

**DECISION**

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

MARIS  
23554

**FILE:** B-207218; B-207218.2 **DATE:** November 9, 1982

**MATTER OF:** American Shipbuilding Company

**DIGEST:**

1. Where "contingency" items (those items for which a need was anticipated but could not be finally determined until after work had begun) were not given lower priority than "definite" items under the RFP in the event that insufficient funds were available for award of both, the contracting agency properly included the evaluated cost of contingency items in its determination that sufficient funds were not available.
2. An agency's issuance of a new solicitation for requirements covered by an earlier solicitation which was canceled after bid opening is proper, and the agency is not required to reinstate the canceled solicitation, where there has been a significant change in its needs since the time of the cancellation.
3. An impermissible auction situation is not created by a cancellation and resolicitation after bid opening where these actions are in accordance with the governing legal requirements.

American Shipbuilding Company (Amship) protests the award of a contract to Bay Shipbuilding Corporation by the United States Coast Guard under invitation for bids (IFB) No. DTCG30-82-B-05082. We deny the protest.

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### Background

Amship's protest arises out of the cancellation of IFB No. DTCG30-81-B-05131 dated July 27, 1981, which had solicited bids for drydocking and repairs to the United States Coast Guard cutter "Mackinaw." The Government cost estimate for the procurement was \$5,500,000. Of that amount, \$3,500,000 related to a requirement for renovation of living space. Bids were solicited on a line item basis, and of the 50 separate line items contained in the IFB, 32 were part of the living space renovation requirement.

Bid opening took place on September 22, 1981. Amship and Bay were the only bidders; Amship submitted the low bid. However, the Coast Guard determined that sufficient funds were not available to cover the cost of the procurement, and the IFB was canceled on October 21, 1981.

On January 21, 1982, the Coast Guard announced that the "Mackinaw" would be decommissioned. This decision was later reversed, and the "Mackinaw" was retained in active service, but with a greatly reduced crew. Consequently, a new IFB was issued on April 27, 1982 for drydocking and repairs to the "Mackinaw." Due to the crew reduction, the requirement for renovation of living space was eliminated, as were several other items of work. In addition, several new items of work were added, and some definite requirements of the original IFB were made optional.

Amship learned of the Coast Guard's intent to issue a new IFB, and on March 31, 1982, filed a protest with the contracting officer, arguing that the agency was required to reinstate the 1981 IFB and make an award to Amship under it. This protest was denied because the agency believed the changes in its requirements required issuance of a new IFB. On April 21, 1982, Amship filed its protest here, and subsequently also protested both actual issuance of the IFB and the award to Bay, which was made on June 7, 1982. (Bay submitted the low bid; Amship was the only other bidder.)

On June 8, 1982, Amship filed suit in the United States District Court for the District of Columbia (Civil Action No. 82-1578), seeking declaratory and injunctive relief. Subsequently, Amship withdrew its motion for a declaratory judgment and the court denied Amship's request for a preliminary injunction. The court's order stated that nothing therein was intended to deter this Office from proceeding with a resolution of the protest.

Cancellation of 1981 IFB

Amship argues in part that the 1981 IFB should have been reinstated because it was improperly canceled at the outset. Amship contends that the Coast Guard did not in fact lack sufficient funds to award it the contract after bid opening because it had \$5,450,000 available and Amship's bid on the definite items was \$5,349,000.

Amship argues that its bid was only in excess of the available funds when certain "contingency" and optional items were added to its prices for the definite items. Amship asserts that it was improper for the Coast Guard to make a determination of insufficient funds on this basis because the IFB gave the definite items priority status, and funds were available for award to Amship on those items.

The record shows that Amship's bid on the "contingency" items was \$605,397. Therefore, even without regard to any optional items, the protester's bid on the definite items plus contingency items was well in excess of the available funds. The IFB defined contingency items as:

"[I]tems of work of such nature that definite need or amount cannot be determined until the vessel is drydocked or other work is accomplished. For bid (offer) evaluation purposes the price quoted in the bid (offer) for each contingency item shall be multiplied by a usage factor which appears opposite each contingency item in the attached \* \* \* schedule. \* \* \* The usage factor is the Coast Guard's estimate of the probability that \* \* \* the work will be required."

Thus, contingency items were items which the agency anticipated it was likely to need, but could make no final determination on until after the ship was drydocked. The possibility that a need for any given item might not in fact arise was accounted for in the evaluation of bids by application of a "usage factor" which reflected the probability that the item would actually be required.

Nothing in the IFB suggests that the Coast Guard considered these contingency items as lower priority needs than those items it could express in terms of definite requirements. Nor did the IFB provide that if funds were not available for both, award would be made for only the

definite items. (In contrast, the IFB described optional items, as those which would be awarded if sufficient funds were available.) Therefore, we find no support for the proposition that the evaluated cost of contingency items could not properly be included in the agency's determination concerning the sufficiency of available funds.

Further, we note that an agency is not required to award a contract for less than the total requirements advertised where there are insufficient funds available for the total quantity. See Genco Tool and Engineering Co., B-204852, March 1, 1982, 82-1 CPD 175. Rather, any such decision is one for the agency's judgment in managing its internal funds. Id.

#### Issuance of 1982 IFB

Amship asserts that rather than issuing a new IFB, the Coast Guard should have reinstated the 1981 IFB and awarded the contract to it since it was the low bidder under that solicitation and sufficient funds are now available. It argues that the issuance of a new IFB created an auction situation since its bid on the first IFB had been exposed. Amship also contends that with the exception of the renovation of living space requirement, the 1982 IFB was virtually identical to the 1981 IFB.

We are not persuaded by Amship's contention that the 1981 IFB should have been reinstated because the Coast Guard now has funds available for repair of the "Mackinaw." Amship cites Spickard Enterprises, Inc.; Cottrell Engineering Corporation, 54 Comp. Gen. 145 (1974), 74-2 CPD 121, in support of this argument, but we do not consider it dispositive.

In Spickard the solicitation was canceled after bid opening because Spickard's low responsive bid exceeded the funds available for the project. Subsequently, additional funds were found which brought Spickard's bid within the available funding. In light of the possible prejudice that accrues to a low bidder when a solicitation is canceled after bid opening, we held that the solicitation should be reinstated and award made to Spickard because award under the original solicitation would meet the actual needs of the Government and would not prejudice any other bidder.

Here, no additional funds became available after the cancellation of the 1981 IFB which would bring Amship's bid under that IFB within the available funding. Instead, due to subsequent changes in the agency's needs, certain requirements contained in the IFB were no longer necessary, and the cost of the procurement was very significantly reduced as a result. In addition, other requirements were added. Thus, it is clear that an award under the 1981 IFB would not serve the Coast Guard's actual needs.

Amship argues that award should nevertheless be made under the 1981 IFB because any necessary contract modifications could be made under the "Changes" clause of the contract after award. We do not agree.

The "Changes" clause is utilized when subsequent to award of a Government contract, changes in the terms of the agreement become necessary. Praxis Assurance Venture, B-190200, March 15, 1978, 78-1 CPD 203. The clause, however, should not be used for changes which are known to be needed before the award is made. Rather, the competition held for the award of a Government contract must be for the work actually anticipated to be performed, A&J Manufacturing Company, 53 Comp. Gen. 838 (1974), 74-1 CPD 240, and the Government is not permitted to award a contract with the intention of significantly modifying it after award. Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91. Therefore, we find no merit to Amship's argument.

We also disagree with Amship's contention that the changes reflected in the 1982 IFB are insignificant. As we have previously indicated, a number of deletions, additions and modifications to the 1981 IFB requirements would be necessary to reflect the Coast Guard's current needs. Further, the estimated cost of the deleted renovation of living space requirement alone was nearly two-thirds of the total estimated cost of the 1981 procurement.

Amship argues that the cost of the canceled requirement should not be considered indicative of its significance. The protester notes that its own bids for those items which were contained in the 1981 IFB and remained in the 1982 IFB were identical notwithstanding the two-thirds reduction in the scope of the contract. Nevertheless, in our view, the elimination of a large dollar value requirement, such as the one for renovation of living space here, at least potentially affects how an offeror would calculate its bid for the remaining work. Consequently,

contrary to Amship's suggestion, we do not believe the Coast Guard could fairly assume that the only changes in a bidder's price would be dollar for dollar price reductions which would have no effect on the outcome of the competition.

In that connection, we have held that an agency should resolicit, rather than negotiate changes in a contract after award, where there is a reduction in work scope which could have an effect on the outcome of the competition. Praxis Venture Assurance, supra. We think the facts present in this case bring it within that rule.

Amship also suggests that the Coast Guard could have reinstated the 1981 IFB and used paragraph 10(c) of Standard Form 33A (Solicitation Instructions and Conditions), which was incorporated by reference into the IFB, to make an award only for those items of work which the agency still needs. This would have left only the five new items added to the 1982 IFB for negotiation under the "Changes" clause, and Amship points out that their total dollar value amounts to only \$35,000. Paragraph 10(c) provides as follows:

"The Government may accept any item or group of items of any offer, unless the offeror qualifies his offer by specific limitations. \* \* \*"

The solicitation, however, also provided at Paragraph 6.1A of the Schedule that definite items (which included the renovation of living space requirement) were those items which would be awarded if there was an award at all. The Coast Guard asserts that this required it to award all the definite items if it made any award, and that it therefore could not use Paragraph 10(c) as Amship suggests. In that regard, Standard Form 33A provides at Paragraph 19 that in the event of an inconsistency between solicitation provisions, the Schedule language will prevail over that of the Solicitation Instructions and Conditions.

Amship argues that Paragraph 6.1A applies only to bid evaluation and does not provide any standards for establishing which items will actually be awarded.

The protester notes that the paragraph appears under the heading "Bid Evaluation" and also states that for bid evaluation purposes, each definite item will be evaluated using the unadjusted price quoted for that item. Nonetheless, the language on which the Coast Guard relies specifically concerns the award of the definite items, and in our view, clearly provides that award of those items will be in the aggregate. We therefore concur in the Coast Guard's conclusion that paragraph 10(c) was not for application here.

Finally, we find no merit to Amship's assertion that the Coast Guard's refusal to reinstate the 1981 solicitation created an impermissible auction situation. We consider the Coast Guard's position to be entirely proper in the circumstances of this case. An impermissible auction atmosphere is not created by cancellation and resolicitation after bid opening where these actions are in accordance with the governing legal requirements. See Arlandria Construction Co., Inc., B-195044, B-195510, April 21, 1980, 80-1 CPD 276.

#### Other Issues

Amship contends that the actions of the Coast Guard in the face of its protest have been arbitrary and capricious. Specifically, Amship points to the Coast Guard's decision to award the contract notwithstanding that its protest was pending before GAO. Amship also states that it has been unable to determine "where its avenue of redress lies" since the Coast Guard Commandant ordered cancellation of the 1981 solicitation, but the contracting officer asserts that the decision to cancel and resolicit was a discretionary one which rested with him.

Concerning the award in face of the protest, Amship specifically questions the propriety of the "urgency" justification used by the agency. In Amship's opinion, the Coast Guard created the urgency by not resolving the protest earlier.

Since the contracting officer denied Amship's protest within 3 weeks after it was filed with him, Amship apparently means that he should have promptly resolved the matter by reinstating the 1981 solicitation and making an award to Amship. We have found the contracting officer's decision not to do so proper and therefore do not find any arbitrary and capricious action therein.

Amship also states that since the Coast Guard made no indication of any urgency during the nine months between the cancellation of the 1981 solicitation and the award under the 1982 solicitation, it had no legitimate basis for suddenly concluding that time was of the essence. The Coast Guard fully documented the basis for its decision in a letter to this Office dated June 4, 1982. Essentially, it stated that if contract award were further delayed, the Coast Guard would be unable to meet its ice-breaking commitments on the Great Lakes beginning in mid-December 1982. The agency stated that the "Mackinaw" is the only ice-breaking vessel currently on the Great Lakes. Amship has not disputed the accuracy of the Coast Guard's statements, and consequently we have no basis to question the urgency determination.

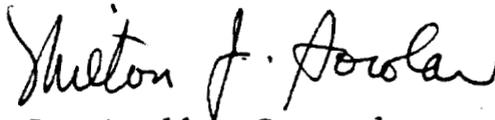
Concerning Amship's contention that it was unable to determine where its avenue of redress lay, we find no inconsistency in the contracting officer's assertion that the Federal Procurement Regulations give him discretion to cancel and resolicit, and the fact that in this case, he exercised that discretion at the direction of the Commandant.

#### Claim for Bid Preparation Costs

Amship also requests reimbursement for the costs of preparing its bid. In light of our conclusion that there was no impropriety in the Coast Guard's actions, we find no basis on which to sustain this claim. See Lanier Business Products, Inc., B-203977, February 23, 1982, 82-1 CPD 159.

Conclusion

Amship's protest is denied. Its claim for bid preparation cost is also denied.

*for*   
Comptroller General  
of the United States