

**DECISION**

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

*LEGAL*  
*2-4-83*

**FILE:** B-208189

**DATE:** January 17, 1983

**MATTER OF:** Twehous Excavating Company, Inc.

**DIGEST:**

1. Although contracting officer has broad discretion to cancel a solicitation, because of the potential adverse impact on the competitive system of canceling an invitation for bids after bid opening, regulations require a compelling reason for such action.
2. Fact that some terms of invitation for bids are in some way deficient does not, of itself, constitute a compelling reason to cancel. Contracting officer must consider whether other bidders would be prejudiced by an award under the solicitation and whether Government's needs would be met if the award were made.
3. When solicitation sets forth complete evaluation scheme, accurately reflects agency's intentions, and does not mislead any bidders, the fact that precise calculation needed to evaluate bid prices for one of 32 line items--or the need for such a calculation--was not explicitly pointed out is not a solicitation deficiency.
4. When bidder completes item intended by agency to be used in determining responsibility by listing make and model of equipment to be used other than that specified as acceptable, agency cannot ignore this information since it renders bid nonresponsive.

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5. On resolicitation, when number of bidders is reduced from 12 to 4, and two previously lowest bidders have changed their prices, auction situation has been created and integrity of the competitive system has been undermined by unnecessary cancellation of invitation for bids.

Twehous Excavating Company, Inc. protests the Department of Agriculture's cancellation of invitation for bids No. SCS-4-MO-82, covering reconstruction of an abandoned mine site in Randolph County, Missouri. The agency's Soil Conservation Service (SCS) justified the cancellation after bid opening on grounds that its intended method of evaluation was not clear to bidders and, during development of the protest, awarded a contract to Magruder Construction Company under a revised solicitation.

Because we find that award should have been made under the canceled solicitation, we sustain the protest.

The Canceled Solicitation:

The solicitation, issued April 22 with an opening date of May 27, 1982, called for prices on 32 line items, including mobilization, labor, materials, and rental of various types of equipment that would be used by the contractor under supervision of the Government's project engineer. One award was to be made to the bidder with the lowest total evaluated price.

For equipment items, bidders were to list hourly rates for different classes--defined by net engine horsepower--of crawler tractors and self-propelled scrapers. Some items indicated that more than one class of equipment would be acceptable; for these, the bid schedule showed the number of hours SCS estimated would be required to perform the contract with the smallest class of equipment and established evaluation

factors that would be used to compare prices for larger, more efficient equipment. For crawler tractors, these were as follows:

<u>Tractor Class</u>	<u>Net Engine Horsepower</u>	<u>Evaluation Factor</u>
I	100 - 150	1.0
II	151 - 200	1.4
III	201 - 300	2.0
IV	over 300	2.7

The agency report illustrates application of these factors to an hypothetical line item for which only a Class I, II, or III (but not Class IV) tractor is acceptable, with Class I to be used for an estimated 1,000 hours:

<u>Bidder</u>	<u>Tractor Class</u>	<u>Hourly Rate</u>	<u>Evaluated Price</u>
A	I	\$40	\$40,000
B	II	\$60	\$42,857 (\$60,000 ÷ 1.4)
C	III	\$79	\$39,500 (\$79,000 ÷ 2)

Bidder C is the apparent low bidder for this item and, as SCS points out, a bidder offering a Class IV tractor would be nonresponsive.

On a separate schedule, bidders were to identify the manufacturer, model number, serial number, and year of the equipment offered for each line item. (A solicitation amendment also required bidders to indicate the class of equipment offered for each item; however, since no bidder actually provided this information, SCS determined it from the make and model listed.)

#### Evaluation of Bids:

Twelve bidders responded to the canceled solicitation. Magruder was apparent low bidder at \$347,550, with Twehous second-low at \$392,491.50. Three higher bids were declared nonresponsive, two for reasons not related to equipment and a third, Ozark Contractors, because it listed equipment other than the class specified for certain items.

SCS's justification for canceling the invitation after opening relates to application of evaluation factors to the remaining bids. For items specifying only one class of equipment, hourly rates were simply

extended. For items specifying more than one class, SCS states that in some cases (for example, Items 28 and 29, which called for Class I, II, III, or IV scrapers) the evaluation factors worked well. However, for item 27, which called for a Class III or IV tractor, SCS points out that bid prices could not be compared directly. Given the 740 hours shown in the solicitation as required for a Class III tractor (the smallest acceptable class for this item), it was necessary to calculate the number of hours that would be required for a Class I tractor before evaluating a bid for a Class IV tractor. Since Class III equipment, as indicated by the evaluation factors, was considered twice as efficient as Class I equipment, the agency calculated as follows:

$$\begin{aligned} 740 \text{ hours} \times 2 &= 1,480 \text{ hours (Class I)} \\ 1,480 \text{ hours} \div 2.7 &= 548 \text{ hours (Class IV)} \end{aligned}$$

Once this calculation was made, SCS could compare the extended hourly rate for a Class III tractor with that for a Class IV tractor.

Because these steps were not fully described in the solicitation, the contracting officer determined that cancellation was justified even though bid prices had been exposed.

GAO Analysis:

We disagree with this determination. Although a contracting officer has broad discretion in canceling an invitation for bids, because of the potential adverse impact on the competitive system of such action, after bid opening a compelling reason is required. Federal Procurement Regulations § 1-2.404-1 (1964 ed.). The fact that some terms of an invitation are in some way deficient does not, of itself, constitute a compelling reason to cancel. Our Office generally regards cancellation after opening as inappropriate when other bidders would not be prejudiced by an award under the ostensibly deficient solicitation, Hild Floor Machine Co., B-196419, February 19, 1980, 80-1 CPD 140, and when such an award would serve the actual needs of the Government. GAF Corporation et al., 53 Comp. Gen. 586 (1974), 74-1 CPD 68. See also MAC Services, Ltd., 61 Comp. Gen. 205 (1982), 82-1 CPD 46.

Here, prices for Class III and IV tractors under Item 27 could not be compared directly. However, it was apparent from the solicitation that all prices were to be evaluated according to the size and efficiency of the equipment offered. While obviously SCS would have had to make a simple mathematical calculation in order to evaluate bid prices for Item 27, the fact that the calculation--or the need for it--was not explicitly pointed out is not, in our view, a solicitation deficiency. The complete evaluation scheme was set forth, it accurately reflected what the agency intended to do, and insofar as the record indicates, it misled no one.

Moreover, even if it could be argued that the evaluation section was deficient, we would see no prejudice to any bidder here. In this regard, we think the low Magruder bid should have been viewed as nonresponsive to Items 25 and 26, and that Magruder should not have been considered for award. We view Magruder's bid as nonresponsive because Magruder, while taking no exception on the bid schedule to the requirement for a Class II tractor for Item 25 and a Class IV tractor for Item 26, by listing a make and model on the equipment-offered list indicated that it would supply Class III tractors for both items.

SCS advises us that for items such as these, for which only one class of equipment was specified, the equipment-offered list was used to determine whether a bidder was responsible, i.e., to show exactly what equipment the contractor would have available for contract performance. A bidder's failure to complete these items was considered a minor oversight, SCS states, and was ignored. We do not believe, however, that SCS could ignore Magruder's insertion of a make and model indicating that it was offering a class of tractor other than that specified for Items 25 and 26. Information submitted with a bid which is intended to reflect on the bidder's responsibility may nonetheless render a bid nonresponsive when it indicates that the bidder does not intend to comply with a material requirement. Palmetto Enterprises, Inc. et al., B-193843, August 1, 1979, 79-2 CPD 74, modified on other grounds, K.P. Food Services, Inc., 60 Comp. Gen. 1 (1980), 82-1 CPD 289; Test Drilling Service Co., B-189682, September 15, 1977, 77-2 CPD 193. Moreover, SCS informally advises us that certain size

tractors were specified for certain items because of space and traffic patterns at the abandoned mine site, so it appears that the classes specified for Items 25 and 26 were material requirements, representing SCS's minimum needs. Therefore, the bid should have been rejected as nonresponsive.

Twehous, the second-low bidder, offered a Class III tractor for Item 27, so that evaluation of its bid for that item merely required multiplication of the hourly rate by the number of hours shown in the solicitation. We fail to see how any of the other bidders, whose total evaluated prices, ranging up to \$1,004,062, were substantially higher, could have been prejudiced by such an evaluation.

Therefore, assuming that Twehous was otherwise responsive and responsible, it appears that an award to it under the original solicitation would serve the Government's needs and would prejudice no other bidder.

In the reissued solicitation, No. SCS-5-MO-82, the agency eliminated evaluation factors and the equipment-offered list and merely specified minimum and maximum sizes of equipment for each line item. SCS does not suggest that this change was necessary because the evaluation factors had distorted bid prices or were otherwise inaccurate, but only indicates that evaluation on the basis of price alone under the reissued solicitation was less complicated and/or confusing. The minimums and maximums for individual line items are such that the same size equipment generally is specified for the same items under both the original and the reissued solicitations.

At opening on July 15, 1982, only four bidders responded. Magruder was low at \$356,829.50 and, as indicated above, was awarded the contract on September 13, 1982. In our opinion, the effect of the resolicitation was to give Magruder, a nonresponsive bidder on two items under the canceled solicitation, an opportunity to become responsive--which it did. Furthermore, because the number of bidders was reduced by eight, and because the two previously lowest bidders changed their prices but not their relative standing (Magruder was higher and Twehous lower under the reissued solicitation), it appears that an auction situation was created and that the integrity of the competitive system was undermined by the cancellation.

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See generally Professional Materials Handling Co., Inc.--Reconsideration, B-205969.2 and B-205969.3, May 28, 1982, 61 Comp. Gen. \_\_\_\_\_, 82-1 CPD 501 (also involving an auction situation).

The protest is sustained.

Corrective Action:

The SCS advised us in late November that Magruder had completed approximately 17 percent of the work under the contract; termination costs at that time were estimated at \$5,000. By mid-January, however, this estimate had increased substantially, based on SCS's assumption that the contractor has incurred more than \$100,000 in costs for purchase or lease and operation of heavy equipment. On the record before us, it is not clear whether termination would be in the best interest of the Government.

We therefore recommend that the agency immediately issue a stop order and determine (1) whether Twehous would be willing and able to complete the contract at the unit prices it originally bid and (2) if so, precisely how expensive it would be to terminate Magruder's contract for the convenience of the Government. The contractor should substantiate costs of labor, materials, and equipment. By letter of today, we are requesting the Secretary of Agriculture to advise us of the agency's recommendation on the basis of this information.

Since this decision contains a recommendation for corrective action, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with 31 U.S.C. § 720, as adopted by Public Law 97-258 (formerly 31 U.S.C. § 1176 (1976)). This section requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

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