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DECISION



THE COMPTROLLER GENERAL OF THE UNITED STATES

WASHINGTON, D. C. 20548

FILE: B-194865

DATE: March 28, 1980

MATTER OF: Cottrell Engineering Corporation

DLG 4233

DIGEST:

1. Issuance of new solicitation after firm protests to agency cancellation of prior solicitation is not adverse agency action on protest where protester may reasonably believe protest is still under active consideration.
2. Protest by low bidder against reasonableness of Government estimate is denied where agency reviewed estimate pursuant to protester's objections and provided reasonable explanations supporting the estimate. Despite several revisions increasing the estimate, low bid still exceeded awardable range allowed by 33 U.S.C. § 624 (1976). Accordingly, IFB was properly canceled pursuant to the statute.
3. Protester's allegation that, in order to make award, agency improperly increased its estimate from that of prior procurement canceled due to unreasonable bids is rejected where agency explains that increase reflects fuel costs, which increased 100 percent over the eight month period and inconsistencies in protester's bidding pattern indicate that protester's bid may not have been correct.

Cottrell Engineering Corporation protests the rejection of its bid under invitation for bids DACW54-79-B-0007, issued by the Army Corps of Engineers, Wilmington District and the resolicitation of the procurement under IFB DACW54-79-B-0021 and IFB DACW54-79-B-0029.

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[Protest Against Bid Rejection]

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On November 16, 1978, the Army issued the first IFB for maintenance dredging at Hancock Creek, North Carolina. Cottrell was the low bidder, with a price of \$244,200 and the only other bid submitted was for \$395,800. However, Cottrell's price exceeded the Government estimate of \$176,807 by \$67,393, or 38.1 percent. Because all bids exceeded the Government estimate by more than 25 percent, they were rejected as required by 33 U.S.C. § 624 (1976).

Cottrell timely protested to the Army, alleging that the Government estimate was unreasonable. Cottrell subsequently submitted its bid calculations and two letters detailing the items of the Government estimate with which it disagreed. After consideration of the data submitted by Cottrell, on March 26, 1976 the Army increased its estimate to \$192,947, or 26.6 percent below Cottrell's bid. As Cottrell's bid was still more than 25 percent in excess of the revised Government estimate, the Army denied Cottrell's protest. Cottrell was so informed by telephone on April 30 and by letter of May 1. Cottrell protested to this Office on May 14.

Meanwhile, on April 16, the Army readvertised the dredging work under IFB DACW54-79-B-0021. Again, the low bid exceeded the Government estimate by more than 25 percent and all bids were rejected.

A third solicitation for the dredging work was issued. Bid opening was postponed pending disposition of Cottrell's protest with GAO. However, because of the urgent need for the work, the Army decided to negotiate award of the contract pursuant to Defense Acquisition Regulation § 3-215.1. Cottrell and another firm submitted offers of \$244,200 and \$234,800, respectively. Both offers were within 25 percent of the \$232,128 Government estimate for this solicitation. The Army awarded the contract to J.M. Furr Landscaping Contractor, Inc., the low offeror.

The Army argues that the protest to this Office involving the first IFB is untimely because it was not filed within 10 days of notice of initial adverse agency

action concerning the protest to the agency. 4 C.F.R. § 20.2(a) (1979). The Army believes that upon receipt of the second IFB dated April 16, Cottrell should have known that notwithstanding its protest the Corps did not intend to make award under the first IFB, and that in effect its protest to the agency was denied. Therefore, the Army believes, Cottrell's protest filed with this Office on May 14 is untimely.

Notice of cancellation of a solicitation or in appropriate circumstances the issuance of a new solicitation after cancellation of an earlier one may be the basis for protest, beginning the 10-day period for filing the protest. See Strati Systems, B-193061, February 27, 1979, 79-1 CPD 135. Once a protest is filed with the agency, however, the subsequent issuance of a new solicitation may or may not constitute adverse agency action on the protest, depending on the circumstances. On the one hand, the protester, upon receipt of a new solicitation, may have no reason to believe that the agency is further considering the protest. On the other hand, the protester may well be justified in believing the agency is still actively considering the protest and that the new solicitation was issued to cope with the possibility that the protest would be denied. In the latter case, the adverse action will be the agency's opening of bids or consideration of proposals rather than issuance of the solicitation. General Leasing Corporation--Reconsideration, B-193527, March 9, 1979, 79-1 CPD 170; Wakmann Watch Company, Inc., January 28, 1977, B-187335, 77-1 CPD 72.

Here, Cottrell filed a timely initial protest with the procuring agency regarding the validity of the Government estimate and it did not construe the mere issuance of a new solicitation, which reduced the scope of work, as adverse to its objections to the original Government estimate. Under these circumstances, it was not unreasonable for Cottrell to expect prior to bid opening that the the Army would make a more direct response to its specific protest. Indeed, the agency did ultimately respond directly to Cottrell's objection prior

to the second bid opening. Accordingly, we view Cottrell's protest to this Office, filed within 10 days of learning the agency had denied its protest, as timely. Furthermore, Cottrell's protests of the second and third IFBs are based on the cancellation of the first IFB, and therefore are timely also.

Cottrell contends that the Government estimate for the first solicitation was unreasonably low. For the most part, the protester disagrees with the Army's estimated production rates for the various portions of the work. The record shows that the Army carefully reviewed its estimate pursuant to Cottrell's objections, providing reasonable explanations supporting the estimate. For example, the Army states that there is no basis or precedent for Cottrell's allegation that production would be reduced because the work is on a military reservation. The Army believes production should be higher because public activities are reduced and construction can proceed unhindered. Furthermore, the Army defends its production rate of 92 cubic yards per hour as a well-established value for hard digging. It adds that this rate is based on extensive field operations, manufacturers' suggested production rates and the calculated book rate for hard digging.

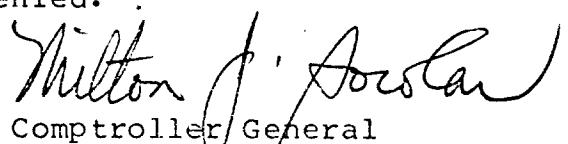
The Army did change its estimate to reflect increases in the time required to transfer the dredge and to construct the dikes. A revised estimate was developed, but Cottrell's low bid still exceeded the awardable range prescribed by 33 U.S.C. § 624. In light of the Army's thorough review and supporting evidence, we cannot say that the revised estimate was unreasonable. Therefore, we view the IFB as properly canceled pursuant to the statute. See OKC Dredging, Inc., B-189507, January 18, 1978, 78-1 CPD 44.

Cottrell also argues that the Army increased its estimate 19 percent over three months in order to make an award. The protester contends that inflation cannot account for that great an increase, and therefore the first estimate must have been incorrect. Cottrell apparently is comparing the estimates for the second

and third IFBs, which actually differed by 22 percent. The Army explains that the estimates for these solicitations cannot be compared because the scope of work was decreased for the second solicitation. The first and third solicitations were identical. The 19 percent increase between the estimates for the first and third solicitations occurred over a period of eight months. The Army states that the increase was not due to correction of errors in the original estimate, but rather that it reflects fuel costs, which increased 100 percent over the eight month period. Furthermore, the Army points out that Cottrell's bid on the third IFB must have provided for these cost increases, and therefore its first bid, at the same price, must have been inflated. We note that Cottrell's bid for the reduced scope of work in the second IFB was over \$40,000 more than its bids for the first and third IFBs. Thus, while we may not be entirely convinced by the Army's arguments, Cottrell's inconsistent bidding does not support its position that its bids were calculated correctly. Accordingly, we cannot say that the Army's position is unreasonable.

Finally, Cottrell contends that despite the 25 percent limitation of 33 U.S.C. § 624, it could have received the award when its bid was only 26.6 percent above the revised estimate. The pertinent regulations provide that a bid that exceeds the Government estimate by more than 25 percent may be accepted if it is determined that the Government estimate is too low and should be corrected. Engineering Regulation 1180-1-1, § 1-372(h) (emphasis added). The Army's corrections of the estimate under this regulation must bring the bid within 25 percent of the revised estimate in order for the bid to be acceptable. The record shows that the Army carefully reevaluated its estimate and we cannot say that the Army was unreasonable in increasing it only to the extent it did. As Cottrell's bid still was not within 25 percent of the estimate, it could not be accepted. Durocher Dock and Dredge, Inc., B-189704, March 29, 1978, 78-1 CPD 241.

The protest is denied.


For the Comptroller General
of the United States