

DECISION

25158

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

FILE: B-209092

DATE: May 17, 1983

MATTER OF: Wheatley Associates

DIGEST:

1. Cancellation of solicitation was proper where a phrase explaining a statutory cost limitation was ambiguous and the ambiguity was clearly prejudicial to at least the apparent low bidder.
2. The test of whether a solicitation is ambiguous is an objective one and is not necessarily dependent on any particular bidder's interpretation.

Wheatley Associates, doing business as Pacific Eagle Constructors, protests the cancellation by the Air Force of invitation for bids (IFB) No. F08651-82-B-0153 (0153) and the resolicitation of the procurement under IFB No. F08651-82-B-0193 (0193). The Air Force issued both solicitations for the renovation of 750 military housing units at Eglin Air Force Base, Florida. Solicitation 0153 was canceled because in the agency's view it contained an ambiguity, which solicitation 0193 was then issued to correct. The protest is denied.

The schedule in solicitation 0153 provided for bids on seven basic items, each consisting of work on a number of units of a different type of housing. For example, item 1 was for 115 type A2 Wherry housing units, while item 2 was for 50 type A3 units. Each item number was listed under a column captioned "Base Bid." After the listing of the seven items, the schedule called for a total price for all seven items, as well as prices for nine deductive items which followed.

The solicitation stated that award would be made to that responsible bidder offering the low aggregate price for the "first or base bid item" minus (in the order of priority listed in the schedule) those deductive bid items

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that would provide for the most features of the work within the funds determined to be available before the opening of bids. The solicitation provided at paragraph 30 that all items on the schedule were subject to a statutory cost limitation.¹ That paragraph further provided: "For a bid to be considered responsive for award, the average price per housing unit in the Base Bid and the average price per housing unit in any Deductive Item selected for award in accordance with the clause entitled 'Deductive Items' * * * must not exceed \$18,400.00 per unit."

The agency received nine bids in response to the IFB. Four of the bids, including the apparent low bid, contained unit prices on items 5 and 6 that exceeded the cost limitation. For each of these bids, however, when the total price submitted for items 1 through 7 was divided by 750 (the total number of units on the schedule) the result was less than \$18,400. The contracting officer determined that the solicitation was ambiguous and might have misled the four bidders, including the low bidder, because it did not clearly reflect the statutory requirement that the

¹Section 1594h-2 of title 42, United States Code (Supp. IV 1980) provides in part:

"None of the funds authorized by this or any other Act may be expended for the improvement of any single family housing unit, or for the improvement of two or more housing units when such units are to be converted into or used as a single family housing unit, if the total cost of such improvements exceeds \$20,000, adjusted by the area construction cost index (as developed by the Department of Defense) for the location at the time of contract award."

To comply with this statutory cost limitation, the solicitation set the contract cost limitation at \$18,400 per housing unit in order to allow for Government-furnished equipment, reconnection of telephone and cable television services, contingencies and other items, which were not covered under the IFB.

cost for each housing unit included in each line item could not exceed the cost limitation. The contracting officer then canceled the solicitation and issued solicitation 0193, including an amended paragraph 30, which provided in part:

"b. For a bid to be considered responsive for award, the price for each individual housing unit must not exceed \$18,400.00. For example, the sum of the estimated amounts for sub-items 2 a, b, c, and d in Pricing Schedule 'A', divided by the 50 housing units in item 2, must not exceed \$18,400.00. Assume the estimated amounts were as follows:

2a	\$900,000.00
b	\$ 3,000.00
c	\$ 10,000.00
d	\$ 12,000.00
	<u>\$925,000.00</u>

$$\frac{\$925,000.00}{50 \text{ units}} = \$18,500.00 \text{ per unit}$$

this example exceeds the statutory per unit price limitation of \$18,400.00 and therefore would not be responsive."

Wheatley contends that the solicitation was not ambiguous. It says that those bids that failed to comply with the cost limitation should have been rejected as nonresponsive and that an award should have been made to it as the remaining low responsive, responsible bidder. Wheatley argues that the only reasonable reading of the cost limitation as originally drafted is that the limitation applied to each line item's housing unit cost. Wheatley says that since the IFB apparently identified every item on the schedule as a "Base Bid" and provided that "the average price per housing unit in the Base Bid * * * must not exceed \$18,400," the only reasonable interpretation of the cost limitation is that it applied to each unit under every item (items 1-7) on the schedule. Wheatley refers also to an IFB provision that stated that

a cost limitation was "applicable to all items on the Pricing Schedule." The fact that the original paragraph 30 provided that the cost limitation was applicable to all "items" in the plural is, according to the protester, a further indication that the limitation unambiguously applied to every item on the schedule and precludes an interpretation that the limitation applied only to the total of Base Bid items 1 through 7. Finally, Wheatley says that reasons other than the existence of an ambiguity could have accounted for four of the nine bidders exceeding the cost limitation on some items and that the contracting officer should have contacted these bidders after bid opening to determine whether they actually were misled.

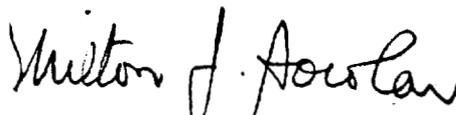
Because the cancellation of an invitation for bids after bid prices have been exposed may have a deleterious effect on the competitive bidding system, the regulations provide that after bids have been opened "award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation." Defense Acquisition Regulation (DAR) § 2-404.1(a). A contracting officer, however, has broad discretion in determining whether a compelling reason justifying cancellation exists, Downtown Copy Center, B-206999.6, December 6, 1982, 62 Comp. Gen. _____, 82-2 CPD 503, and thus a determination to cancel a solicitation after bid opening is not legally objectionable unless there clearly is no reasonable basis for it. Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91. The fact that the terms of an IFB are deficient in some respect does not alone constitute a compelling reason to cancel. Instead, two factors must be examined: (1) whether the best interests of the Government would be served by making an award notwithstanding the deficiency, and (2) whether bidders would be treated in an unfair and unequal manner if an award were made. SKS Group, Ltd., B-205871, June 14, 1982, 82-1 CPD 574.

We believe that the cost limitation in the original solicitation was confusing at best, and we find no basis upon which to object to cancellation of the IFB.

As noted by Wheatley, the original cost limitation provision arguably could be interpreted as imposing the \$18,400 cost limitation on each item listed on the schedule. On the other hand, the limitation could well be read as applying only to the total of Base Bid items 1 through 7 in light of the reference in the singular to "the average price per housing unit in the Base Bid." Also, although the protester views the schedule as designating each of items 1 through 7 as a "Base Bid," we think the more reasonable interpretation, given how the schedule was set up, was that these items were merely components of the overall "Estimated Total Base Bid" for which a price was to be inserted at the end of the base bid schedule and to which the cost limitation was intended to apply. Further, we believe the use of the phrase "average price per housing unit" was likely to be understood by at least some bidders as referring to the units encompassed by the total base bid because it would serve little purpose to compute an "average" price for the units within each item since such units obviously would be priced identically.

In short, we think the solicitation did not clearly indicate how the ceiling would be applied. Since the bid of the apparent low bidder was responsive under one interpretation but not the other, the ambiguity was clearly prejudicial to at least one of the bidders. Although Wheatley contends that the contracting officer should not have determined that the cost limitation provision was ambiguous without first contacting those bidders whose bids exceeded the limitation to ascertain whether any of them were actually misled, we point out that the test of whether a solicitation is ambiguous is an objective one, that is, whether the solicitation is susceptible of more than one reasonable interpretation, and is not necessarily dependent on any particular bidder's interpretation. Cf. Skytop Plastics, Inc., B-207022, October 15, 1982, 82-2 CPD 340 (fact that several bidders may have found solicitation confusing was not probative evidence that it was ambiguous). Under these circumstances, we think the decision to cancel the solicitation, as being in the best interest of the Government, was reasonable. Maron Construction Co., Inc., B-193106, March 9, 1979, 79-1 CPD 169.

The protest is denied.


for Comptroller General
of the United States