



FILE: B-186114

DATE: July 19, 1976

MATTER OF: Allied Contractors, Inc.

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H/ 97911

DIGEST:

Where specifications in IFB for advanced sewage treatment plant were ambiguous as to whether prefabricated metal building was required, IFB failed to clearly state Government's actual minimum needs. Government would lack reasonable assurance that its needs would be met if protester's lump sum bid were accepted. Therefore, contracting officer had compelling reason to cancel IFB and resolicit using revised specifications which clearly indicate actual requirements.

Allied Contractors, Inc. (Allied), protests the cancellation of the invitation for bids (IFB) No. N62477-75-B-0089, issued by the Naval Facilities Engineering Command. The IFB sought bids for the construction of an advanced sewage treatment plant at the United States Naval Station in Annapolis, Maryland.

Section 01011, paragraph 2 of the IFB specifications, contained a general description of the sewage treatment plant as follows:

"The work includes the design, fabrication and construction of a sewage treatment plant, a prefabricated building for housing its equipment and an access road thereto. The work includes providing mechanical and electrical services to operate this plant, footings for support of the prefabricated building, and design of the floor slab to support the equipment."

Bids were opened on January 7, 1976. Allied's bid (for "all work") was lowest priced (\$438,200).

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On January 8, 1976, Klemens Schuster, the second low bidder (\$499,900) expressed concern in a letter to the contracting officer that the prefabricated building requirement might be altered or dropped. The letter stated that, despite the apparent requirement under the specifications for a prefabricated building in which to house the sewage treatment equipment, Schuster had learned that an alternative plant package was available to the bidders which was less expensive. The alternative plant package did not require a prefabricated building at all, and thus no slab, no interior electrical system, no propane gas heating, nor an access road. Schuster stated its belief that Allied was intending to use a less expensive package of this type.

Allied responded to this in a statement dated January 19, 1976, which set forth its interpretation of the specifications. The provisions from which that interpretation was gleaned included the following:

Section 01011, paragraph 1, General Intention:

"It is the declared and acknowledged intention and meaning to provide and secure an advanced Sewage Treatment Plant complete and ready to use."

Section 15380, paragraph 3, General Requirements:

"The advanced sewage treatment system shall be a pre-engineered, field erected system. The system shall be a standard product and shall be manufactured by a single firm regularly engaged in the manufacture of advanced sewage treatment systems as described hereinafter. The Contractor must have at least 10 full-scale plants in operation for at least one year which incorporate the principles contemplated herein. A list of these installations shall be furnished to the Government. The system shall be certified by an approved independent laboratory acceptable to the Contracting Officer that it will produce an effluent meeting the standards set forth below. The manufacturer shall provide technical direction during installation of the advanced sewage treatment plant. The Contractor shall furnish all equipment, piping, valves, and fittings necessary for performance of the plant within the limits of the plant proper."

Section 15380, paragraph 3.2, General Requirements:

"* * * All equipment to be exposed to the elements shall be weather proof and suitable for such use."

Section 01011, paragraph 2, General Description, supra.

Section 03300, paragraph 2.2, Calculations:

"* * * Calculations shall show that the slab, footings and foundation walls are adequately designed to accommodate the prefabricated building and all equipment to be installed inside the building. The calculations shall show compliance with the structural design recommendations of the manufacturer of the prefabricated building and the treatment equipment."

Section 13601, paragraph 4.3, Prefabricated Metal Building:

"* * * The building shall be sized to enclose the Sewage Treatment units, specified in Section 15380, as recommended by the manufacturer of the Sewage Treatment units * * *."

Allied reasoned that, since under the specifications the contractor is given a great deal of design latitude, a system may be designed which does not include an unnecessary appurtenance such as a prefabricated building. By extension, Allied asserted that since the structure of the building itself depends largely upon the recommendations of the plant manufacturer, and there are manufacturers who do not recommend a building to house their product at all, the specifications require no building. In substance, Allied argued that the specifications and the needs of the Government are satisfied if the system offered produces an acceptable effluent, and that this objective is reachable without a prefabricated metal building. Allied also pointed out that a design which does not include an increment for the cost of a prefabricated building and its related appurtenances will be lower priced and therefore in the best interests of the Government.

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A preaward conference took place on January 19, 1976. The requirement of a prefabricated building was discussed. In a letter to the contracting officer dated February 12, 1976, Allied declared its intention to be guided by section 4.3, Prefabricated Metal Building, supra. The letter further stated:

"The size of the building, if any, will be determined in the final design in consonance with the criteria of the manufacturer of the Advanced Sewage Treatment Plant and our registered Professional Engineer." (Emphasis added.)

By letter dated March 11, 1976, the contracting officer informed Allied that the IFB had been canceled as of March 3. The determination to cancel, the letter stated, had been made because the Navy decided that the specifications were ambiguous. The contracting officer cited several pertinent provisions of the IFB, including sections 01011, 13601 and 15308, supra. He then pointed out that these provisions could reasonably support two conflicting interpretations: (1) that a building for the sewage treatment plant is required and that the manufacturer's recommendation is limited to only the dimensions of the building housing the plant, or (2) that a building is not required if the manufacturer of the plant recommends no building. Furthermore, if no building is required, no access road to its service doors would be required although apparently called for in section 01011, paragraph 2. Therefore, "in consideration of fairness to bidders" which were unable to determine the correct interpretation, the IFB was canceled.

By letter to our Office dated March 15, 1976, Allied asserted that its bid had actually included the cost of a building, and protested the cancellation of the IFB. Allied requested that the contract be awarded to it as the low bidder.

The Armed Services Procurement Regulation (ASPR) sets forth guidelines governing preaward cancellations of invitations for bids. ASPR § 2-404.1 (1975 ed.) provides in pertinent part:

"(a) The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * *

"(b) When it is determined prior to award but after opening that the requirements of 1-1203 (relating to the availability and identification of specifications) have not been met, the invitation for bids shall be canceled. Invitations for bids may be canceled after opening but prior to award when such action is consistent with (a) above and the contracting officer determines in writing that--

"(i) inadequate or ambiguous specifications were cited in the invitation;

* * * * *

"(viii) for other reasons, cancellation is clearly in the best interest of the Government."

An ambiguity exists only if two or more reasonable interpretations of the specifications are possible. See 48 Comp. Gen. 757, 760 (1969). The conclusion that two reasonable interpretations exist in this case is supported not only by the contracting officer's analysis, supra; it is also supported by the protester's own statements. This is clearly indicated in Allied's statement dated January 19, 1976, and in its protest letter to our Office dated March 15, 1976. Allied contends that since there are two reasonable interpretations of what is required, a bidder can choose either approach, and that a bid which meets the other requirements of the IFB at the lowest price to the Government should be accepted. Thus, Allied does not deny that an ambiguity exists, but contends that it should be awarded the contract in spite of it.

We note that inadequate, ambiguous, or otherwise deficient IFB specifications do not necessarily constitute a compelling reason to cancel and readvertise. Consideration must be given to whether bidders are prejudiced and whether an award under the solicitation would serve the actual needs of the Government. See GAF Corporation et al., 53 Comp. Gen. 586, 592 (1974), 74-1 CPD 68, and decisions cited therein. That decision involved a situation where the specifications were defective, but it appeared that no bidders were prejudiced and an award would meet the Government's actual needs.

In the present case, we believe that there is a compelling reason to justify the cancellation of the IFB. It is that the

IFB failed to set forth the Government's actual requirements with sufficient clarity so that acceptance of a bid under the solicitation would assure that those requirements would be satisfied under the resulting contract. The Navy's report on the protest, dated March 24, 1976, indicates to us that the prefabricated building and other related features are considered to be minimum needs of the Government. We have no basis on the record to question this position. Moreover, we understand that for the resolicitation of this project the IFB is being revised to clearly indicate the requirement for a prefabricated building and associated features.

There are conflicting assertions in Allied's correspondence as to whether it intended to include a prefabricated building and the other related features in its bid. In any event, a bidder's intention must be determined from the bid itself, without consideration of extraneous evidence offered subsequent to bid opening. See 51 Comp. Gen. 352, 355 (1971). The record indicates that Allied's bid was submitted on a lump sum basis and without any additional indication of specific features which were intended to be included. Given the ambiguity in the IFB's specifications, it follows that Allied's bid is also ambiguous. In making an award to Allied--or, for that matter, any other bidder--the Navy would have no reasonable assurance that its minimum needs would be met under the resulting contract at the price(s) bid in the competition. See, in this regard, Learning Resources Manufacturing Co., B-180642, June 6, 1974, 74-1 CPD 308.

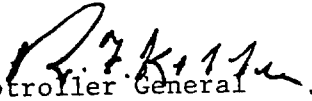
Allied has also complained of the impropriety of Schuster's allegation that the prefabricated building specifications might be waived--which Schuster raised for the first time after bid opening. Allied believes that this allegation should have been raised in a timely manner prior to bid opening.

We agree that any difficulties with the specifications should be brought to the contracting agency's attention prior to bid opening. However, the controversy now before our Office is not an untimely protest by Schuster, but Allied's protest against the cancellation of the IFB. Moreover, we have pointed out that a contracting agency may exercise its prerogative to cancel a solicitation regardless of when or how the information precipitating the cancellation first surfaces. See Edward B. Friel, Inc., et al., 55 Comp. Gen. 488, 490 (1975), 75-2 CPD 333.

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In view of the foregoing, the protest is denied.

Deputy


Comptroller General
of the United States