DECISION

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

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FILE: B-212882, B-212882.2 **DATE:** April 10, 1984

MATTER OF: Jackson Marine Companies

DIGEST:

1. Protest against award to low bidder under resolicitation is rendered academic when resolicitation is canceled.

2. Protest against post-bid-opening cancellation of IFB is denied where agency had a compelling reason to justify the cancellation.

3. Request for bid preparation costs is denied where agency has not engaged in arbitrary or capricious conduct.

Jackson Marine Companies (Jackson) protests the Army Corps of Engineers (Corps) post-bid-opening cancellation of invitation for bids (IFB) No. DACW57-83-B-0193, a 100-percent small business set-aside, and the resolicitation of this procurement under IFB No. DACW57-83-B-0251. Jackson also protests that Cascade, the low bidder on the resolicitation, is not responsible and is not a small business. Jackson requests that we require the Corps to reinstate the first IFB and make an award to Jackson. In the alternative, Jackson requests bid preparation costs.

The protest and request for bid preparation costs are denied.

IFB -0193 was issued for bids to remove three timber pile dolphins and to construct two steel and concrete mooring dolphins and two steel and concrete breasting dolphins. Bidders were required to submit a lump-sum price for line item No. 0001, removing the existing timber pile, and item No. 0003, concrete. Bidders were required to bid a cost per lineal foot for line item No. 0002, steel pipe piling. Paragaraph 2.2 of the IFB's technical provisions advised that for steel pipe piling bidders only would be paid the bid price per lineal foot multiplied by the amount of feet actually installed. Under paragraph 4.1 of the technical provisions, the amount of piling installed would be

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determined from the drawings provided with the IFB or by the Corps determination that the piling had reached the point of refusal (bottom of river basin). The IFB estimated 3,300 lineal feet of pipe piling would have to be installed.

On the bid opening date, the Corps received two bids. After reviewing these bids and the IFB, the Corps determined that the provisions governing payment for steel pipe piling were inadequate. Therefore, the Corps canceled the IFB.

Subsequently, the Corps resolicited its requirements under IFB -0251. The new IFB provided for the entire job to be bid on a lump-sum basis. Jackson protested to the Corps that Cascade, the low bidder on the resolicitation, was non-responsible and was not a small business. The Corps denied Jackson's protest after the Small Business Administration (SBA) found Cascade was a small business and the contracting officer found that Jackson was responsible. Jackson protested these decisions to our Office.

Later, the Corps canceled the resolicitation because performance could no longer be completed before the onset of adverse weather. Cancellation of the resolicitation renders academic Jackson's protest under the resolicitation. See Stacor Corporation, B-210794, April 5, 1983, 83-1 CPD 368. However, in any event, our Office does not ordinarily review affirmative responsibility determinations, Oliver Taxi and Ambulance Service, B-213590, December 14, 1983, 83-2 CPD 688, and we do not review small business size status determinations. Putnam Mills Corporation, B-212037, July 5, 1983, 83-2 CPD 53.

Concerning Jackson's protest that the Corps improperly canceled the first IFB, a solicitation should be canceled after bid opening only if a compelling reason to cancel the solicitation exists. Defense Acquisition Regulation (DAR) § 2-404.1(a) (Defense Acquisition Circular (DAC) No. 76-17, September 1, 1978); Go Leasing Inc.; Sierra Pacific Airlines, B-209202, B-209202.2, April 14, 1983, 83-1 CPD 405. Contracting officers have broad discretion in determining if a cogent and compelling reason exists and a decision to cancel a solicitation after bid opening will not be disturbed unless that decision lacks a reasonable basis. Arctic Corner, Incorporated, B-209765, April 15, 1983, 83-1 CPD 414.

The Corps states that it canceled the IFB because the payment provision for the pipe piling, which stated that the bid price must include all labor and material and that the

contractor would only be paid the lineal foot bid price for the amount of piling actually installed, placed an undue economic risk on the contractor. The Corps reached this result by reasoning that the contractor would be required to order the steel pipe piling before beginning work and, if there was any excess pipe, the contractor would not be able to return it for a refund and, due to the payment provision, would not be reimbursed by the government for the cost of the excess pipe. The Corps concluded that the provision resulted in competitive prejudice.

In support of this position, the Corps notes that 21 bids were solicited and only two bids were received. The Corps believes that the economic risk discouraged potential bidders from participating in the procurement. The Corps also points out that the two bids received were mathematically unbalanced. The Corps believes that the two bidders placed a substantial portion of their cost in other line items to reduce the risk to them inherent in bidding on line item No. 2. We note that Jackson has agreed that it bid in a way that would reduce its risk.

We find that the Corps has provided sufficient justification for canceling the IFB after bid opening. We have indicated that a compelling reason to cancel a solicitation exists if an award under the deficient IFB would prejudice other bidders. See Twehous Excavating Company, Inc., B-208189, January 17, 1983, 83-1 CPD 42. In determining if prejudice exists, we have considered whether there was a reason to believe that additional firms would bid on a solicitation with revised specifications. See Immigration and Naturalization Service, B-182949, March 19, 1975, 75-1 CPD 165. In this regard, we note that procuring agencies are required to provide specifications which will foster maximum competition. DAR § 1-1201(a) (DAC No. 76-40, November 26, 1982). When the Corps received only two bids in response to the 21 invitations it sent out, the Corps had reason to believe that additional firms would bid on a revised solicitation. This conclusion is supported by the results of the resolicitation on which the Corps received two additional bids and a more favorable price. Accordingly, we cannot find that the Corps lacked a reasonable basis to conclude that the IFB should be canceled.

Regarding Jackson's request for bid preparation costs, these costs are recoverable only when the government has engaged in arbitrary and capricious conduct. Since the Corps properly canceled the solicitation, it did not act

arbitrarily or capriciously. Thus, Jackson's request is denied. D-K Associates, B-206196, January 18, 1983, 83-1 CPD 55.

for Milton J. Socolar
Comptroller General
of the United States