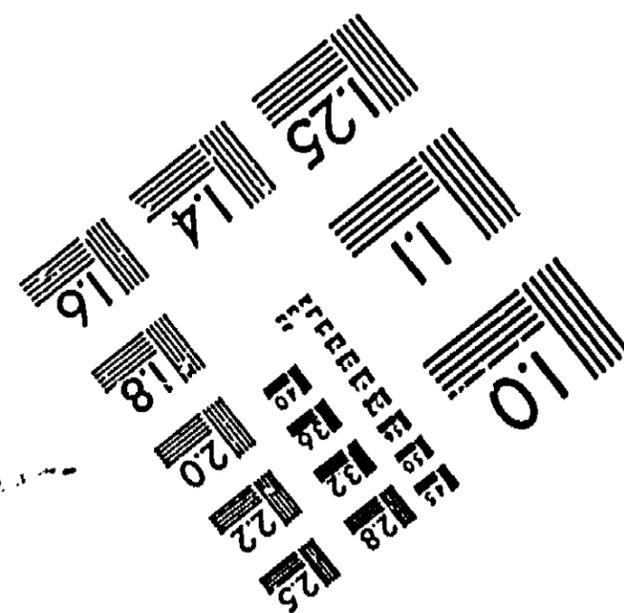
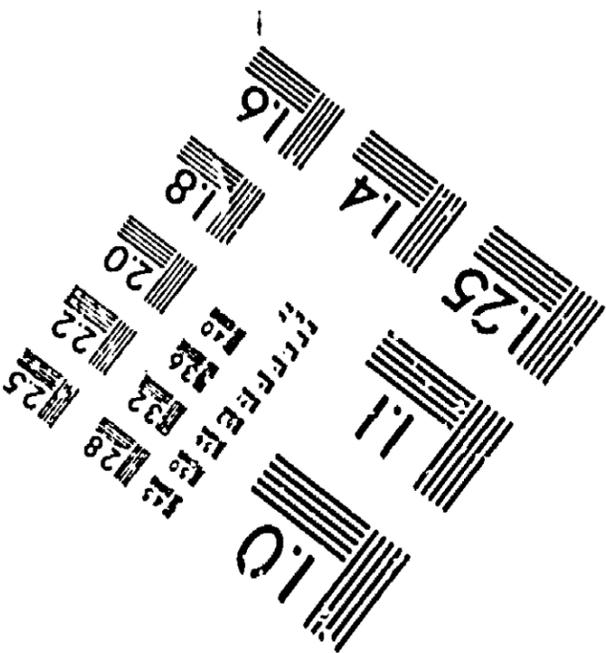
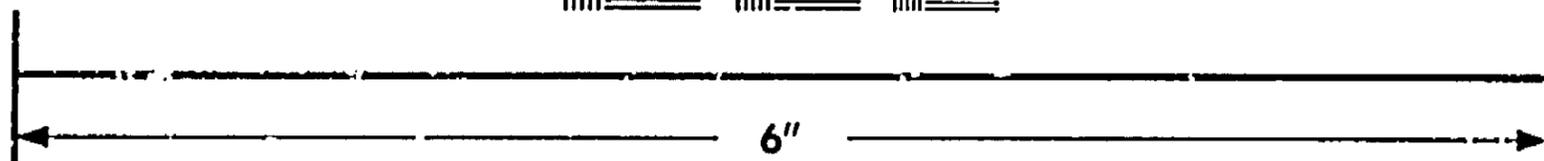
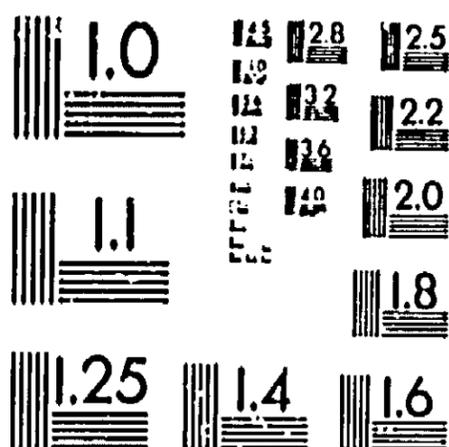


**IMAGE EVALUATION
TEST TARGET (MT-3)**



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118677

DECISION



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

FILE: B-204704.2; B-204704.3; **DATE:** June 4, 1982
B-205374; B-205374.2

MATTER OF:

Moore Service, Inc.; National Environmental
Waste Systems, Inc.; A. J. Fowler Company

DIGEST:

1. Contracting officer improperly canceled solicitation, which requested bids on alternative methods of performing contract and indicated that award would be made to lowest bidder. While contracting officer concluded that award criteria were ambiguous since they did not specify how agency would decide between low bidder on each method, GAO concludes that only reasonable interpretation is that award would be made to low bidder on alternative chosen. Since bidders were on notice that agency would be choosing between alternative methods, award criteria encouraged bidders to bid lowest prices, and all bidders bid on both alternates, no bidder was competitively prejudiced by this method of procurement and, therefore, no compelling reason to cancel existed.
2. Where invitation for bids solicited bids for alternative methods of trash collection, Army may properly award to lowest priced bidder on one method even though protester's bid price on other method is lower. Economic analysis by Army shows that contractual savings gained by awarding to protester will be more than offset by extra-contractual expenditures related to protester's method of trash collection. Though protester argues that Army's economic analysis is faulty, we have no basis to question accuracy of Army's findings.
3. Protest that Army must award trash collection contract on basis of curbside pickup rather than behind quarters pickup alternative called

for in invitation is denied. Army regulation relied upon by protester as support also provides that other than curbside pickup may be used if such method provides economic advantage to Government, and Army's economic analysis shows that behind quarters pickup provides required cost savings to Government. Moreover, Army regulation merely implements Department of Defense directives which do not have force and effect of law and provide no basis to question legality of award.

4. Protest, that invitation is defective because of discrepancy between bid schedule showing requirement for 12 months of particular services and amendment which stated that such services might not be required until 6 months after award, is untimely under section 21.2(b)(1) of our Bid Protest Procedures, because alleged defect was apparent prior to bid opening, but was not filed until after bid opening.
5. Protests alleging that bid of proposed awardee is unbalanced and does not represent lowest cost to the Government are denied. Since damage caused by explosion after bid opening has been repaired and lowest evaluated bid once again appears to represent lowest overall cost to Government, GAO cannot find unreasonable agency's determination that no compelling reason to cancel invitation exists at this time.

Moore Service, Inc. (Moore), National Environmental Waste Systems, Inc. (NEWS), and A. J. Fowler Company (Fowler) have protested under invitation for bids No. DABT31-81-B-0132, issued by the Procurement Division, Fort Leonard Wood, Missouri (Army). The invitation was canceled by the contracting officer because of an apparent ambiguity in the award criteria, and the requirement was resolicited (invitation for bids No. DABT31-82-B-0008).

Fowler protests that there was no ambiguity in the original solicitation and, therefore, it should be reinstated and award made to Fowler. Fowler also protests against alleged defects in the resolicitation.

Moore and NEWS protest that the contracting officer's determination to cancel the original invitation was proper. In the alternative, both Moore and NEWS contend that, if the original invitation is reinstated, Fowler's bid must be rejected as unbalanced.

We agree with Fowler and sustain its protest. The Moore and NEWS protests, therefore, are denied.

Solicitation No. DABT31-81-B-0132, invited bids for collection/disposal of all trash and related services at Fort Leonard Wood from October 1, 1981, or from the date of award, if later, until September 30, 1982, and there are options for 2 additional years. The invitation, as amended, invites bids on 13 separate line items representing various services required under the contract. Line item 0002 calls for collection and disposal of all trash in the family housing area and specifies that "behind quarters pickup" is required. Line item 0016 calls for an alternate bid price for collection and disposal of all trash in the family housing area using "curbside quarters pickup." The invitation states that "The Government reserves the right to determine after bid opening & before award to substitute Item No. 0016 for Item No. 0002." The solicitation also states that award will be made to the bidder whose aggregate total of line item estimated quantities times unit prices for the 3 years is low. Bids were opened on August 27, 1981, and the evaluation revealed that NEWS's bid is low based upon curbside pickup and Fowler's bid is low based upon behind quarters pickup.

On September 10, Moore filed a protest in our Office contending that Fowler's bid is unbalanced. NEWS filed its protest in our Office on September 18 and, in addition to repeating the charge that Fowler's bid is unbalanced, NEWS contends that: (1) the original solicitation is defective because it does not set forth the criteria for determining whether to award a contract based upon curbside pickup or behind quarters pickup; (2) NEWS should be awarded the contract because its curbside bid price is approximately \$76,000 less than Fowler's behind quarters bid price over the 3-year period of the contract plus options; and (3) the Army is required to utilize curbside pickup instead of behind quarters pickup under Army Regulation (AR) 420-47, paragraph 2-4.f (June 9, 1977).

The contracting officer decided, after reviewing the bids and the protests, that the invitation's award criteria were ambiguous because they did not state how the agency would choose between the lowest bid for behind quarters pickup and the lowest bid for curbside pickup. Therefore, on October 13, 1981, the solicitation was canceled. The resolicitation was issued on October 23. Fowler's protest, filed in our Office on November 2, argues that the original invitation should be reinstated and the resolicitation canceled. The Army has reported that it basically agrees with Fowler, desires to reinstate the original solicitation, and proposes to award the contract to Fowler. The Army has extended bid opening under the resolicitation until our Office issues a decision on these protests.

At the outset, we must determine whether the contracting officer's determination to cancel the original invitation was proper. Defense Acquisition Regulation (DAR) § 2-404.1 (Defense Acquisition Circular No. 76-17, September 1, 1978) prohibits cancellation of an invitation for bids once the bids have been opened "unless there is a compelling reason to reject all bids and cancel the invitation." We conclude that no such compelling reason presents itself here.

The solicitation indicated that the Army was considering alternative methods of trash collection-- either behind the family living quarters or at curbside. The bid schedule clearly informed bidders that the Army reserved the right to examine bids received before deciding which method of trash collection it wanted to utilize. Moreover, the invitation included the following provision:

"10. AWARD OF A CONTRACT

"(a) The contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered.

* * * * *

"(c) The Government may accept any item or group of items of any offer * * *."

Thus, in addition to awarding to the lowest priced bidder for the aggregate 3-year period, the Army put all bidders on notice that: (1) it would be choosing the method which would be used by the contractor and (2) "other factors" would affect the award decision.

We conclude that the solicitation was not ambiguous as to how the awardee would be selected. Since only line items 0002 (behind quarters) and 0016 (curbside) differed, it should have been clear to bidders that bid prices were contemplated for alternate methods of doing the same work. We find that the only reasonable interpretation of the solicitation clauses is that the low bidder on the methodology chosen would be awarded the contract. We have consistently stated that, "Requirements that contracts for public work be let to the lowest bidder are not violated when specifications are drawn for different work, bids are sought on different bases, and a choice is not made by the contracting officials until after all the bids are opened." See H. M. Byars Construction Company, 54 Comp. Gen. 320 (1974), 74-2 CPD 233; B-157227, Aug. 18, 1965; B-148333, April 9, 1962.

Since all bidders were put on notice that the Army was considering alternate approaches, the award criteria encouraged all bidders to bid their lowest prices in order to receive the contract and, in fact, all bidders bid on both alternates, we fail to see how any bidder was competitively prejudiced by this method of procurement. Certainly, no evidence has been presented to show that any of the protesters bid other than their best prices on either alternate. Therefore, we find that all bidders were treated equally in this procurement and conclude that the cancellation was improper.

We are not convinced by NEWS's argument that the Army should be required to award the contract to it on the basis of curbside pickup. The Army report on this protest shows that, even though curbside collection would represent a contractual savings of approximately \$76,000 over the 3-year period covered by this contract if the options are awarded, such savings are more than offset by other costs the Army would incur. The Army relies upon an economic analysis performed by technical personnel at Fort Leonard Wood in 1979 which showed that curbside collection would result in an expenditure

of approximately \$495,000 more than behind quarters collection in the first year alone. These extra-contractual expenses represent, among other things, expenditures for hand trucks, sidewalks, and pickup pads. The Army still considers this analysis to be valid.

NEWS contends that the Army's analysis is grossly distorted because it includes expenditures for many unnecessary items, including those mentioned above. In this connection, we find that the protester has not carried its burden of proving its case. All that has been presented is the protester's opinion, which is not sufficient to overcome the agency's technical personnel's opinion of the agency's needs. Moreover, we have no basis for questioning the accuracy of the Army's economic analysis and find that the contracting officer's reliance on the technical advisor's analysis was reasonable. See ACMAT Corporation, B-197589, March 18, 1981, 81-1 CPD 206. Furthermore, we have held that award to other than the lowest priced bidder is permissible where the invitation has requested bids on alternate approaches to a requirement as long as award is made to that bidder which offered the lowest price for the particular alternate chosen by the agency. H. M. Byars Construction Company, supra; B-157227, supra; B-148333, supra; B-141127, December 4, 1959.

However, we see no reason why bidders could not have been advised in the solicitation of the price differential that would be considered in evaluating the alternatives for award selection. This would have permitted bidders to make an intelligent choice in bidding between curbside pickup and behind quarters pickup. By letter of today, we are recommending to the Secretary of the Army that such action be taken in the future.

NEWS also argues that the award must be made on the curbside pickup alternate because that method is mandated by AR § 420-47, paragraph 2-4.f. Even though the cited regulation expresses a preference for curbside pickup, we note that the regulation provides that other than curbside pickup may be used by an agency if a cost advantage will thereby accrue to the Government. As discussed above, the Army has determined that behind quarters pickup represents economic advantages and the

agency has performed the required economic analysis to support its determination. Moreover, the regulation cited by the protester merely implements Department of Defense directives which do not have the force and effect of law. Thus, it provides no basis for our Office to question the legality of an award. Timeplex, Inc., et al., B-197346, B-197346.2, B-197346.4, April 13, 1981, 81-1 CPD 280.

The final protest issue concerns whether Fowler's bid should be rejected because it is unbalanced. The invitation required bids for 13 separate line items. Item 0001 was for collection/disposal of trash in the cantonment area and item 0002 was for collection/disposal of trash in the family housing area. Fowler bid a monthly price of \$30,284.60 for each of these line items. However, Fowler inserted the word "Free" for line items 0003 through 0013, which represent related services. The protesters contend that Fowler has included fees for performing items 0003 through 0013 in its prices for the first two items. Of particular concern is line item 0013, which requires operation of the tipping floor at the heat recovery plant for 12 months, 7 days per week, 24 hours per day. The heat recovery plant exploded on September 24, 1981, and was not back in operating condition until March 15, 1982. The protesters argue that, if the contract was awarded to Fowler while the heat recovery plant was not operating, Fowler would be paid under items 0001 or 0002 for work it did not perform under item 0013.

Moore's total evaluated bid price for behind quarters pickup is only about \$8,430 more than Fowler's total bid price over the 3-year period. Moore bid a price of \$9,100 per month for operating the tipping floor. If the eventual contractor does not have to operate the tipping floor for any length of time, the Government will not have to pay Moore for the work not done, but will have to pay Fowler. From the above figures, it is clear that even 1 month of nonperformance under item 0013 would result in Moore's bid representing the lowest actual cost to the Government. The protesters also point out that amendment No. 0002, issued August 13, 1981, contained a statement to the effect that no payment would be made on item 0013 until the heat recovery plant was operating and bidders were put on notice that this might not occur until 6 months after the start of the contract period. Accordingly, the protesters contend that Fowler's bid is unbalanced in that it does not necessarily represent the lowest actual cost to the Government.

Insofar as the protests are interpreted as charging that the invitation is defective because of the discrepancy between the bid schedule which indicated that the tipping floor service would be required for 12 months and the amendment which stated that tipping floor services might not be required until 6 months after the award of the contract, the protests are untimely. This alleged defect was apparent from the solicitation prior to bid opening and, therefore, had to be filed before bid opening in order to be considered under section 21.2(b)(1) of our Bid Protest Procedures. H. M. Byars Construction Company, supra. Accordingly, we will not consider this issue on its merits.

As to the contention that Fowler's bid is unbalanced and does not represent the lowest cost, we note that the invitation for bids does not contain any clause prohibiting unbalanced bidding. However, as noted above, the invitation did contain a detailed award clause stating how the low bidder would be determined. Under this clause, Fowler was evaluated low and in line for award. Therefore, if Fowler were determined not to represent the ultimate lowest cost to the Government, it would bring into question either the award clause or the estimated quantities in the invitation and cancellation would be the proper action in these circumstances.

The Army states that it expected the heat recovery plant to be fully operational by October 1--the date performance was to begin at the earliest. The Army's expectation was reasonable at the time of bid opening since construction of the heat recovery plant was completed in September. Once the unexpected explosion destroyed the heat recovery plant and it appeared that award to Fowler would not represent the lowest overall cost to the Government, the Army could have canceled the invitation for bids. However, since the heat recovery plant has been fully repaired and Fowler's bid once again appears to represent the lowest ultimate cost to the Government, we cannot find unreasonable the Army's determination that no compelling reason to cancel exists at this time.

For the above reasons, we agree with the Army that solicitation No. DABT31-81-B-0132 may properly be reinstated and that award may be made to Fowler if otherwise

B-204704.2, et al.

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acceptable to the Army. Since bids have not yet been opened under solicitation No. DABT31-82-B-0008, we hold that it should be canceled and need not decide Fowler's protest that it contains ambiguities.

for *Milton J. Fowler*
Comptroller General
of the United States

LEND