

01339

**DECISION**



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

**FILE:** B-186657 **DATE:** November 30, 1976  
**MATTER OF:** Michael O'Connor, Inc.

**DIGEST:**

1. Protest after bid opening against inviting bids on requirements-type contract on net or single percentage factor basis to be applied to agency priced items not stating quantity estimates is considered significant issue, since propriety of method of soliciting bids which is continuing and increasing never has been addressed in prior decisions and is considered in circumstances to be of widespread application to procurement practices; however, since protest is untimely no corrective action is recommended for immediate procurement.
2. Protest after bid opening against ambiguity in item description apparent prior to bid opening is untimely and will not be reviewed as matter of widespread interest, since it relates to isolated procurement.
3. IFB soliciting bids on requirements-type contract on net basis or single percentage factor applied to agency priced items not stating estimated quantities or list of past orders is in violation of FPR § 1-3.409(b)(1) (1964 ed., circ. 1) and contrary to 52 Comp. Gen. 732, 736 (1973).
4. Requirement for submitting net or single percentage bid on requirement-type contract prevents deliberate unbalancing of prices by bidder which assures award to low bidder regardless of quantities ordered. Further, if predetermined prices in IFB are too low or too high, bidders can adjust prices by offered plus or minus percentage factor.

Invitation for bids (IFB) No. GS-03B-63045 was issued by the General Services Administration (GSA) on May 6, 1976. The IFB was for a requirements-type, 1-year term contract, which involved removing and installing various types of partitions and related tasks in Government buildings. The Government's requirements consisted of a schedule of 36 separate job descriptions so as to permit issuance of orders for

the work actually to be done when the need arises. The IFB specified for each item a unit price which had been predetermined by GSA. No quantity estimates were specified. Bidders were to bid on a net basis or submit a single plus or minus percentage factor to be applied to the unit prices in the schedule which would then be applied to every work order. Award was to be made to the bidder offering the net or percentage factor which would produce the lowest unit prices for the line items.

On May 27, 1976, bids were opened. The following is a list of all bids (discounts) received:

Free State Builders, Inc.	-	38.3 percent
Kora & Williams Corporation	-	36 "
Michael O'Connor, Inc.	-	35.65 "
Edward B. Friel, Inc.	-	19.6 "

On June 4, 1976, Michael O'Connor, Inc. (O'Connor), challenged the propriety of the IFB. O'Connor alleged that the IFB was defective because (1) there were ambiguities in the item descriptions; and (2) bidders were precluded from intelligently bidding due to the lack of estimated quantities and the requirement for a single percentage factor.

Section 20.2(b)(1) of the Bid Protest Procedures, 4 C.F.R. part 20 (1976), provides:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. \* \* \*"

The alleged improprieties in the solicitation were apparent prior to bid opening. Since O'Connor's protest was not filed with either GSA or this Office until after bid opening, it is untimely. However, the Comptroller General may consider an untimely protest which raises an issue significant to procurement practices or procedures 4 C.F.R. § 20.2(c) (1976). "Issues significant to procurement practices or

procedures" refers to the presence of a principle of widespread interest. Fairchild Industries, Inc., B-184655, October 30, 1975, 75- CPD 264. Although there have been a number of decisions involving procurements by the single percentage factor method, we have never addressed the specific issue of the propriety of the procedure. Since the inviting of bids on a requirements-type contract by submitting a single percentage factor to the priced items without the benefit of estimated quantities is continuing and increasing, the soliciting of bids by this method in the circumstances is deemed to be of widespread application to the procurement practices. Consequently, the issue will be considered. The other basis of protest, ambiguities in the item description, relates to an isolated procurement. Therefore, it is not considered to be of widespread interest and will not be reviewed.

GSA states the reason for adopting the method of bidding in the immediate IFB was the inherent unreliability of its quantity estimates. The use of erroneous quantity estimates in prior IFB's and the evaluation of bids thereunder led to unbalanced bidding and sometimes cancellation of the procurement action. See Edward B. Friel, Inc., B-183381, September 22, 1975, 75-2 CPD 164. Additionally, GSA contends that the Government was not assured of determining which bid was most advantageous to the Government because the actual requirements vary substantially from the evaluation factors derived from prior year experience. Edward B. Friel, supra. GSA contends the method in the instant IFB precludes unbalanced bidding and assures the Government of awarding the contract to the lowest bidder.

Although GSA has indicated that it resorted to the immediate method of bidding because of the difficulty it had in determining the estimated quantities it will procure under the contract, the IFB is in violation of Federal Procurement Regulations (FPR) § 1-3.409(b)(1) (1964 ed., circ. 1) which is specific that in a requirements contract--

"\* \* \* An estimated total quantity is stated for the information of prospective contractors, which estimate should be as realistic as possible. The estimate may be obtained from the records of previous requirements and consumption, or by other means. \* \* \*"

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In 52 Comp. Gen. 732, 736 (1973), it was indicated that, where it was not administratively feasible to estimate future requirements, the listing in the solicitation of past orders was a reasonable alternative.

Since, in the immediate case, GSA was able to inform bidders in the IFB that the annual dollar volume of the prior contract was \$400,000, it appears that it would have been a relatively simple task to advise bidders of the item quantities that produced the total. In that event, all bidders would have had the same information as the incumbent. While we do not know the actual degree of importance bidders attach to the quantity estimates in a requirements-type contract, it may be helpful to the bidders in preparing a reasonable and intelligent bid.

The agency report indicates that actual experience will likely vary substantially from estimated quantities, no matter how carefully drawn, serving to "make the Government an involuntary participant in the gamble created by a successful bidder's unbalanced bid." A bidder who recognizes that the relative proportions of projected quantities used for bid evaluation are substantially wrong may achieve an unwarranted evaluation advantage by bidding high on the proportionately underestimated quantities and low on those overestimated. Therefore, GSA is reluctant to indicate relative quantities. However, this position ignores the fact that the method utilized in the present procurement indicating only a basic unit of measure itself establishes relative proportions. It is not the absence of projected quantities which prevents deliberate unbalancing but the setting by the Government of unit prices with the bidder limited to a single overall percentage discount or surcharge. Under this method the presence or absence of projected quantities does not affect the opportunities for unbalancing.

With regard to the requirement for submitting a net or single percentage bid, we believe GSA's position is rationally founded. The system allows GSA to quickly evaluate bids and assures award to the low bidder under the IFB regardless of the quantities ordered during the contract term. Even assuming that the prices estimated by GSA are too low or too high, bidders can adjust the prices by their offered percentage factor (plus or minus) if they are informed of reasonably anticipated quantities. As noted, the system has the virtue of preventing the deliberate unbalancing of prices by a bidder where he has reason to believe that the proportion of item quantities projected is substantially wrong with the result that a bid evaluated low will in fact result in a higher cost to the Government than would have been the case under a bid evaluated higher.

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As indicated above, the only objection our Office has to the immediate procurement method is the failure to include future quantities estimated or past quantities purchased. Since the protest in this regard was untimely, no corrective action is being recommended for the immediate procurement. However, by separate letter we are advising GSA of our objection.

Deputy

*Anthony J. Kelly*  
Comptroller General  
of the United States