

**DECISION**



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

60880

FILE: B-185502

DATE: May 14, 1976

MATTER OF: Michael O'Connor, Inc.

98942

**DIGEST:**

1. No compelling reason exists to cancel IFB and resolicit where there is no indication of record that protester's unsuccessful attempts to obtain IFB for bidding purposes resulted from conscious or deliberate attempt to preclude firm from competing and adequate competition was generated and reasonable prices obtained.
2. Contention is made that prior decision recommending IFB cancellation due to work overlap with requirements term contract confirms that IFB, issued in violation of contract, was void ab initio and subsequent partial termination eliminating overlap cannot cure impediment to proposed award under IFB. Agency possessed authority to issue IFB. Prior decision did not stand for proposition that issuance of IFB was illegal under existing circumstances. Recommendation was made to avoid Government exposure to possible consequences of overlapping awards. Elimination of overlap removes impediment to award under IFB.
3. Contention that failure to utilize term contract for work covered by IFB issued during term contract should now result in directed award to that term contractor is untimely under section 20.2(b) of Bid Protest Procedures and not for consideration on merits since basis of protest was known at least by December 9, 1975, but not raised until April 15, 1976.

By letter dated April 21, 1976, the General Services Administration (GSA) requested a decision on one of the issues raised but not discussed in Michael O'Connor, Inc., B-185502, April 5, 1976, involving invitation for bids (IFB) GS-00B-03259. O'Connor and Free State Builders, Inc. (low bidder under the IFB), have requested further consideration of the matter covered by our decision.

O'Connor asserts that attempts were made to secure a copy of the IFB on December 4 and 5 by telephone calls to the Acting Director, Construction Management Division, Public Buildings Service, GSA. The calls were not returned. Also on December 5, O'Connor called the bid activity room and requested a copy of the IFB. O'Connor was informed that the supply of documents had been exhausted. Thereafter, O'Connor called an individual in the office of the Regional Commissioner of the Public Buildings Service.

Initially, GSA was unable to find any record of O'Connor's contact with GSA before December 8, the day before bid opening. In this light, GSA characterized O'Connor's attempts to obtain copies of the IFB as untimely. However, upon further examination of records, the individual deciphered a previously unintelligible entry in his telephone log. The substance of the entry was that O'Connor had called on December 5 and requested assistance in obtaining a copy of the IFB. Thereafter, the individual states that he called the Acting Director, who was out of his office, as was his assistant. The telephone call was not returned until December 8, the following Monday, when the Acting Director agreed to try to locate a copy of the IFB. O'Connor was informed of the Acting Director's efforts. At that point in time, the contracting officer refused O'Connor's request to postpone bid opening scheduled for the next day. It is this action that prompted the protest on this issue.

GSA cites numerous decisions of our Office for the proposition that where adequate competition results in reasonable prices, bids need not be rejected solely because a single bidder did not receive a copy of an IFB, as long as there was no purpose or intent on the part of the agency to preclude the bidder from competing. See, e.g., 49 Comp. Gen. 707 (1970).

In response to GSA's position, O'Connor maintains that the cited decisions are factually distinguishable because its attempts to obtain a copy of the IFB were timely, whereas in the cited decisions efforts to obtain the IFB were all initiated after the supply of solicitations had been exhausted. To iterate, O'Connor's attempts were initiated on December 4. GSA states that the supply of IFB's was not exhausted until December 5. Further, while GSA states that notice of the procurement was sent to O'Connor as one of the bidders on the applicable mailing list, O'Connor maintains that it never received this notification.

Two issues were raised by the protester in that case: (1) whether award under GSA's IFB for renovation work could be made in light of an existing requirements-type term contract for certain items of work that overlapped with the IFB; and (2) whether GSA fulfilled its statutory requirement to secure maximum competition by wrongfully denying O'Connor a copy of the IFB for bidding purposes.

We concluded that O'Connor's term contract was a requirements contract with no limitation. Consequently, as the IFB included work covered by the term contract, we recommended that the IFB be canceled and the term contract utilized to satisfy the work requirements. This conclusion rendered consideration of O'Connor's second issue unnecessary.

On April 15, 1976, GSA partially terminated O'Connor's term contract for the convenience of the Government applicable to:

"\* \* \* (1) requirements specified in this [O'Connor's] contract which may be achieved through the use of General Services Administration personnel, and (2) requirements specified in this [O'Connor's] contract that may be a portion of specific alteration and repair projects that encompass work of a nature covered in [O'Connor's] [c]ontract \* \* \*."

GSA concluded that the termination of the contract was essential, in part, so as to effect exclusions intended, but not specifically delineated originally, to permit integrated sequencing of the work performed by its term contractors thereby preventing expected chaotic performance, protracted delay in completion and claims for additional compensation. The partial termination eliminated the overlap between the term contract and the IFB discussed in the April 5 decision. GSA now requests that we consider O'Connor's second issue.

Notice of the proposed procurement was placed in the October 31, 1975, issue of the Commerce Business Daily (CBD), as well as the November 17 issue of the Blue Report, and the November 19 issue of the Dodge Report. The IFB was issued on November 13. Bid opening was scheduled for December 9. GSA states that normal procedures were followed in sending notice of the IFB to those firms on the pertinent bidder's mailing list, including O'Connor. Eighteen bids were opened on December 9.

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O'Connor has not alleged that GSA acted deliberately to preclude it from competing under the IFB. Further, the record does not show that the failure of GSA to return O'Connor's call on the day before and the day that the supply was exhausted stemmed from any deliberate attempt to prevent O'Connor from competing. GSA states that 125 sets of bidding documents were printed. Ninety-one were issued in response to sixty-one requests. The remainder were either placed in bid rooms or retained by GSA for use in awarding the contract. This general availability of the bid documents plus the advertisement of the procurement in the CBD weigh heavily against any inference of a deliberate attempt to exclude O'Connor. Valley Construction Company, B-185684, April 19, 1976.

Inadvertent actions of an agency which preclude a potential supplier (even an incumbent contractor) from competing do not constitute a compelling reason to resolicit, so long as adequate competition was generated and reasonable prices were obtained. Valley Construction Company, *supra*. In this case, 18 bids were received, 7 of which, we are informed by GSA, were below the Government estimate.

Therefore, the protest on this point is denied.

O'Connor maintains that our decision confirmed that the IFB was issued in violation of its term contract, and consequently, the IFB was void ab initio. Furthermore, the partial termination of the term contract to cure the impediment to award under the IFB cannot, in O'Connor's view, cure the illegality of the IFB as issued.

We do not agree with O'Connor's interpretation. We concluded in the April 5 decision that:

"[s]ince there are no exclusionary limitations expressed in the contract, we see no basis upon which the work contemplated in IFB No. GS-00B-03259, as it overlaps with the term contract, may be awarded in light of the requirements nature of that contract. Therefore, we recommend that the IFB be canceled and the term contract utilized to satisfy those requirements."

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GSA had the authority to issue the IFB. 41 U.S.C. § 252(a) (1970). Our decision did not stand for the proposition that the issuance of the IFB was illegal. Rather, our recommendation that the IFB be canceled was directed to the propriety of the proposed award to maintain the validity of the term contract under the circumstances which existed at that time. We took this position so as not to expose the Government to the possible consequences which would have resulted from overlapping awards.

Since the overlap has been eliminated, we conclude that no further impediment to award under the IFB exists.

Free State requested clarification of our decision focusing on two aspects: (1) at what time use of an existing requirements contract should be effective; and (2) whether the existence of a requirements contract precludes the use of a separate solicitation to accomplish work covered by the requirements contract.

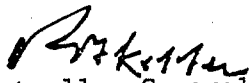
Concerning the first issue, Free State notes that had not the IFB been issued, which was the cause of the O'Connor protest, the sixth floor renovation of the GAO Building would have been accomplished by using the term contract which preceded O'Connor's term contract and was held by Free State. The assertion is made that, but for issuance of the IFB, the renovation work would have been performed by Free State and that since the plans for the work covered by the IFB were drafted and approved during the period covered by Free State's contract, it follows from our decision that Free State should now receive the award.

The matter is untimely raised and not for consideration on the merits. The failure of GSA to utilize Free State's term contract for this work was known, at the latest, when Free State submitted a bid under the IFB in early December 1975. Despite this, the issue was not raised until a letter dated April 15, 1976. See section 20.2(b) of the Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

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Free State further states that "It is our reading of the opinion that whenever a line item exists in a term contract, all work of that nature must be given to the individual holding that contract." This is a fair interpretation of the decision, subject to any limitations contained in particular term contracts. Thus, as indicated in the April 5 decision, GSA may properly place maximum and/or minimum order limitations, or other types of limitations, in term contracts.

In view of the above, we would have no objection to an award being made under the IFB. However, this does not alter GSA's obligation to report to the committees named in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970).

  
Deputy Comptroller General  
of the United States