

0155 - Gary



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Source AV, Inc.
File: B-238017
Date: March 27, 1990

Michael R. Smith, for the protester.
Craig R. Schmauder, Esq., Office of General Counsel,
Department of the Army, for the agency.
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the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Contracting agency had a compelling reason to cancel invitation for bids (IFB) after bid opening where it reasonably determined that IFB specifications relating to copying and photographic printing services were ambiguous, or did not accurately reflect its minimum needs.
2. Protest that agency improperly failed to negotiate with low bidder after finding that IFB did not accurately reflect its minimum needs is denied; low bidder's revised offer in response to negotiations under such circumstances, in effect, would have constituted an improper late bid modification, and agency's decision instead to resolicit the requirement based on revised specifications thus was proper.

DECISION

Source AV, Inc., protests the cancellation of invitation for bids (IFB) No. DACW67-89-B-0014, issued by the Army Corps of Engineers for visual information services. Source, the apparent successful bidder, asserts that the Army's determination that the IFB contained defective specifications was erroneous, and that the agency therefore lacked a proper basis for canceling the solicitation after bid opening. In the alternative, the protester asserts that, even if the specifications were defective, the impact on its bid price was negligible and the Corps therefore should have negotiated with Source rather than cancel the solicitation.

We deny the protest.

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The IFB was issued as part of a cost comparison in accord with Office of Management and Budget Circular A-76, which sets forth the executive branch's policy for determining whether it would be less expensive to contract for services than to continue their performance by government employees. Of the five bids received, the lowest was that of International Creative & Training, Ltd., at \$1,171,860; the second low cost was the protester's, at \$1,273,918. The remaining bids were considerably higher in price (approximately \$2.2 million to \$3.8 million), and the government's estimate prepared for cost comparison purposes was \$2,241,727. Based on the large discrepancy between International's price and the other bids, the Corps held a preaward conference with International to make sure it had understood all of the requirements of the IFB and to verify that there was no mistake in its bid. As a result of the conference, International indicated that it inadvertently had failed to include in its bid the cost of diazo copying equipment;^{1/} the firm then formally withdrew its bid.

The Corps next held a preaward conference with the second low bidder, Source. After comparing a copy of Source's detailed cost estimates with the IFB's requirements, the agency concluded that Source had underestimated the workload and materials needed to perform diazo services and the photographic printing of 3-1/2 x 5 inch prints. However, the Corps determined that the underestimate was due, not to a mistake on the part of the bidder, but to ambiguities in the specifications for the diazo and printing requirements. Based on its conclusion that these specifications did not adequately reflect the government's actual minimum needs, the Corps canceled the solicitation in order to revise the specifications and to recompute the requirement.

Source asserts that the allegedly defective specifications were in fact clear and unambiguous. Alternatively, Source argues that even if the Army believed that the deficiencies were sufficient to warrant a change in the specifications, rather than cancel the solicitation the agency should have negotiated with Source, the low bidder, because its bid price would have been affected only marginally by the needed revisions.

^{1/} The diazo process produces a copy through the use of a chemical coating that is decomposed by exposure to light.

An IFB may be canceled after bid opening when there is a compelling reason to do so. Federal Acquisition Regulation (FAR) § 14.404-1(a). Inadequate or ambiguous specifications cited in the IFB may constitute such a compelling reason. FAR § 14.404-1(c)(1). An ambiguity exists if a specification is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole. Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 CPD ¶ 234. Contracting officials have broad discretion to determine whether or not appropriate circumstances for cancellation exist, and our review is limited to considering the reasonableness of the exercise of that discretion. United States Elevator Corp., B-225625, Apr. 13, 1987, 87-1 CPD ¶ 401. We generally regard cancellation after bid opening to be appropriate when an award under the solicitation would not serve the actual minimum needs of the government or when other bidders would be prejudiced by such an award. Id.

We agree with the Corps that the specifications in question were ambiguous. First, regarding the diazo services, the Corps explains that the IFB failed to specify the relative numbers of copies that would be required in small, medium, and large sizes, although, based on its prior experience, the agency states that 70 percent of its actual requirement was for large-sized copies. The Corps determined that the failure to specify the actual percentage requirements led bidders to structure their bids on the basis of different assumptions, based on materially different understandings of the work involved.

The record confirms the Army's assessment. For example, as Source itself states, its bid for diazo services was structured on the assumption that the bulk of the Army's requirement was for medium-sized copies; according to the protester, such an approach is typical where, as in this case, the solicitation does not specify otherwise. On the other hand, the record shows that the government cost estimate was based on the assumption that the bulk of the agency's requirement was for large-sized copies; unlike Source's bid, the government estimate was based on the assumption that the agency's requirement was for the same percentage of copies in large sizes as in the past. Thus, the specifications were not only subject to more than one reasonable interpretation due to the lack of adequate specificity, they were actually interpreted in materially different fashions by the Army and the protester. Consequently, it was reasonable for the Army to conclude that the diazo specifications were defective. United States Elevator, Corp., B-225625, supra; Energy Maintenance Corp., B-223328, supra.

Similarly, with regard to photographic printing, at least two offerors based their bids on different understandings of the specifications. We find that this confusion in the bidding was directly attributable to ambiguities in the solicitation. Specifically, IFB Section C.5.3.1, "Develop Film," states that unless specified otherwise, 3-1/2 x 5 inch "prints" shall be made from each frame of film. The next section of the IFB, C.5.1.3.2, "Produce Photographic Prints," specifies that "prints" shall be provided in various sizes, including 3-1/2 x 5 inches, as requested. Where the IFB sets forth specific numbers of items to be produced for these categories, however, in Technical Exhibit 6, the lines between the categories are blurred. For example, in connection with the first requirement, section C.5.3.1, the technical exhibit lists specific numbers of "impressions" required to be made; in the exhibit, moreover, although section C.5.3.1 is listed as a line item, it is no longer designated "Develop Film," but instead is labeled as "Developed Film Images." The number of impressions to be provided under the requirement totals 29,157. For the next requirement, section C.5.1.3.2, the technical exhibit includes, under required production, a category, not for 3-1/2 x 5 inch prints, but "3x5 prints"; the total output required is only 1,248 prints.

In our view, it is difficult, if not impossible, to determine from these conflicting specifications precisely what the agency required; that view is confirmed by the bidding that resulted. As a result of the preaward conference with Source, for example, the Corps determined that Source's bid included the cost of the 1,248 prints, but not the 29,157 prints. The record indicates that the government's estimate, on the other hand, priced the 29,157 prints, but failed to include the 1,248 quantity. Thus, again, Source and the Corps structured their bids on the basis of materially different understandings of the requirements, which were set forth in the IFB in a confusing manner. Further, neither of the bids met the agency's actual needs. According to the Army, what it actually required was a minimum of 29,157 prints from the developed film images in addition to the 1,248 prints; again, however, neither the Corps nor the protester bid to those requirements. We conclude, therefore, that the 3-1/2 x 5 inch print specifications also were ambiguous and failed adequately to reflect the agency's actual needs.

Source argues that a revision of the deficient specifications to reflect the agency's actual needs would have had only a negligible impact on its bid price. The protester states that the change in the diazo requirements would increase its bid price by less than \$5,000, and that the

added requirement for photographic prints would increase its price by only \$15,000. According to Source, in view of the minimal effect on its bid price, the Army should have negotiated with Source on the basis of its actual requirements rather than cancel the solicitation.

We find that the impact of corrected specifications on Source's bid price would not be inconsequential, as Source suggests. With respect to diazo services, the Army has presented detailed calculations that indicate that, if the specifications were revised to reflect its actual requirements, Source's bid price would increase, not by the \$4,593 suggested by the protester, but by \$255,945. To illustrate the differences in the calculations, Source's bid indicates a total cost for "blackline" material (one of the elements of the diazo process) of \$5,791, based on 36 rolls of 36 x 150 inch material, for a total of 16,200 square feet. The Corps' detailed figures, however, indicate that if all copies were requested in large-size format, the amount of blackline material required would be 471,835 square feet, at a cost of \$168,728; if all of the copies were made in a smaller-size format, 118,094 square feet of material would be required, at a cost of \$42,182. It is apparent from these figures that the size of the copies has a considerable impact on the cost of meeting the total diazo requirements, and that the difference in cost between various sizes is not negligible. See generally Customer Fabrication, Inc., B-221825, Feb. 24, 1986, 86-1 CPD ¶ 190 (where change in solicitation requirement imposes new obligations on contractor or has more than a trivial impact on price, the change is material, and award may not be based on a bid that does not reflect the changed requirement); see also Hygrade Painting, Inc., B-232564, Dec. 29, 1988, 88-2 CPD ¶ 601 (failure of bids to reflect change in material requirement of solicitation is compelling reason to cancel solicitation).

In response, the protester states that the agency's estimates are based on its subcontracted per order price, which is inflated relative to the cost of performing the work on-site; however, the protester does not challenge the details of the calculations, such as the example above, concerning the amount and cost of the materials required for each of the sizes. Instead, Source simply provides its own unsupported, summary estimate of the cost of producing diazo copies in each size. In the absence of a more specific rebuttal of the Corps' detailed calculations, the methodology for which appears reasonable on its face, we have no basis for disregarding the Corps' estimate in favor of Source's estimate.

Similarly, with regard to photographic printing, the Corps estimates that the additional work it requires, which was omitted from Source's bid, would increase the protester's bid price by \$56,855, as opposed to the \$15,000 estimated by Source. Again, the agency has provided detailed calculations to support its estimate, and Source has provided none. Accordingly, we accept the Corps' estimate as to the price impact of this requirement as well.

Further, to the extent Source is suggesting that, if given the opportunity, it would have offered to perform in accord with the new specifications at a revised bid price, such an offer, in effect, would have amounted to a late modification of its bid; the Corps could not properly have accepted such a late modification without offering other bidders an opportunity to bid to the same, revised specifications. Snowbird Indus., Inc., B-226980, June 25, 1987, 87-1 CPD ¶ 630. By resoliciting its requirement the agency will obtain the same result in the proper fashion. Id. Similarly, to the extent Source suggests that the scope of work and the price of the contract could have been modified after it received the award, we note that an agency may not award a contract competed under a given set of specifications with the intention of significantly modifying its terms, based on its actual requirements, after award. American Television Sys., B-220087.3, June 19, 1986, 86-1 CPD ¶ 562.

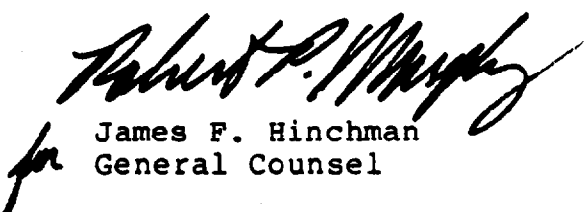
We conclude that the specifications in question were material requirements, and were not clearly set forth in the IFB. As a result, an award to Source would not result in a contract under which all of the agency's material needs would be met. supra. Accordingly, cancellation was justified.

Source asserts that, in finding the solicitation defective, the Corps was misled by agency technical personnel who had a vested interest in canceling the solicitation, since they would lose their jobs if the government contracted for the solicited services instead of retaining them in-house. In particular, Source questions why, if the Corps' concerns about defective specifications were genuine, they were not raised at the time of its first preaward conference with International. Source suggests that the Corps' delay in raising the issue until after the conference with Source, rather than at the earlier conference with International, is evidence that the discrepancies between the IFB and Source's bid were slight, and that the Corps was merely trying to justify a cancellation in order to retain the services in-house. The Corps responds that its conference with

International did not entail the kind of detailed information that it obtained during Source's preaward conference, and that it first became aware of the defects in the specification during Source's conference, when it compared Source's detailed bid information with the IFB specifications and the government estimate.

We find the Corps' explanation reasonable, and Source has presented no evidence supporting its speculation to the contrary. In any event, since an agency may properly determine to cancel an IFB after bid opening no matter when the information precipitating the cancellation first surfaces, and since we have determined that the Corps properly determined that the specifications were in fact deficient, the time when the Army first raised the issue is not relevant to the merits of the protest. Able Fence and Guard Rail Inc., B-223380, Sept. 4, 1986, 86-2 ¶ 259. Moreover, given the agency's intention to revise the specifications and issue a new solicitation, there is no reason to believe that the Corps improperly was motivated to cancel in order to retain the work in-house.

The protest is denied.


for James F. Hinchman
General Counsel