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DECISION



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

FILE: B-193106

DATE: March 9, 1979 9380

MATTER OF: Maron Construction Co., Inc.

[Protest Alleging Improper Cancellation of IFB]

DLG 1117

DIGEST:

1. IFB having erroneous and ambiguous specifications is properly cancelled after opening of bids but prior to award.
2. Prebid site inspection provision is not mandatory and is only for purpose of warning bidders that site conditions could affect performance cost and bidders therefore assume risks of increased performance cost caused by observable site conditions, and to protect Government from necessity of permitting bid withdrawal or claims after contract award.
3. IFB provides for notice to contracting officer of specification defects and notice to temporary reservist conducting site inspection does not satisfy IFB requirements.
4. Award under IFB with materially defective specifications may not be made where other bidders have been prejudiced.

The United States Property and Fiscal Officer for Rhode Island issued on July 28, 1978, Invitation for Bids (IFB) DAHA 37-78-B-0004 as a total small business set-aside for the installation of steel doors and frames at Coventry Air National Guard Station, Rhode Island. No objections to the plans or specifications were received prior to bid opening, no amendments were issued, and bids were opened at 3:00 P.M. on August 30, 1978. Seven bids were received, of which C & D Construction Company (C & D) was lowest at \$39,591, but was found nonresponsive. The next low bidder was Maron Construction Co., Inc. (Maron), with a bid of \$49,985. The Government estimate for the work was \$34,600.

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By letter of August 31, 1978, the contracting officer advised Maron that it had submitted the apparent low responsive bid, and was being considered for award. However, prior to award, a letter was received from C & D stating that a field survey showed a requirement of 43 frames and 53 doors on which C & D based its bid rather than 43 doors and 43 frames as stated in the IFB. After consultation with the Air National Guard Engineering Staff and with Maron, and on advice of counsel, the contracting officer cancelled the IFB, and by letters of September 22, 1978, notified all bidders.

The cancellation was based on the contracting officer's determination in writing that the plans and specifications were defective and contained

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these pervasive errors: "(1) number and type of doors to be furnished was in question; (2) the door schedule contained at least ten (10) errors; (3) the frames schedule was incomplete; (4) the hardware schedule was incorrect; and (5) dimensional data was in error." The government in fact needed 39 frames and 57 doors.

The contracting officer also stated that despite Maron's allegation that C & D was not an interested party, he had been put on notice of defects and ambiguities in the specifications so material as to prevent the bidders from competing with equal standing and that the IFB failed to present the actual minimum needs of the Government. The cancellation was based on the provisions of section II, part 2, paragraphs 2-404.1(a), 2-404.1(b)(1) and 2-404.1(b)(viii) of the Defense Acquisition Regulation (DAR), formally the Armed Services Procurement Regulation.

Maron protests the cancellation, alleging that the requirements of the Government could be and were determined by Maron by a site visit in accordance with the provisions of the IFB, that the defects in the specifications were pointed out to a Government agent by Maron during the site visit, that Maron had agreed to meet any and all requirements of the Government, and that therefore cancellation constitutes an abuse of discretion by the contracting officer. Maron also alleges that C & D, having been found nonresponsive, was not an interested party, and therefore, presumably should not be heard to protest the specifications.

Paragraph 2-404.1 of the DAR provides:

"(a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * *

(b) * * * Invitations for Bids may be cancelled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that--

(i) inadequate or ambiguous specifications were cited in the invitation;

* * * * *

(viii) for other reasons, cancellation is clearly in the best interest of the Government."

In Byron Motion Pictures Incorporated, B-190186, April 20, 1978, 78-1 CPD 308 we stated that the authority vested in a contracting

officer to decide whether to cancel a solicitation is extremely broad, and in the absence of a showing of abuse of discretion, a contracting officer's decision to cancel an IFB will be upheld. In Learning Resources Manufacturing Co., B-180642, June 4, 1974, 74-1 CPD 308, a case similar to this one, the specifications in the IFB were ambiguous as to whether the article was to be manufactured entirely of particle board or in combination with plywood. Even though no request for clarification of the IFB was made prior to the bid opening and all amendments to the IFB were acknowledged and no exceptions to the specifications or amendments were stated prior to bidding, we held that the contracting officer was not precluded from cancelling the IFB when an ambiguity created by the specifications and amendments was brought to his attention prior to award. And in Essex Electro Engineers, Inc.; Cummins Diesel Engines, Inc., 54 Comp. Gen. 1068, 1070 (1975), 75-1 CPD 372, we stated that where a solicitation so inadequately expresses the Government's requirements as to ensnare the average bidder into submitting a nonresponsive bid, the solicitation should be cancelled and resolicited under terms which clearly reflect the Government's needs. See, also, 49 Comp. Gen. 713 (1970).

The record shows that C & D bid on furnishing 43 frames and 53 doors; Maron bid on 39 frames and 57 doors; and E. Girard & Sons bid on 39 frames and 43 doors. Bidders, therefore, were "ensnared" into submitting nonresponsive bids.

The bid of C & D averaged \$1,000 per frame and door unit and the high bid averaged \$1,700 per frame and door unit. It seems obvious that the variations in the numbers of frames and doors units would cause substantial effects to the bid amounts. Thus, the finding of the contracting officer that the bidders were not on equal standing is supported by the record. And no abuse of discretion has been shown.

The protester states that he visited the site of the work as allegedly required under Paragraph SW-5, Page SW-1, STATEMENT OF WORK Part 1, of the IFB. Paragraph SW-5 provides:

"Submission of a bid by a contractor shall be accepted as prima-facie evidence that he has examined the specifications and drawings and has satisfied himself as to the nature and locations of the work and cost thereof under this contract. Any failure of the Contractor to acquaint himself with all the available information, including a physical survey of the site of the proposed work, will not relieve him from successfully performing all work required to be done for a complete finished job."

See also paragraph 2 of Instructions to Bidders, Standard Form 22, which also provides for site visitation.

Neither provision of the IFB is mandatory. Under an IFB which specifically stated that the site visitation was mandatory, we held that whether expressed in mandatory terms or not, the purpose of the site inspection provision must be viewed as warning the bidders that site conditions could affect performance cost and bidders therefore assume the risks of increased performance cost caused by observable site conditions, and as protecting the Government from the necessity of permitting bid withdrawal or claims after contract award. Edw. Kocharian & Company, Inc., 58 Comp. Gen. - (B-193045, January 15, 1979), 79-1 CPD 20.

The protester further alleges that during the site inspection the discrepancies were pointed out to the Government agent who conducted protester on the site visit. The tour of the work site was conducted by a reservist attending weekend training. Maron pointed out discrepancies to this reserve officer. However, paragraph 2 of the General Provision and Paragraph 64 of the amendments to the General Provisions require notification of discrepancies to be made to the contracting officer. The reservist was not authorized and was not held out as authorized to act for the contracting officer and the contracting officer was not notified of the discrepancies prior to the notice by C & D. Therefore, contrary to the allegations of Maron it did not satisfy all of the requirements of the IFB, and did not notify the authorized Government agent.

The protester alleges that it had indicated to the agency that it would have no objection to clarification of job requirements in order to meet the actual needs of the Government. We have held that a deficiency in a solicitation does not necessarily justify cancellation, if the bidders offer to meet the Government's actual requirements, and no parties will be prejudiced when no unfair or unequal treatment is evident. See Halifax Engineering, Incorporated, B-190405, March 7, 1978, 78-1 CPD 178; and Johnson Controls, Inc., B-188488, August 3, 1977, 77-2 CPD 75. The record in this case, clearly shows that the bidders were in fact prejudiced by the errors in the solicitation.

Finally, we agree with the contracting officer that whether C & D is or is not an interested party is not an issue and that the controlling factor is that it was put on notice that serious deficiencies might exist in the IFB.

The record clearly justifies cancellation and resolicitation with corrected specifications.

Protest denied.


Deputy Comptroller General
of the United States