

DECISION

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

FILE: B-206196**DATE:** January 18, 1983**MATTER OF:** D-K Associates, Inc.**DIGEST:**

1. Protest of Army's consideration of appeal of comparative cost analysis and agency's subsequent decision to sustain that appeal and to order new management study under Office Of Management and Budget Circular A-76 analysis is subject to GAO review where solicitation establishes ground rules for the appeal process.
2. Cancellation of invitation after bid opening is proper where Government determines, albeit after allegedly inappropriate consideration of OMB Circular A-76 appeal, that solicitation's statement of work overstates actual minimum needs and that Government is no longer able to furnish a significant amount of the Government Furnished Equipment identified in the solicitation.
3. Agency may not avoid canceling solicitation where it is aware before award of need for specification changes by use of Changes and Government-Furnished Property clauses which provide for an equitable adjustment for property not delivered by the Government.
4. Claim for bid preparation costs is denied where the claimant has not shown that agency has abused its discretion in canceling the solicitation.

D-K Associates, Inc. protests the Army's cancellation of invitation for bids DAKF27-80-B-0206 for the operation of the Training and Audiovisual Support Center at Ft. Meade, Maryland. The solicitation, which was issued as a part of a cost comparison under Office of Management and Budget (OMB) Circular A-76, was canceled

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primarily because an agency management study resulting from an appeal of the cost comparison analysis revealed inaccuracies in the solicitation's list of Government Furnished Equipment (GFE). Essentially, D-K contends that the appeal of the cost comparison should not have been considered, that the management study should not have been conducted and that in any event, the Army did not have compelling reasons to cancel the solicitation. D-K claims that it is entitled to either contract award or bid preparation costs. We deny the protest.

In 1981, the Army developed a statement of work, conducted a management study and prepared an in-house cost estimate in anticipation of issuing the subject solicitation. The estimate was based on the assumption that 43 civilian employees and seven buildings would be required for the Army's operation of the Center. The Army also concluded that \$1.2 million in GFE would be provided the contractor if the function were contracted out.

The Army issued the solicitation on May 7, 1981. The solicitation advised bidders that it was part of a cost comparison to determine whether accomplishing the work in-house using Government employees or by contract would be more economical. The solicitation also provided that, prior to a final determination regarding contracting out, interested parties would be given time to review the cost comparison data and could appeal the results of that comparison. Bids were opened on June 22 and D-K's bid was the lowest of the five bids received from commercial firms. The agency determined as a result of its cost comparison that it would be most economical to contract out the function to D-K.

On July 17, a civilian employee of the Center appealed the agency's proposed decision to contract out this activity. The employee contended that the cost comparison was not based on the optimum organizational structure for the operation of the Center and argued that the organization and staffing could be improved at savings to the Government. On September 3, the U.S. Army Forces Command Appeals Board sustained the appeal in part and directed Ft. Meade to conduct a new management study and develop a revised estimate for performance in-house. By letter of October 8, D-K protested to the Army that its consideration of the appeal was improper. The Army denied the protest by letter of November 10.

Meanwhile the new management study was completed on November 6. It produced recommendations to close some buildings and renovate others, which would result in the use of only four buildings for the Center instead of the seven stated in the solicitation's statement of work and in the reduction of the personnel needed from 43 to 32. In conjunction with the new study, Ft. Meade reviewed the solicitation's provisions on workload and GFE. A complete inventory of the Center revealed the unavailability of approximately \$368,000 worth of equipment identified as GFE in the original statement of work, as well as approximately \$86,000 worth of equipment acquired subsequent to the development of the statement of work and not listed in the solicitation. Based on these findings and the fact that the prolonged evaluation period would require that the proposed start date be delayed at least 6 months, the agency concluded that the solicitation should be canceled. It informed D-K of its decision by letter of January 11, 1982.

The agency canceled the solicitation notwithstanding a memorandum dated November 25 from the Deputy Assistant Secretary of Defense (Facilities, Environment and Economic Adjustment) concurring with an Office of Federal Procurement Policy (OFPP) letter dated November 19 which concluded that the appeal should not have been considered. The OFPP letter stated that it was improper for contracting activities to consider appeals involving OMB Circular A-76 determinations after bid opening where the issue raised concerns whether the agency has chosen the most efficient approach for performing the function in developing its in-house cost estimate. The Army, however, states that it decided to complete its reevaluation since by the time it received the November 25 memorandum the new management study was completed and in the final stages of review and the preliminary inventory showed a substantial variance from the list of GFE included in the solicitation.

D-K objects to the rejection of its low bid and the cancellation of the solicitation on two main grounds. First, the protester contends that the appeal filed by the Center employee should not have been considered and the second management study resulting from that appeal should not have been conducted because neither the solicitation nor agency regulations contemplated appeals based on the management approach chosen by the Government. Second, the protester argues that even if the appeal and the resulting management study were proper, the conditions cited by the agency as justifying the cancellation are insignificant.

D-K's position concerning the propriety of the appeal and the second management study is fourfold. First, D-K asserts that the appeal challenged the original management study and not the cost comparison analysis as provided for in the solicitation, Department of the Army (DA) Circular No. 235-1, para. 3-6d and OMB Circular A-76. Second, the protester states that no evidence has been introduced to indicate that the conclusions of the original study were unfounded or that the list of GFE was inaccurate at the time the cost comparison analysis was conducted. Third, D-K claims that the appeal was lodged after exposure of its bid and that elements of that bid subsequently formed the basis of the employee's appeal as well as the basis of the reorganization plan in the second study. Lastly, D-K asserts that the new study was contrary to the OFPP letter as adopted by the Department of the Defense (DOD).

The Army states that we should not consider this matter because the cost comparison analysis involves OMB Circular A-76, and implementing Department of the Army regulations, which reflect only executive policy and which we regard as outside the scope of our Bid Protest Procedures, 4 C.F.R. Part 21 (1982).

Generally, we do not review an agency decision to perform work in-house rather than to contract for the services because we regard the decision as a matter of policy within the province of the executive branch. Midland Maintenance, Inc., B-202977.2, February 22, 1982, 82-1 CPD 150. Where, however, an agency uses the procurement system to aid in its decision making, spelling out in the solicitation the circumstances under which the Government will award or not award a contract, we will review whether the agency followed announced procedures in comparing in-house and contract costs. We do so because we believe it would be detrimental to the system if, after the agency induces the submission of bids, it deviates from the ground rules or procedures announced in the solicitation and which were relied on by those induced to bid. See, e.g., Mar, Inc., B-205635, September 27, 1982, 82-2 CPD 278; D-K Associates, Inc., B-201503, B-201625, September 10, 1981, 81-2 CPD 208.

Our prior cases have involved a challenge to the actual cost comparison that was made, with the protester asserting that the comparison rules announced in the solicitation-- usually those found in OMB's Cost Comparison Handbook or

in other agency regulations--were not followed. See, e.g., Mar, Inc., supra; Crown Laundry & Dry Cleaners, Inc., 61 Comp. Gen. 233 (1982), 82-1 CPD 97, affirmed B-204178.2, August 9, 1982, 82-2 CPD 115; Serv-Air, Inc.; AVCO, 60 Comp. Gen. 44 (1980), 80-2 CPD 317. This case is somewhat different because the protester does not challenge the cost comparison; rather, it challenges the Army's decision to consider the employee's appeal and to conduct a second management study, and ultimately to cancel the solicitation and resolicit. This difference is not material to the question of whether we should consider the protest, however, because the invitation contained a provision dealing with appeals and, in our view, established the ground rules for the cost comparison appeal process. Moreover, the challenge to the cancellation of the invitation is appropriate for our review since we believe the general rules applicable to cancellation after bid opening, see Defense Acquisition Regulation (DAR) § 2-404.1 (1976 ed.), are applicable to solicitations issued for Circular A-76 cost comparison purposes since the competitive bid system is involved.

Under the circumstances, however, we need not consider the propriety of the Army's consideration of the appeal because we believe that regardless of whether the appeal should have been considered the cancellation¹ of the invitation was appropriate.

The general rule regarding cancellation after bid opening and the exposure of bids is that such cancellation is not proper unless it is warranted by a cogent and compelling reason. McGregor Printing Corporation, B-207084, B-207377, September 20, 1982, 82-2 CPD 240. One

¹ The Army contends that the protest of the cancellation is untimely. It argues that D-K was told by the contracting officer in a telephone conversation on December 22 that the solicitation was to be canceled, but D-K did not file its protest until January 26, more than 10 working days after it had knowledge of the basis for the protest. See 4 C.F.R. § 21.2(b)(2) (1982). However, on December 22, D-K was merely advised of the agency's intent to cancel--no final decision had been made at that time. The Army did not actually cancel the solicitation until it issued its January 11 letter notifying D-K of the cancellation. As D-K filed its protest on January 26, within 10 working days of its receipt of that notification, the protest is timely.

recognized basis for cancellation is that the solicitation did not reflect the Government's actual minimum needs. See Praxis Assurance Venture, B-190200, March 15, 1978, 78-1 CPD 203. As we pointed out in that case:

"* * * when * * * an invitation for bids contains specifications which overstate or misstate the minimum needs of the procuring agency, or the agency decides after bid opening that the needs of the Government can be satisfied by a less expensive design differing from that on which bids were invited, the best interest of the Government requires cancellation of the invitation. * * *"

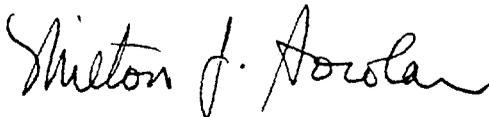
Here, even if we assume that the Army's consideration of the appeal was inappropriate, it learned as a result of the appeal and subsequent management study that its original statement of work overstated its actual needs and that there was a less expensive approach to satisfying those needs. While the Army should have determined the most advantageous approach prior to soliciting bids, nothing requires it to be locked into a less advantageous approach, either through in-house performance or contracting out, which exceeds its minimum performance needs. That an agency will discover after bid opening that its needs have been overstated in a solicitation is simply one of the risks faced by those who bid on Government contracts.

Moreover, the disparity discovered with respect to the GFE also provides a basis for the cancellation. The variance discovered in the \$1.2 million worth of GFE listed in the solicitation was substantial, amounting to \$368,000. The agency also found that equipment worth \$86,000 had been acquired since the list in the IFB had been computed. Although it is true, as D-K argues, that these changes in the GFE list did not alter the description of the services needed in the solicitation, the change in the GFE list significantly alters the resources available for use by both commercial bidders and the Government in performing these services and thus changes the basis upon which bidders and the Government computed their prices. In such circumstances, we have recognized that cancellation is appropriate. See Monarch Enterprises, Inc., B-201688, June 15, 1981, 81-1 CPD 483; Aul Industries, Inc., B-195887, February 6, 1980, 80-1 CPD 98.

Further, we do not agree with D-K's assertion that this matter could be accommodated by the Government-Furnished Property (GFP)² and the Changes clauses included in the solicitation. Both provisions (the GFP clause provides for an equitable adjustment under the Changes clause for property not delivered by the Government) are concerned with changes which occur after the award of the contract and are not to be used to make changes which like these are known prior to contract award. See Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91; DAR § 7-104.24(f). The integrity of the competitive bidding system requires that the agency not award a contract competed for under one set of provisions with the intention of changing to a different set after award. See W. M. Grace, Inc., B-202842, August 11, 1981, 81-2 CPD 121.

In conclusion, we find that the Army's cancellation of the solicitation was proper. Accordingly, we cannot find that D-K has been subjected to arbitrary and capricious treatment, a showing of which is a prerequisite to entitlement of bid preparation costs, and therefore the protester is not entitled to recover such costs. See Man Barrier Corporation, B-197208, August 5, 1980, 80-2 CPD 88.

The protest and the claim are denied.

for 
Comptroller General
of the United States

² There is no difference between GFE and GFP here. The list in the solicitation was designated GFE while the clause uses the term GFP.