

**DECISION**



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

11,008

PLT

FILE: B-194630

DATE: August 9, 1979

MATTER OF: North American Laboratories  
of Ohio, Inc.

19LG 02559

**DIGEST:**

*[Protest of Air Force Award of Contract for Custodial Services]*

1. Recommendation is made to cancel IFB and resolicit since record discloses that IFB was materially deficient and prevented fair and equal treatment of bidders by inclusion of "Reasonable Costs/Minimum Manning" clause which, by calling for bid rejection as unreasonably priced if below minimum manning cost, improperly converted matter of responsibility into responsiveness. Regulation cited as authority in clause (DAR § 2-402.2(e) (1976 ed.)), which provides that bid may be rejected if unreasonable as to price, has been applied to permit rejection as nonresponsive of bid which is considered unreasonably high rather than low.
2. In view of recommendation that IFB be canceled, issues involving whether prebid conference should have been conducted to resolve questions with IFB or whether protest regarding alleged specific improprieties in IFB was timely will not be decided by GAO. Comment offered that standard form of IFB provides mode to resolve such questions concerning IFB, and expectation that agency will take protester's specific complaints into account prior to resolicitation.
3. Unsupported allegation of discrimination against minority contractors which has been refuted by agency does not meet protester's burden of affirmatively proving case.

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North American Laboratories of Ohio, Inc. (NAL), protests the proposed awards of contracts under invitation for bids (IFB) 33601-79-B0143, issued April 13, 1979, by the Base Contracting Branch, Wright-Patterson Air Force Base, Ohio. The IFB scheduled for opening on April 27, 1979, called for bids for custodial, janitorial and related services for various facilities at Wright-Patterson Air Force Base.

By letter dated April 10, 1979, NAL protested the procurement action to our Office. NAL sets forth four bases for protest. First, NAL contends that a prebid conference should have been held to permit bidders to ask questions regarding the IFB prior to bidding. Second, it is alleged that the IFB is constructed in such a poor and haphazard manner that it could force a contractor out of business or to commit fraud in attempting to comply with the requirements. NAL cites compliance with the minimum manning requirements as the problem, contending that in determining responsiveness to section D-3 of the IFB, the contracting activity is not assuring that sufficient cost has been included in the bid for taxes, insurance, supplies, equipment, vacation pay, G&A and profit. NAL next contends that the existing IFB provides the tools to contracting officers and inspectors to vary the quality of inspections so that some contractors would be allowed to provide less service than that required. NAL's final contention is that the history of contracting activities at Wright-Patterson Air Force Base shows a continuous pattern of discrimination against local black janitorial contractors.

Section D-3 of the IFB provides:

"Reasonable Costs/Minimum Manning

"In the evaluation of bids, the Government will compare the price bid for sub-items a. thru e. of each item to the total minimum cost established for each [of six] item[s]. The total minimum cost is established by multiplying the item minimum manning requirements (See Section F, paragraph 4-01) by the applicable minimum wage rates. Any bid which contains a price for

sub-items a. thru e., which is less than the established item minimum costs, shall be determined to be unreasonable in accordance with DAR (ASPR) 2-404.2(e), and the bid for that item will be rejected as being non-responsive."

The Air Force states that this provision is used to ensure that the bidders have enough dollars in their bids to provide the required services and to preclude the contractor from offering a price that is so low that it will be forced out of business. Its experience has indicated that failure to include this provision results in awards of contracts to contractors who cannot satisfactorily accomplish its requirement, even though preaward surveys have been performed. Further, the agency argues that bidders are not precluded from including the costs cited by NAL. To the extent NAL is alleging "buying in" and "potential for selective enforcement," the Air Force views such statements as speculative and "GAO has repeatedly held that a below cost bid is not a legal basis for precluding or disturbing a contract award."

In our view, the subject IFB is materially deficient because section D-3 requires that noncompliance with this clause will result in a bid being rejected as nonresponsive. In our opinion, the Air Force has improperly converted a matter of responsibility into responsiveness. The Air Force's rationale for section D-3 relates to the ability and not the legal obligation of the bidder to perform the contract. We have stated that a matter of responsibility cannot be made into a question of responsiveness by the terms of the solicitation. Reliable Building Maintenance Co., B-190167, February 17, 1978, 78-1 CPD 139; Haughton Elevator Division, Reliance Electric Company, 55 Comp. Gen. 1051 (1976), 76-1 CPD 294. We note here that the Air Force correctly states our position against rejecting below-cost or unprofitable bids other than in the context of responsibility. Yet, that is exactly the effect of the application of section D-3. Further, the section's specified authority to reject bids as nonresponsive is not authority to reject an unreasonably low bid. DAR § 2-404.2(e) (1976 ed.), which provides that a bid may be rejected if it is unreasonable

as to price, applies only to reject for the benefit of the Government excessively high bids. Similarly, DAR § 2-404.1(b)(vi) permits cancellation of an invitation where otherwise acceptable bids are at unreasonable (i.e., high) prices. We find no support for a provision such as section D-3.

Moreover, the regulations provide measures to be taken if a bid is suspected of being too low. For example, the contracting officer should request verification as required by the mistake in bid procedures set forth in DAR § 2-406 (1976 ed.). Further, DAR § 1-311 (1976 ed.), dealing with the practice of "buying in," does not permit the contracting officer to reject as nonresponsive a bid suspected of being below cost. Rather, postaward and follow-on procurement safeguards are required to protect the Government.

We stated in Edward B. Friel, Inc., 55 Comp. Gen. 231, 237 (1975), 75-2 CPD 164, that "The fact that the terms of an IFB are deficient in some way does not necessarily justify cancellation after bids have been opened and bidders' prices exposed." See Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183. However, in determining if a cogent and compelling reason exists to justify cancellation, two factors must be examined: (1) whether the best interest of the Government would be served by making an award under the subject solicitation, and (2) whether bidders would be treated in an unfair and unequal manner if such an award were made. Here, we believe that the inclusion of the "Reasonable Costs/Minimum Manning" clause clearly prevented fair and equal treatment of bidders. See Dyneteria, Inc. and La Tex Foods, Inc., B-190029, December 16, 1977, 77-2 CPD 475. Five of the 26 bids were determined to be nonresponsive as being below the minimum manning requirements to at least one of the six specified items, including the bids of two of the proposed awardees. In addition, the clause may very well have contributed to the "responsiveness" of the other 21 bids by forcing those bidders to exceed the minimum. Further, the inclusion of this clause may have discouraged other firms from submitting bids.

Accordingly, a cogent and compelling reason exists for the cancellation of the IFB and we recommend that the Air Force resolicit. Any new

solicitation should eliminate the objections we noted in the "Reasonable Costs/Minimum Manning" clause.

NAL, prior to bid opening, contended generally that the contracting officer should have conducted a prebid conference to permit bidders to ask questions regarding the IFB. NAL, in a letter to our Office dated well after bid opening, refers to specific alleged improprieties in the IFB. Although it appears that the questions raised by counsel are untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1979), since they were not raised prior to bid opening, we need not decide this issue or the necessity for a prebid conference in view of our recommendation that the subject IFB be canceled.

However, we offer the following comments. The requirement and scheduling of a prebid conference rests with the contracting officer. See DAR § 2-207 (1976 ed.). Further, the subject IFB, as will the resolicitation, in paragraph 3 of Standard Form 33A, Solicitation Instructions and Conditions, provides that "Any explanation desired by an offeror regarding the meaning or interpretation of the solicitation, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach offerors before the submission of their offers." Bidders are required by this provision to specifically raise all questions they may have regarding the IFB prior to submitting a bid. In conclusion here, we trust the agency will take the protester's specific complaints into account prior to the resolicitation.

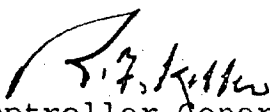
NAL makes an unsupported statement that section D-3 provides the tools to contracting officers and inspectors to vary the quality of inspection. In view of our conclusion that this section is objectionable, this matter is moot and will not be considered.

NAL further contends that the history of contracting activities at Wright-Patterson Air Force Base shows a continuous pattern of discrimination against local black janitorial contractors. No support for this statement appears in the record.

Contrary to NAL's contention, the contracting officer states that over 56 percent of the previous year's custodial awards were made to minority contractors. Our Office does not conduct investigations for the purpose of verifying a protester's allegations and speculations. It is the responsibility of the protester to present probative evidence to affirmatively establish its position and NAL has failed to do so in this case. See Bowman Enterprises, Inc., B-194015, February 16, 1979, 79-1 CPD 121.

In view of our conclusion that the IFB is defective and thus no award should be made, by letter of today to the Secretary of the Air Force we are recommending resolicitation.

The protest is sustained.

  
Acting Comptroller General  
of the United States