

PL-2  
Pagan  
119995

**DECISION**



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

**FILE:** B-208164

**DATE:** November 29, 1982

**MATTER OF:** R. S. Bowers Construction Company

**DIGEST:**

1. Contracting officer's cancellation of an IFB for a construction project because the bids received were excessive, and the subsequent negotiation of the contract, were proper, since the low bid exceeded the Government estimate by 34 percent and substantially exceeded available funds. Also, participation in the follow-on negotiated procurement need not be limited to participants in the advertised procurement.
2. Contracting officer's informal request by telephone for submission of final price proposals by "about 3:30 to 4:00 p.m." implied an approximate time period for submission of offers and did not establish a firm closing time for receipt of proposals, so that an offer submitted at 4:05 p.m. was timely.
3. Contracting officer's signing of a contract constitutes an affirmative determination of responsibility, which GAO will not review in the absence of a showing of fraud on the part of procuring officials or an allegation of the failure to apply definitive responsibility criteria.

R. S. Bowers Construction Company protests the award of a contract by the Forest Service, Department of Agriculture, to Ron McCain, Inc. and Dean L. Scott, a joint venture (McCain), for the construction of maintenance and administration buildings at Thorne Bay, Alaska. Bowers objects to the contracting officer's decision to cancel the original invitation for bids (IFB No. R10-82-12) for this project and to

negotiate the procurement, after determining that the bid prices received were excessive. Bowers also states that it submitted the low negotiated price within the time period specified by the contracting officer under the resolicitation (RFP No. R10-82-72) and should have received the award. Finally, Bowers objects to the contracting officer's determination that McCain is a responsible business concern. We deny the protest in part and dismiss it in part.

The IFB, which included five lump sum bid items and two deductive bid items, contained the following provision:

"DETERMINATION OF LOW BID AND BASIS OF AWARD

"The Government contemplates making award for the total project if sufficient funding is available. The Contracting Officer, prior to the opening of bids, shall determine and record in the contract file the amount of funds available for the project. The amount so recorded shall be controlling for determining the low bidder.

"DEDUCTIVE ITEMS

"The low bidder for purposes of award shall be that conforming responsible bidder offering the low aggregate amount for the Total Bid [the five lump sum bid items] Inclusive, minus \* \* \* only those deductive bid items \* \* \* required to allow for award to be made within the funds determined by the Government to be available before bids are opened. \* \* \*

On June 28, 1982, bid opening day, the contracting officer announced that funds in the amount of \$1,847,000 were available for the project. Six bids were received. The following chart indicates the two lowest bids and the Government estimate:

<u>Bidder</u>	<u>Total Bid</u>	<u>Deductive Bid Items</u>	<u>Bid Less Deductive Items</u>
R. S. Bowers	\$2,717,000.00	\$268,000.00	\$2,449,000.00
Northwestern	2,775,500.00	345,000.00	2,430,500.00
Government estimate	2,117,778.69	306,535.69	1,811,243.00

The two lowest net bids exceeded the Government estimate by more than 34 percent, and also substantially exceeded the available funding of \$1,847,000. The contracting officer decided that the bids therefore were unreasonable. The contracting officer then requested and was granted authority from the Forest Service's Washington, D.C. office to undertake negotiations pursuant to Federal Procurement Regulations (FPR) § 1-3.214 (1964 ed.), which permits negotiation after formal advertising if the bid prices received are unreasonable.

On June 29, the contracting officer advised each of the six bidders by telephone that the bids for the project were excessive, that the bids were rejected, and that negotiations were now being conducted for the award of the contract. The contracting officer further advised the bidders that the specifications for the project would remain unchanged and that award was to be made for the total project. Three of the six bidders did not express further interest in the procurement.

On June 30, McCain, a contractor which had not participated in the initial competition, requested information from the contracting officer concerning the results of the bidding and volunteered to submit an offer under the negotiated resolicitation. The contracting officer informed McCain that he would consider such an offer if McCain submitted its proposal by "about 3:30 to 4:00 p.m." that same day.

Proposals submitted pursuant to negotiations were in the following amounts:

<u>Firm</u>	<u>Final Offer</u>
McCain	\$2,107,000
R.S. Bowers	2,646,005
Northwestern	2,692,500

The contracting officer awarded the contract to McCain on June 30, and the unsuccessful offerors were so advised on the following day. (While additional funds were apparently secured after the cancellation to permit award to McCain, the contracting officer states that sufficient funds were never available to make award at Bowers' offered price.)

Determination to cancel the IFB and negotiate

Bowers protests that the cancellation of the IFB and the subsequent award after negotiation to a firm that was not involved in the formally advertised competition were improper. We disagree.

Initially, we point out that participation in a follow-on negotiated procurement is not restricted to those firms that bid on the advertised solicitation. In fact, FPR § 1-3.214(b)(2) provides that the lowest negotiated price received after formal advertising is the lowest negotiated price from "any responsible supplier." See Primeco, Inc., B-195998, January 15, 1980, 80-1 CPD 45. Further, there is no question concerning the Forest Service's authority to cancel an IFB if the bid prices are unreasonable and to negotiate. The regulations state that an invitation for bids may be canceled after opening but prior to award when "all otherwise acceptable bids received are at unreasonable prices," FPR § 1-2.404-1(b)(5), and permit negotiation without formal advertising if the bid prices after advertising are not reasonable, FPR § 1-3.214. Also, section 10(b) of Standard Form 22, which was included in the IFB, provides that "The Government may, when in its interest, reject any or all bids \* \* \*."

Regarding the propriety of the cancellation, as previously mentioned, the low bid under the IFB was 34 percent above the Government estimate. We have upheld the rejection of bids and subsequent negotiation of a contract where the low eligible bid exceeded the Government's estimate by only 17 percent. C. J. Coakley Company, Inc., B-181057, July 23, 1974, 74-2 CPD 51. Also, all bids received exceeded the total available funding for the project. We have also recognized the propriety of a cancellation of an IFB because of the lack of sufficient funds. See Somers Construction Company, Inc.--Reconsideration, B-193929, July 24, 1979, 79-2 CPD 54.

Bowers suggests it nonetheless is inconsistent to find a bid of \$2,717,000 unreasonable where an invitation itself indicates an "Estimated Price Range" of \$1,000,000 - \$3,000,000 for the project. As pointed out by the Forest Service, however, publication of an estimated price range is not intended to disclose the Government's official estimate or to relieve bidders of the responsibility to prepare their own independent bids. Instead, the purpose of supplying bidders a price range is merely to supply information concerning the relative magnitude of construction projects. See Scott Glass, Inc. - Reconsideration, B-185864, August 17, 1976, 76-2 CPD 164; FPR § 1-18.109. Therefore, unlike a Government estimate, an estimated price range is merely informational, and does not indicate that bids within the range necessarily will be found reasonable. The protester's reliance on the estimated price range as an indicator of the reasonableness of its bid simply is misplaced.

Under the circumstances, we see no basis to question the determination of the contracting officer to reject all bids and to negotiate.

#### Consideration of McCain's "late" offer

The protester also argues that it submitted the lowest negotiated price under the resolicitation "in the time period specified by the contracting officer," and therefore should have received the award. As stated previously, the contracting officer had advised McCain on June 30 that its price proposal would be considered if submitted by "about 3:30 to 4:00 p.m." Bowers, however, contends that it was advised that it had until 4:00 p.m. precisely to submit its offer. McCain, with the low negotiated price of \$2,107,000, submitted its proposal by telephone at 4:05 p.m. on June 30, and followed it with a confirming telegram.

Despite Bowers' assertion that it was given only until exactly 4:00 p.m. on June 30 to submit its offer, the contracting officer's record of his telephone requests for proposals from the bidders under the canceled IFB indicates that he gave them the same time frame for proposal submission that he gave McCain: "about 3:30 to 4:00 p.m." Where there is a dispute of fact such as this, we are constrained to accept the agency's version, since the protester has the burden to prove its case. Line Fast Corporation, B-205483, April 26, 1982, 82-1 CPD 382.

Moreover, we do not believe the contracting officer's request for submission of offers by "about 3:30 to 4:00 p.m." reasonably can be construed as establishing a firm closing time--4:00 p.m.--for receipt of proposals. Rather, the record shows that the contracting officer, in attempting to complete the procurement informally and expeditiously, essentially was indicating to offerors when he anticipated making award, namely, the afternoon of June 30, and that he did not intend by indicating a general time frame to preclude consideration of any proposals received before award. (The contract was awarded at 4:20 p.m.) Thus, we do not believe that consideration of McCain's offer of 4:05 p.m. constituted acceptance of a late offer.

We do point out, however, that as a general matter offerors indeed should be given a precise time by which the field of competition is to be defined. See Harris Corporation, PRE Electronics Division, B-209154, October 13, 1982, 82-2 CPD \_\_\_\_. Nonetheless, no firm here was prejudiced by the use of an approximate time frame, since we conclude that all competitors were given the same advice in that regard.

#### McCain's responsibility

Finally, Bowers argues that the contracting officer could not have made an appropriate determination of McCain's responsibility within the short time available between receipt of McCain's offer and the award of the contract. The contracting officer's signing of a contract with McCain, however, constituted an affirmative determination of McCain's responsibility. FPR § 1-1.1204-1(a). That is, the contracting officer evidently decided that he knew enough about McCain to be satisfied that the joint venture could perform at the contract price. Our Office does not review such determinations in the absence of a showing of fraud on the part of procuring officials or an allegation of failure to apply definitive responsibility criteria. Global Crane Institute, B-204555, September 18, 1981, 81-2 CPD 226. Neither is present here, and we therefore dismiss this basis for protest.

The protest is denied in part and dismissed in part.

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