



111536

12815

PLI

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-194902

DATE: February 12, 1980

MATTER OF: Gibson &amp; Cushman Dredging Corporation

DIGEST:

*[Oral Protest Against Solicitation  
Deficiencies]*

1. Oral protest to agency is permissible if intent to protest is clear. Intent to protest allegedly defective specifications is clear where protester met with contracting officials on two occasions shortly before bid opening, discussed alleged defects with great specificity, and stated that specifications were "the worst he had ever seen" and that "he intended to file a protest on the bid regardless of whether he had the low bid or not."
2. Oral protest against allegedly defective specifications was lodged before bid opening. Agency did not regard oral protest as protest and opened bids without correcting any of defects alleged. Written protest filed with contracting agency and GAO within 10 days of bid opening is timely filed since bid opening was initial adverse agency action.
3. Because of environmental considerations and other factors, IFB for dredging contract was issued prior to spring floods which frequently cause changes in location of shoals. Moreover, State of Connecticut did not give agency location of all available disposal areas until after bid opening. Use of contract describing type of services required but no specifics as to location of dredging or disposal sites is appropriate in these unusual circumstances. However, IFB was deficient since statement of work was not based on best available information. Therefore, protest is sustained on this point.
4. Contracting agency is not required to equalize competition on particular procurement by considering competitive advantage accruing to bidder by virtue of its incumbency.

~~008638~~ 111536

5. Though statement of work contained in IFB for dredging contract was deficient because it was not based on best available information known to agency, GAO cannot recommend corrective action because contract has already been completed. However, Secretary of the Army is being notified of deficiencies in effort to prevent similar difficulties in future dredging contracts.

*ID* Gibson & Cushman Dredging Corporation (G&C) *DHG-03892*  
protests against award of a contract for maintenance  
and dredging of approximately 50 miles of the  
Connecticut River to Perini Corporation (Perini) by *CNG-01990*  
the New England Division of the Army Corps of  
Engineers pursuant to invitation for bids (IFB) *DLG-02490*  
No. DACW33-79-B-0023.

The Army argues that we should not consider G&C's protest on the merits because it was not filed in a timely manner. According to the Army, the bases of G&C's protest all relate to alleged deficiencies in the specifications which should have been apparent to G&C prior to the time set for bid opening (May 10, 1979, at 3 p.m.), and, therefore, G&C should have filed its protest prior to bid opening in accordance with section 20.2 of our Bid Protest Procedures. 4 C.F.R. part 20 (1979). Because G&C's written protest was filed with the New England Division of the Corps of Engineers on May 12, 1979, and its written protest was filed with our Office on May 17, 1979, the Army contends that the protest is untimely.

A representative of G&C met with contracting officials on either May 4 (according to G&C) or May 8 (according to the Corps) to discuss the alleged specification deficiencies. According to the Army report, G&C's objections to the IFB were discussed in great detail and the G&C representative told agency officials at the meeting that the specifications were "the worst he had ever seen" and that "he intended to file a protest on the bid regardless of whether he had the low bid or not." At another meeting with Corps officials held on May 10, shortly before the time set for bid opening, the G&C representative again stated G&C's objections to the IFB and requested that the

Corps release information it allegedly possessed regarding disposal sites. G&C contends that it orally protested to the Corps at these meetings. The Army, however, contends that G&C's representative did not actually protest at either of the meetings, but merely indicated his intention to protest at some future time. Furthermore, the Army argues that, even if we consider G&C to have filed an oral protest, G&C was required to confirm its protest in writing before bid opening in accord with section 2-407.8(a) of the Defense Acquisition Regulation (DAR) (1976 ed.) and section 20.2(b)(1) of our Bid Protest Procedures.

An oral protest is permissible under section 2-407.8(a) of the DAR, but in order to be effective as a protest the intent to protest must be clear. Joule Technical Corporation, 58 Comp. Gen. 550 (1979), 79-1 CPD 364. Merely complaining or expressing displeasure to contracting officials prior to bid opening without more is not sufficient evidence of the intent to protest against alleged solicitation defects. However, we think G&C's representative did more than just express displeasure. He discussed his complaints with specificity and stated his intent to protest whether or not G&C submitted the lowest bid. We believe it is clear that the G&C representative was protesting at the time he made those remarks and was not merely expressing an intent to protest at some future time. Moreover, DAR § 2-407.8(a) does not require written confirmation of oral protests, except where requested by the contracting officer, which was not the case here.

Since G&C orally protested against alleged solicitation deficiencies prior to bid opening, the opening of bids on May 10 without correcting any of the alleged defects constituted the Corps' initial adverse agency action on G&C's protest. Leo Journagan Construction Co., Inc., B-192644, January 29, 1979, 79-1 CPD 59. Accordingly, our receipt of a written protest on May 17, 1979, was within 10 days of the initial adverse agency action, and, therefore, the protest was timely filed in accordance with section 20.2(a) of our Bid Protest Procedures and we will consider it on the merits. 4 C.F.R. § 20.2(a) (1979).

G&C alleges numerous deficiencies in the solicitation relating to the description of the work to be done. Basically, G&C contends that because of these alleged deficiencies, the IFB did not accurately describe the actual minimum needs of the Corps of Engineers in two important respects: (1) the IFB did not describe which shoals were to be dredged, and (2) the IFB did not describe which disposal areas were available for disposal of dredged material. The protester alleges that the Corps of Engineers had information in its possession which should have been incorporated into the IFB in order to provide a more accurate description of the work actually required to fulfill the Government's minimum needs. As evidence, the protester points to the Government estimate which allegedly shows that the Corps knew that the description of the work required in the IFB overstated the work which would actually be required under the contract awarded. G&C contends that the low bidder, Perini, was given a competitive advantage by the Corps because of the inaccurate work description contained in the IFB. Since Perini was the incumbent contractor for dredging this part of the Connecticut River for the Corps of Engineers, G&C argues that Perini had access to information not available to other bidders by virtue of its experience with the Corps on this part of the river.

Finally, G&C protests that its representatives asked Corps contracting officials to furnish them with information regarding the location of probable disposal areas prior to bid opening, but that Corps officials refused to provide such information even though the State of Connecticut had provided the information to the Corps by bid opening. G&C contends that, without this information, it had to include contingencies for spoil area operations which substantially raised its bid price and that Perini was able to bid a much lower price because it did not have to include the same contingencies, since its experience had shown that a great deal of less expensive riverine disposal would be sufficient to fulfill the actual needs of the Corps of Engineers.

The Army Corps of Engineers admits that the IFB did not describe the specific shoals to be dredged nor indicate where the disposal areas would be located. The Corps explains that this solicitation is significantly different from previous Connecticut River dredging contracts which specifically identified each shoal to be dredged and its disposal area. The Corps' experience under those solicitations was that the spring floods would often cause the shoals to shift. Thus, the contractors might proceed to a specified bar after the spring runoff and find no bar to dredge while other bars would have been created and would not be covered by the specifications. As a result, the Corps was forced to pay the contractors equitable adjustments at great additional expense to the Government for dredging shoals formed after the specifications were drawn.

According to the Corps, weather conditions, environmental restrictions imposed by the State of Connecticut, and commercial fishing considerations required the dredging for this section of the Connecticut River to be accomplished between June 15 and August 15, 1979. In order to allow sufficient time for solicitation and submission of bids, evaluation and award, and a reasonable startup time for the contractor, the Corps states that it was forced to issue the IFB before the spring floods. Therefore, the Corps was unable to identify where the shoals requiring dredging would be located at the start of the performance period. In order to avoid the equitable adjustments of prior contracts caused by the shifting of bars after the spring runoff, the Corps wrote the present specifications so that the stretch of the river requiring dredging was identified without identifying the specific shoals which would need dredging. The specifications merely listed 34 shoals which were known to exist and which had required dredging under previous contracts and included a map showing the location of those shoals. The solicitation also indicated that prior experience had shown that 8 to 10 of those bars would probably require dredging and that the total estimated minimum quantity of material to be removed was 150,000 cubic yards including allowable overdepth. The solicitation indicated that the

actual amount and location of dredging could not be determined until predredge surveys were completed and that the contracting officer would direct the contractor to the next bar no less than 5 days before dredging was finished at the bar currently being dredged.

The Corps reports that it could not include a description of available disposal areas in the IFB because the State of Connecticut did not provide it with any relevant information until the morning set for bid opening. (The Corps had requested the information from the State under the terms of a local cooperation agreement for this program.) The Corps states that the only information in its possession on the morning of the bid opening consisted of identification of 11 of 34 definite disposal sites and information regarding possible disposal areas which were not yet definite because the State still had to secure disposal agreements from the landowners and the State had to issue Water Quality Certifications for the sites. Because definite disposal areas were not yet secured and because the bars to be dredged had not yet been identified, the Corps refused to give G&C any information regarding disposal areas (i.e., drawings or photographs of areas which the State of Connecticut had secured or was trying to secure) even though the G&C representative requested such information and it was in the hands of Corps officials on the morning of bid opening. The contracting officials believed that G&C would be misled since all of the disposal sites were not yet secured and they felt that release of such information to G&C would give it an advantage over other bidders which had not been given such information.

The Corps reports that, since definite disposal areas could not be identified, the specifications described the most costly method of disposal and used a "worst case" basis to describe the areas where the contractor could dispose of dredged material. The Corps admits that a "worst case" basis was not used in preparing the estimate for this procurement. Instead, the Corps assessed the most likely places for disposal based on past experiences on this part of the river in preparing the estimate. The Corps asserts that

G&C and all other bidders were experienced and should have used their experience to assess historical data on previous dredging contracts on this river in preparing their bids. Accordingly, the Corps believes that, since all bidders were required to bid on the same "worst case" basis, all bidders were treated equally and any competitive advantage Perini may have had was due solely to its experience on the Connecticut River under previous contracts but that Perini did not have access to any other information which was not available to all other bidders.

It is a fundamental principle of Federal procurement law that solicitations must be drafted in a manner which informs all offerors in clear and unambiguous terms of what will be required of them under the contract to be awarded so that offerors can compete on an equal basis. Norfolk Conveyor Division of Jervis B. Webb Company; E. C. Campbell, Inc., B-190433, July 7, 1978, 78-2 CPD 16, at p. 7. However, the unique circumstances surrounding this procurement made it impossible to identify accurately the locations of various dredging and disposal sites before performance was scheduled to begin. Due to: (1) probable extreme changes in the condition of the river bottom between issuance of the IFB and performance under the contract awarded, (2) the inability of the State of Connecticut to identify the exact location of all disposal areas prior to bid opening, and (3) the rigid timeframe within which this procurement and resultant performance had to be completed, the Corps resorted to using an unusual statement of work in this solicitation. The IFB clearly and unambiguously described the services the Government desired to purchase (clearing the navigation channel), limited the services to a certain geographical area (a 50-mile section of the river), and specifically set forth the necessary time constraints on performance (June 15 to August 15), but did not describe specifically where this work was to be done.

We think that this procurement, though unusual in form, was similar to a requirements-type contract in which the contracting activity agrees to let the contractor fill all of the contracting activity's needs for a particular service during a specified period of time by placing timely orders with the contractor.

A requirements contract must comply with section 3-409.2 of the Defense Acquisition Regulation (DAR) (1976 ed.) which provides that solicitations for requirements contracts must contain an estimated total quantity for the information of prospective contractors. DAR § 3-409.2 also states that the solicitation's estimate "should be as realistic as possible" and may be obtained from the records of previous requirements or by any other means.

The present solicitation was like a requirements contract in that the Corps was able to describe clearly the needed service (dredging) but was unable to tell prospective contractors where the service would be performed or exactly how much dredging would be required. The solicitation estimated that the total minimum quantity to be dredged would be 150,000 cubic yards. Bidders were required to bid a unit price (per cubic yard) for the initial 0 - 150,000 cubic yards dredged under line item 3a of the Unit Price Schedule. Under line item 3b of the Unit Price Schedule, bids were also required on a unit price basis for an additional 50,000 cubic yards of dredging. Thus, the solicitation estimate was that 150,000 to 200,000 cubic yards would have to be dredged under the contract awarded. There is no evidence that this estimate was not based on the best available information. Bidders were required to include total estimated amounts for various line items (unit price X estimated quantity), but the unit prices would control in case of discrepancy. The solicitation indicated that the contracting officer would specify future dredging sites during the performance period of the contract. In accord with Technical Provision 1-7, payment for dredging would be made after each bar was completed on the basis of the number of cubic yards multiplied by the price bid per cubic yard. All potential contractors were on notice that the contract would require whatever dredging it would take to clear this section of the channel and that specific locations could not be determined before award. Since the Corps could not be more specific regarding dredging and disposal sites

due to the unusual circumstances surrounding this procurement, we will not object to the lack of specificity in the IFB's statement of work. Accordingly, G&C's protest on this point is denied.

In addition, we cannot fault the Corps for failing to release to G&C whatever information it had received from the State of Connecticut concerning possible disposal sites on the morning of bid opening. The record shows that such information was received so late in the procurement that there was not enough time to amend the solicitation and make it available to all bidders.

Moreover, the record does not substantiate G&C's contention that Perini, the incumbent contractor, was given access to information which was not available to other bidders. Rather, it appears that Perini may have enjoyed a competitive advantage by virtue of its previous experience along this section of the Connecticut River as the incumbent, and we have consistently held that the Government is not required to equalize competition on a particular procurement by considering competitive advantages accruing to firms because of their own particular circumstances. Patrician, B-194011, July 3, 1979, 79-2 CPD 3.

While we find the contract appropriate in view of the unusual circumstances, we have a criticism of this procurement which we believe may have led to unusually high offers from all bidders other than Perini and which may have limited the field of competition for this contract.

Regarding disposal of excavated material, the IFB stated in Technical Provision 1-5 that disposal sites would be located "no farther than 6000 feet" from dredging sites and estimated that 80 percent of disposal would be upland while 20 percent would be riverine. The Corps admits that the specifications described the "worst case" using "the most costly methodology." However, our examination of the Corps' estimate shows that the Corps did not anticipate using more than 2,000 feet of shore pipe and 1,500 feet of pontoon pipe. Therefore, we conclude that the Corps knew at the time it prepared the estimate that upland disposal would not be located as far as 6,000 feet from the dredging

site as indicated in the specifications. While a requirements-type contract was appropriate since specific information regarding sites was not available, the specifications should have been based upon the best available information. B. B. Saxon Company, Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD 410. It appears that the best available information was used to compute the Government estimate but was not incorporated into the IFB. We believe that the Corps may have misled bidders by drafting the specifications to show the most costly methodology when it knew that the most costly methodology would not have to be used. Accordingly, the specifications were defective in that they intentionally overstated the Government's minimum needs. Gardner Machinery Corporation; G. A. Braun, Incorporated -- Request for Reconsideration, B-185418, September 25, 1978, 78-2 CPD 221. As a result, many bidders may have included contingencies in their bids to cover the worst possible cases and the prices bid may have been inflated. The record substantiates that this may have occurred since the Government estimate (based on the total estimated quantity of 200,000 cubic yards) was \$498,715, Perini bid \$493,000, G&C had the next low bid of \$677,750, and all other bids were significantly higher. Also, some potential bidders may have been discouraged from competing.

While we are denying the protest on many issues, we agree with the protester that the solicitation did not contain the best available information regarding location of disposal sites and are sustaining the protest on this point. However, we cannot recommend corrective action because the contract has been fully performed. Therefore, we are notifying the Secretary of the Army of our findings in this matter so that the improprieties found in this solicitation will not be repeated in future solicitations for dredging contracts. We note that the Corps indicates that it will have more complete information regarding location of shoals to be dredged and available disposal areas prior to bid opening next year and trust that this information will be incorporated into next year's solicitation in a timely manner.

The protest is denied in part and sustained in part.

*R. F. Kellen*  
Deputy Comptroller General  
of the United States