



The Comptroller General
of the United States

Washington, D.C. 20548

Gilman

Decision

Matter of: Donco Industries, Inc.

File: B-230159.2

Date: June 2, 1988

DIGEST

Compelling reason exists for canceling an invitation for bids, after bid opening where agency determines that needs of the government can be satisfied by a less expensive inspection method differing from that on which bids were invited.

DECISION

Donco Industries, Inc., protests the cancellation after bid opening of invitation for bids (IFB) No. DACW57-88-B-0001, issued by the Portland District, U.S. Army Corps of Engineers for maintenance service for 49 submerged traveling screens at the John Jay Project in Rufus, Oregon. The screens divert downstream bound migratory fish away from turbines of the hydroelectric generating units. Donco alleges that the agency lacked a compelling reason for cancellation. We deny the protest.

Donco was the low bidder at the January 26, 1988 bid opening. The contracting officer rejected Donco's bid as nonresponsive to the IFB's requirement for 10 years of prior work experience. Donco protested to our Office that its bid should not be rejected as nonresponsive because work experience relates to bidder responsibility, not responsiveness.^{1/} After reviewing the protest with legal counsel, the contracting officer concluded that Donco was correct in its assertion that the IFB's work experience requirement related to bidder responsibility.

^{1/} We dismissed Donco's protest as academic when the IFB was canceled.

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Before the contracting officer decided whether Donco was responsible, he received a request from the requiring activity to cancel the IFB. The Army states that during evaluation of the bids, it discovered that the specifications were inadequate in several respects and did not reflect the government's needs. For example, the Army determined that the cost for providing underwater video inspections of the screens, as required by the IFB, was too exorbitant in the face of the minimal benefits likely to be achieved. Specifically, the Army found that:

"1. High turbidity often occurs in the spring during the peak periods for downstream juvenile fish migration. This is the time that the underwater video inspection is most critically needed. However, during this critical period, the underwater video inspection is incapable of providing a clear view of the screens because of the high turbidity, and thus, is of little use when it is most needed;

"2. Underwater video inspection can only view a small portion of the screen at a time so that the camera will have to be moved many times in order to view the entire screen. During the inspection of the screen, the generators must be stopped. Such excessive down time for electrical power generation is very costly;

"3. Underwater video inspection of the more hidden vertical barrier screens is virtually untested and will require many adjustments in its operation before a satisfactory inspection can be achieved; and

"4. The cost of the video inspection is unexpectedly prohibitive, and amounts to about 33.8% the apparent low bid. . . ."

After considering alternative inspection methods, the Army decided to revise the specifications to substitute a visual examination method on the powerhouse deck after extraction of the fish screens from the turbine intakes. The Army believed that on-deck visual inspection would be more dependable than underwater video inspection, and produce better quality viewing at significantly lower overall costs and minimal non-productive down time for the electrical generators. By eliminating all work related to video inspection of the screens, the Army determined it could reduce costs associated with specialized underwater video equipment, including estimated costs of \$30,000 for camera monitors and cables plus \$20,000 for the control mechanisms.

Donco contends that the revisions are not sufficient to warrant cancellation. Donco notes that the underwater video inspection technique was the method used by the government when the work was performed in-house, and concludes that award on the basis of the present specifications will meet the government's needs. Donco argues that the Army's concern with turbine down time is invalid, alleging that the turbine would be shut down for removal of the screens as well as for video inspection, and that the time for removal and visual inspection is in all likelihood longer than for video inspection. Donco asserts that the Army reviewed the video inspection requirement 2 weeks before bid opening and was satisfied it met the government's needs, and improperly canceled the solicitation only to circumvent Donco's protest. According to Donco, the specification change was a belated effort to improve upon an inspection method which was already satisfactory, and could have been accomplished by change order. Donco requests that we direct the Army to reinstate the solicitation and make award to Donco as the low responsive, responsible bidder or submit the issue of responsibility to the Small Business Administration. Alternatively, Donco seeks reimbursement of its bid preparation costs and the costs of filing and pursuing the protest.

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting officer must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1) (FAC 84-5); Uffner Textile Corp., B-204358, Feb. 8, 1982, 82-1 CPD ¶ 106. The determination of whether a sufficiently compelling reason exists is primarily within the discretion of the administrative agency and will not be disturbed absent proof that the decision was clearly arbitrary, capricious or not supported by substantial evidence. Chrysler Corp., B-206943, Sept. 14, 1982, 82-2 CPD ¶ 271. In determining whether such a reason exists, one of the factors that must be considered is whether the best interest of the government would be served by making an award under the solicitation. When it is determined that an IFB overstates the minimum needs of the government, or the agency decides after bid opening that its needs may be satisfied by a less expensive alternative, the best interest of the government requires cancellation. International Trade Overseas, Inc., B-221824, Apr. 1, 1986, 86-1 CPD ¶ 310.

Here, the Army found that the on-deck visual inspection method would satisfy the agency's requirements and result in lower costs. Donco does not dispute that the visual inspection method would satisfy the Army's requirements nor that costs could be reduced by eliminating \$50,000 in costs associated with specialized underwater video equipment.

In these circumstances, we cannot conclude the cancellation was improper.

Although Donco argues that the solicitation was canceled only to circumvent Donco's protest, an agency may cancel a solicitation after bid opening no matter when the information precipitating cancellation first surfaces. Chrysler Corp., B-206943, supra. Here, even though the agency initially determined that the specifications were adequate, its later determination that substantial costs could be saved under revised specifications provides a proper basis for cancellation.

In arguing that the specification change could have been accomplished by a change order, Donco, in essence, wants the agency to award it a contract knowing it will have to be changed subsequent to the award. The integrity of the competitive bidding system precludes an agency from awarding a contract competed under given specifications with the intent of changing to materially different specifications. See U.S. Materials Co., B-216712, Apr. 26, 1985, 85-1 CPD ¶ 471.

Donco also challenges the other grounds relied on by the Army as justification for canceling the IFB. Since we have determined that a compelling reason exists for cancellation, we need not consider Donco's contentions regarding the other grounds relied on by the Army.

The protest against the cancellation of the solicitation is denied. Accordingly, Donco's original protest that the Army improperly rejected its bid as nonresponsive is academic. See Global Fuels Limited, Corp., B-225665.2, Mar. 27, 1987, 87-1 CPD ¶ 355. In view of our decision, Donco is not entitled to recover its bid preparation costs or the costs of pursuing the protest. See 4 C.F.R. § 21.6(d) (1988); Aero Executive Helicopters, B-227133, Aug. 17, 1987, 87-2 CPD ¶ 167; Rix Industries, Inc.; Ingersoll-Rand Co., B-225176.3, B-225176.4, Mar. 30, 1987, 87-1 CPD ¶ 356.

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