

DECISION



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

FILE: B-219407

DATE: September 18, 1985

MATTER OF: Alliance Properties, Inc.

DIGEST:

1. Protest challenging cancellation of an invitation for bids (IFB), where the contracting agency plans to award a contract under the IFB when reissued in amended form, falls within the definition of protest in the Competition in Contracting Act, and GAO review of such a protest is consistent with congressional intent to strengthen existing GAO bid protest function.
2. Contracting agency had a compelling reason for canceling IFB for public works services where, because of provisions setting minimum performance deadlines for fewer than 100 percent of repair service calls, agency could not ensure that all service calls would be performed in a timely manner, as required to meet the agency's minimum needs.

Alliance Properties, Inc. protests the cancellation of invitation for bids (IFB) No. N62470-84-B-5593, issued by the Navy for public works services at Fort Story, Virginia. The protester maintains that the Navy lacked an adequate basis for canceling the solicitation. We deny the protest.

The IFB calls for maintenance repair and minor construction work for various facilities at Fort Story. The contractor is to provide a comprehensive range of services, including pest control, waste collection, plumbing and electrical work, and work on heating and air-conditioning equipment. The IFB provides for both maintenance and repair of the equipment included in the scope of work.

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The IFB, part of a cost comparison under Office of Management and Budget Circular A-76, was issued on August 14, 1984, with bid opening on January 18, 1985. The protester was the low bidder; its bid price for the base year and 2 option years (\$2,985,000) was \$619,135 lower than the government's estimate of performing the work in-house.

On April 17, 1985, the Navy canceled the IFB on the ground that it contained defective provisions which could have a significant impact on the Navy's ability to acquire timely and effective services. Specifically, according to the Navy's report, two provisions were considered defective: (1) the IFB did not require the contractor to respond to and complete all repair service calls; and (2) because of dollar limits in the IFB on the contractor's liability, the Navy could not ensure that the contractor would not simply allow equipment to deteriorate to a point beyond which the contractor would not be liable for the cost of repair. The protester disagrees with the Navy's position, arguing that the two provisions are clear and that performance under the IFB will satisfy the Navy's needs.

Jurisdiction

As a preliminary matter, the Navy maintains that our Office lacks jurisdiction to decide a protest such as this which involves a challenge to cancellation of a solicitation. As support for its position, the Navy relies on a narrow reading of the Competition in Contracting Act, which defines a "protest" as:

". . . a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract." 31 U.S.C. § 3551(1), as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199.

In the Navy's view, a protest challenging cancellation of a solicitation concerns only the failure to award a contract, and thus does not fall within the statutory definition.

We believe that, in enacting the bid protest provisions of the Competition in Contracting Act, Congress intended that our Office continue to decide protests involving cancellations. As explained in the conference report on the Act, the purpose of the Act's bid protest provisions was to strengthen our existing bid protest function in order to ensure an effective enforcement mechanism for the Act's mandate for competition. H.R. Rep. No. 861, 98th Cong., 2d Sess. 1435 (1984). Before enactment of the Competition in Contracting Act, our Office routinely reviewed bid protests involving cancellations. See, e.g., Scotts Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 CPD ¶ 302. In view of the continuing potential for adverse impact on the competitive system as a result of the unwarranted use of the authority to cancel solicitations^{1/}, it is consistent with the Act's goal of strengthening our preexisting bid protest function for us to continue to review protests involving cancellation of solicitations.

Moreover, in our view, a protest against cancellation of a solicitation where, as here, the contracting agency plans to reissue the solicitation in an amended form, in effect concerns the proposed award of a contract under the new solicitation. Thus, even under the Navy's narrow interpretation of the Act, a protest concerning cancellation of a solicitation falls within our bid protest jurisdiction as defined in the Competition in Contracting Act.

Cancellation of the IFB

Although a contracting officer has broad discretion to cancel an IFB, he must have a compelling reason to do so after bid opening because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed. Electric Maintenance & Installation Co., Inc., B-213005, Mar. 13, 1984, 84-1 CPD ¶ 292. As a general rule, changing the requirements of a procurement after the opening of bids to express properly the agency's minimum needs constitutes such a cogent and compelling reason. Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 CPD ¶ 484. In this case,

^{1/}An unwarranted cancellation results in bidders incurring the unnecessary expense of preparing bids only to have all the bids rejected and the bid prices exposed.

the cancellation was based on the Navy's determination that the contractor's performance may not meet its minimum needs because of two defective provisions in the IFB, discussed in detail below. Since we agree that one of the provisions is defective, and as a result the Navy's needs will not be met by award under the IFB, we find that the contracting officer had a compelling reason to cancel the IFB.

Section 00005, para. 4 of the IFB requires the contractor to perform service calls to repair equipment as needed between scheduled maintenance work. The IFB establishes three types of service calls--emergency, urgent, and routine--classified according to the nature of the repair problem. In the Navy's view, the IFB is defective with regard to the time requirements for responding to and completing urgent and routine service calls. Section 00005, para. 4.2.1 of the IFB establishes response and completion times for all emergency service calls. With regard to urgent and routine calls, however, the IFB does not specify response and completion times for all calls: for urgent calls, section 00005, para. 4.2.2 requires 90 percent of the calls to be responded to in 24 hours and 75 percent to be completed in 48 hours; for routine calls, while response time is specified for all the calls, para. 4.2.3 specifies a completion time (from 4 to 14 days) for only 92 percent of the calls.

The Navy maintains that the IFB can be interpreted to relieve the contractor of the obligation to respond to or complete that percentage of the total service calls for which no response or completion time is specified. Under this interpretation, for urgent calls, 10 percent would not have to be responded to and 25 percent would not have to be completed; for routine calls, 8 percent would not have to be completed. As a result, the Navy argues, there is no assurance that the contractor will perform 100 percent of the repair service calls, as is required to meet the Navy's needs.

The thrust of the protester's argument is that, despite the fact that not all service calls are subject to specific time limits, the contractor in fact is obligated to respond to and complete all the calls. While we agree with the protester's basic position, we do not believe that that conclusion resolves the defect in the service call provisions.

The clear intent of the IFB is to acquire comprehensive services for continuing maintenance and

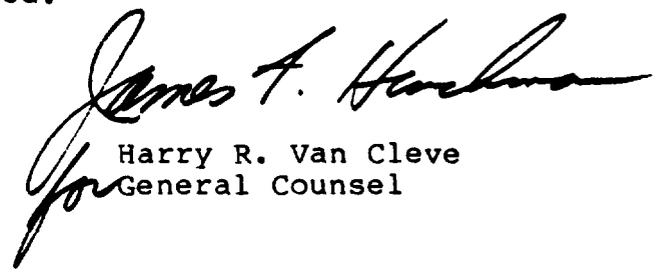
repair of facilities at Fort Story. While a certain percentage of calls is not subject to the specific response and completion time limits, there is no indication in any other IFB provision that the contractor is not obligated ultimately to perform all the service calls placed by the Navy. See, e.g., Section 00005, para. 4.2.4 ("rework calls" requiring performance or reperformance of all service calls not satisfactorily performed); Attachment I, para. 5 (requiring contractor to perform service calls on all buildings listed in exhibit-1-A). The service call provisions in particular contemplate repair of equipment on an as-needed basis, and we think that the only reasonable interpretation of the IFB is that all service calls must be responded to and completed. See Dyneteria, Inc., et al., B-210684, et al., Dec. 21, 1983, 84-1 CPD ¶ 10.

While the contractor thus would be required to perform all the service calls placed by the agency which fall within the scope of work of the IFB, we agree with the Navy that the provisions nevertheless are defective because, by not specifying response and completion times for all urgent and routine service calls, there is no way to ensure that they will be completed in a timely manner, as required to meet the Navy's needs. As defined in section 00005, para. 4.2.2 of the IFB, service calls are designated as urgent when the underlying problem "would soon inconvenience and affect the health or well-being of personnel or disrupt operational missions." Without specific response or completion times for a certain percentage of urgent calls, neither the Navy nor the contractor can be sure that the contractor's performance time will be adequate to meet the Navy's needs. Similarly with routine calls, the IFB does not indicate how the adequacy of the contractor's performance in terms of completion time will be measured for those calls not covered by the specific time limits. Further, the IFB at paragraph 2 of section 00004 establishes a scheme for penalizing the contractor for failure to perform or late performance of the specified tasks. The lack of standards for all urgent and routine calls would render this scheme ineffective for a significant portion of such calls, and could give rise to disputes during contract performance.

The protester suggests that the percentage of urgent calls not covered by specific time limits should be regarded as subject to the time limits for routine calls. There are two flaws in this approach, however; first, urgent calls by definition require a quicker response and completion time than routine calls; and, second, as noted above, 8 percent of routine calls themselves are not subject to specific completion times.

Based on our finding that the IFB provisions regarding response and completion times for service calls are defective, and, as a result, award under the IFB would not meet the Navy's needs, we conclude that the contracting officer had a compelling reason for canceling the IFB. In view of our conclusion that the initial deficiency cited by the Navy justifies the cancellation, we need not consider whether the second provision was in fact defective.

The protest is denied.


for Harry R. Van Cleve
General Counsel