
2. Where (1) unsuccessful bidder makes showing that quantity estimates for at least 17 of 50 IFB items were inaccurate, (2) agency does not show that contested quantity estimates were accurate, and (3) agency reports that estimates for four additional items were seriously in error, sufficient basis exists to conclude that IFB estimates of work requirements were not reasonably accurate representation of actual anticipated needs. Therefore, acceptance of apparent low-priced, mathematically unbalanced bid constituted improper award.

Michael O'Connor, Inc. (O'Connor), and Free State Builders, Inc. (Free State), have protested concerning invitation for bids (IFB) No. GS-03B-49549, issued by the Public Buildings Service, General Services Administration (GSA). Two issues must be decided: (1) To what extent should our Office review the propriety of the award of a contract to Free State in light of GSA's subsequent decision to terminate that contract for the convenience of the Government? (2) If reviewable, was the award proper or not?

Background

The IFB contemplated the award of a requirements-type contract. It contained 50 items of work, typical of which is the installation of various types of partitions in certain Government buildings. For each item, an estimated quantity was stipulated. These quantities were applied to the unit prices quoted by bidders in order to determine the evaluated bid prices.

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Shortly after bids were opened O'Connor protested to our Office, contending that Free State's bid was unbalanced. In the meantime, GSA had concluded that Free State's evaluated price was lowest and had awarded it the contract notwithstanding the protest. O'Connor continued to pursue its protest and contended that the estimated quantities in the IFB were not reasonably accurate. O'Connor requested that we recommend termination of Free State's contract and a resolicitation.

In three reports to our Office, GSA maintained that the IFB's estimated quantities were reasonably accurate, that the award was proper, and that O'Connor's protest should therefore be denied. However, in a fourth report, dated April 16, 1976, GSA stated that it had recently discovered serious flaws in the IFB evaluation quantities and had decided to terminate Free State's contract for the convenience of the Government. GSA's change of position, as a practical matter, has the effect of granting to O'Connor the relief it requested and rendering O'Connor's protest to our Office academic. Further, it has resulted in Free State's protesting to our Office against GSA's newly adopted position.

Scope of GAO Review

In response to Free State's protest, GSA points out that the termination for convenience of Free State's contract is a matter of contract administration, and that our Office has indicated that it does not review such matters, citing Ampex Corporation, 53 Comp. Gen. 572 (1974), 74-1 CPD 58; B-179308, October 24, 1973; 47 Comp. Gen. 1 (1967); and Columbia Van Lines, Inc., et al., 54 Comp. Gen. 955, 961 (1975), 75-1 CPD 295. GSA notes that, in contrast to these cases, a more recent decision of our Office (Service Industries, Inc., et al., 55 Comp. Gen. 502 (1975), 75-2 CPD 345) indicates that we will review the procedures leading to a protested award notwithstanding the agency's termination of the contract for the convenience of the Government. O'Connor's position is that a termination for convenience renders this entire matter academic, and that our Office should not give any further consideration to it.

In the Service Industries case, as here, a decision to terminate for convenience arose out of a protest against the award. If unreviewable, the agency's decision to terminate could effectively deny the contractor--an interested party in the protest proceedings--a

decision by our Office on the propriety of the award. Our decision could be significant not only in regard to the particular procurement, but also in terms of establishing the proper procedures to be followed in future procurements. In these circumstances, we believe there is a sufficient connection between the agency's termination action and the subject matter of the protest to justify our reviewing the propriety of the award. We note that the other decisions of our Office cited by GSA, supra, did not involve terminations for convenience arising out of protests against awards. In view of the foregoing considerations, we will review the propriety of the award to Free State in the present case.

Propriety of Award to Free State

In Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164, we held as follows (quoting from the syllabus):

"As general rule, mathematically unbalanced bid--bid based on enhanced prices for some work and nominal prices for other work--may be accepted if agency, upon examination, believes invitation for bid's (IFB) estimate of work requirements is reasonably accurate representation of actual anticipated needs. But where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel IFB and resolicit, based upon revised estimate. * * *"

Whether a bid is mathematically unbalanced depends on whether each bid item carries its share of the cost of the work plus profit or whether the bid is based on nominal prices for some work and enhanced prices for other work. Edward B. Friel, Inc., supra; Mobilease Corporation, 54 Comp. Gen. 242, 245 (1974), 74-2 CPD 185. Free State bid "no charge" for IFB items 1, 5, 6, 15, 34 and 40. In addition, O'Connor asserts and GSA agrees that Free State's bid of \$6 per unit on item 3 does not appear to be a price which covers the cost of the work plus profit. Further, GSA regards Free State's price of \$249 per unit on item 31 as "highly inflated." Free State has not contested the charge that its bid was mathematically unbalanced.

If an apparent low-priced bid is mathematically unbalanced, the pertinent question in determining the propriety of the award is whether the IFB's estimate of the work requirements is a reasonably accurate representation of actual anticipated needs. GSA has stated that its

intention in drafting the IFB was to base the IFB quantity estimates--for those items which had been ordered under the prior year contracts--solely upon the quantities of requirements which were actually ordered. GSA's procedure was to total the quantities of items ordered under work orders issued in the previous years, round off the totals, and insert these in the IFB as the quantity estimates for the succeeding year. GSA's April 16, 1976, report points out, however, that for the following items the rounded-off quantity estimates did not accurately reflect the actual prior year requirements:

<u>IFB item number</u>	<u>IFB estimated quantity</u>	<u>Actual prior year requirements</u>
5	16,000	None
9	1,800	477
18	1,600	None
31	10	426

In addition, O'Connor's protest submissions have analyzed the work orders issued under the prior year contracts. O'Connor has submitted its computation of the discrepancies between actual prior year requirements and the IFB estimates for various items. Some examples are:

<u>IFB item number</u>	<u>IFB estimated quantity</u>	<u>Actual prior year requirements</u>
3	13,000	15,989
7	1,000	1,649
8	20	125
9	1,800	537
10	1,200	2,340
14	1,200	5,314
15	15,000	8,456
16	1,700	2,338
23	3,000	6,654
24	3,000	4,896
25	2,200	2,917
33	10	16
43	10	15
45	100	221
46	20	125

<u>IFB item number</u>	<u>IFB estimated quantity</u>	<u>Actual prior year requirements</u>
48	200	277
49	350	452

GSA disagrees with O'Connor's computations. The agency believes that the actual prior requirements are not correctly totaled, because O'Connor erroneously included certain inapplicable work orders, erroneously excluded other work orders, credited certain quantities under the wrong item numbers, counted some quantities twice, and made other errors in its calculations. GSA suggests that additional computations would be needed to obtain completely accurate totals. Notwithstanding its disagreement with O'Connor's analysis, the agency wishes to terminate Free State's contract for convenience because, in its opinion, the incorrect quantity estimates for items 5, 9, 18 and 31, supra, demonstrate that the IFB was defective.

Free State contends that the errors uncovered by GSA are not significant, because their effect on the bid prices balances out. In other words, though some quantity estimate errors, if corrected, would favorably affect O'Connor's price, others would have an equally favorable effect on Free State's price. Free State believes undertaking further computations--to definitively determine whether the IFB's quantity estimates were accurate--would be a prerequisite to any termination for convenience of its contract.

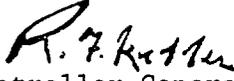
We believe that while the information submitted by O'Connor may not be 100 percent accurate, it is certainly sufficient to cast serious doubts on the accuracy of the IFB's quantity estimates. We have taken GSA's criticisms of O'Connor's computations into consideration in reaching this conclusion. We believe that O'Connor has made out a case against the validity of the IFB's estimates. To overcome this showing would require not merely a critique of O'Connor's analysis, but the presentation of argumentation and evidence which demonstrates that the IFB quantity estimates were in fact a reasonably accurate representation of actual anticipated needs.

Neither GSA nor Free State has made such a presentation. GSA, despite its criticism of O'Connor's computations, is in agreement with O'Connor's ultimate conclusion that the IFB was defective. Free State has not presented anything to show that the questioned estimates were reasonably accurate. Further, Free State's contention that the effect of correcting quantity estimate errors on the

bid prices would balance out is not in point. If the solicitation's quantity estimates are not reasonably accurate, there is reasonable doubt that award to any bidder would result in the lowest ultimate cost to the Government; the proper course of action in such circumstances is to cancel the IFB and resolicit. Edward B. Friel, Inc., supra.

Thus, after a lengthy development of this matter, during which all parties had an opportunity to present their views, the result is a record which indicates serious errors in the quantity estimates for 21 or more of the 50 IFB items. We think this is a sufficient basis to support a conclusion that the IFB estimate of work requirements was not a reasonably accurate representation of actual anticipated needs. It follows from this that the acceptance of Free State's mathematically unbalanced bid constituted an improper award. See Edward B. Friel, Inc., supra.

In view of the foregoing, O'Connor's protest to our Office has become academic and Free State's protest is denied.


Deputy Comptroller General
of the United States