

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20540**

D. July 16 1978

8189

FILE: B-192480 DATE: November 3, 1978
MATTER OF: King-Fisher Company

DIGEST:

1. Agency properly rejected late modification from low bidder when low bid was not acceptable as originally submitted because it exceeded agency's funding for project.
2. Agency cancellation of solicitation and subsequent cancellation of resolicitation of same requirements is not objectionable where low responsive bid in each instance exceeded available funds and agency attempted in resolicitations to either broaden competition or loosen requirements.

King-Fisher Company (King-Fisher) has protested the Department of the Army, Omaha District Corps of Engineers' (Corps) decision to cancel invitation for bids (IFB) No. DACA45-78-B-0070 (0070) and its subsequent decision to cancel IFB No. DACA45-78-B-0086 (0086). IFB 0086 was essentially a resolicitation of IFB 0070. It is our understanding that the Corps has again resolicited the procurement. This time it is reported that additional performance time is allowed. We are informed that Corps believes it has a responsive bid within its funding limitation. Award is being withheld pending resolution of this protest.

On June 8, 1978, the Corps issued IFB 0070, as a total small business set-aside, for the design and installation of a rapid reaction deluge sprinkler system at the Indiana Army Ammunition Plant. Three bids were submitted in response to the solicitation

and were opened on July 19, 1978. King-Fisher submitted the low responsive bid at \$764,933, while Rinkhoff Construction Company (Rinkhoff) and Bentley Electric Company, Inc. (Bentley) submitted bids of \$635,822.27, and \$659,500, respectively. Rinkhoff's bid was determined nonresponsive because it did not submit a bid guarantee. Bentley's bid was considered nonresponsive because it took exception to various technical requirements as well as to the completion date and liquidated damages requirement. The following day the Corps informed King-Fisher that its bid could not be accepted because sufficient funds were not available and because its bid exceeded the Government's estimate of \$655,714 by 15.6 percent. King-Fisher then offered to reduce its bid by \$11,833 bringing it within 14.84 percent of the Government estimate. This offer was rejected by the Corps on the grounds that acceptance of the reduction was not authorized under the IFB or the Defense Acquisition Regulation (DAR) (formerly the Armed Services Procurement Regulation). The Corps further reasoned that even if King-Fisher's offer could be accepted, sufficient funds were still not available.

On July 21, 1978, the Corps issued IFB 0086 as a resolicitation of the sprinkler system requirement. IFB 0086 was not a total small business set-aside. In other respects (apart from some minor changes) it was essentially the same as the original solicitation. Once again three bids were submitted and again King-Fisher was the low responsive bidder, this time at \$753,000. Bentley's bid of \$620,770 was determined nonresponsive for taking exception to various technical requirements and Viking Fire Protection Company's bid of \$636,092 was declared nonresponsive for imposing conditions on approvals and completion time. King-Fisher was again notified that its bid could not be accepted because it exceeded available funds.

King-Fisher maintains that its original bid, as modified, should have been accepted for award. The protester asserts that acceptance of its reduction would not, as the Corps alleges, compromise the integrity of the competitive bidding system, and was specifically authorized by paragraph 7(d) of the IFB. Paragraph 7(d), which was required by DAR § 7-2002.2 (DPC 76-7, April 29, 1977) to be included in all formally

advertised procurements, states in pertinent part that "a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted."

The Corps argues that acceptance of King-Fisher's late modification would have been improper because it was transmitted after bid opening. The agency also notes that in any event the company's proposed reduction which would have reduced its bid to \$753,000 was still more than the maximum funding that could be made available, \$681,450.

We do not agree that the provision concerning late modification of otherwise successful bids is limited to modifications transmitted before bid opening. Minnesota Mining and Manufacturing Company, B-185456, May 13, 1976, 76-1 CPD 321. However it is our view that King-Fisher's proposed modification was properly rejected because that firm's bid as originally submitted was unacceptable as exceeding the agency's available funding. Generally late modifications may only be accepted pursuant to the subject clause if that bid is acceptable as originally submitted. See generally 45 Comp. Gen. 229 (1965). Also, all the Corps notes, even if the modification were accepted that bid would still exceed the agency's funding limitation.

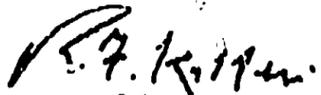
With regard to the second solicitation, King-Fisher alleges that its low responsive bid should have been accepted and that rejection of its bid and resolicitation a third time after disclosure of bid prices was improper.

The Corps states that funds for construction projects at the Indiana Army Ammunition Plant are authorized under the Military Construction Authorization Act, 1978, approved August 1, 1977, Pub. L. 95-82, 91 Stat. 358, and that \$649,000 of available funds was allocated by the Corps to the sprinkler system project. The Corps further states that even under Section 503(a) of the Act, which permits the Secretary of the Army to increase authorized expenditures by 5 percent, only \$32,450 in additional funds could be made available. In view of the fact that the lowest of King-Fisher's two bids was \$753,000, an amount still in excess of available funds, the Corps maintains that neither bid could be accepted.

Our Office has long recognized that the authority vested in a contracting agency to cancel a solicitation and readvertise is extremely broad and in the absence of bad faith or an abuse of discretion, a decision to cancel a solicitation will not be disturbed. Byron Motion Pictures Incorporated, B-190186, April 20, 1978, 78-1 CPD 308. However, in order to protect the integrity of the competitive bidding system DAR § 2-401.1 (1976 ed.) requires that there exist a compelling reason to cancel a solicitation after all bids have been opened and bid prices exposed. We have held an agency determination that adequate funds are not available for contract obligation to be sufficient reason to reject bids received and cancel a solicitation. Emerson Construction Company, Inc., B-190702, December 15, 1977, 77-2 CPD 468 and cases cited therein.

Thus we believe that the Corps was justified in canceling both solicitations, as in both instances the low responsive bid which was submitted by King-Fisher exceeded available funding. In this regard we note that although the Corps did not attempt to secure the additional 5 percent funding pursuant to Section 603(a) of the Authorization Act it did in each resolicitation attempt to either loosen the requirements (lengthen performance time in the latest resolicitation) or broaden competition (open procurement to large business in first resolicitation). We cannot say that the Corps' failure to secure this additional 5 percent funding was prejudicial to the protester since each of its bids (including the latest bid) exceed the funds which would be available even if the 5 percent increase were granted.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States