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*Letter
Proc I*

DECISION



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

FILE: B-190387

DATE: January 24, 1978

MATTER OF: Pacific West Constructors

DIGEST:

1. Because IFB was canceled before offer was accepted and award document was executed, formal contract never arose. Furthermore, factors necessary for a showing of estoppel have neither been alleged nor demonstrated.
2. Claim for bid preparation costs is denied since there is no evidence of arbitrary or capricious action toward claimant by procuring activity in canceling the IFB.
3. Agency need only cancel a portion of a solicitation requiring two separate and distinct bids as long as the portion not canceled contains no inadequacies in its specifications that would preclude bidders from competing on an equal basis.
4. Evidence showed that no cogent or compelling reason to cancel the solicitation completely existed since the differences in the IFB drawings pertaining to the Base Bid portion of the solicitation did not preclude the bidders from competing on an equal basis.
5. Agency determination subsequent to cancellation of IFB to have 20 percent of originally solicited work done in-house rather than contract for such work is matter of Executive Policy for consideration under OMB Circular A-76, and is not within decision function of General Accounting Office. Therefore, since agency's procurement needs have significantly changed since cancellation, IFB cannot now be reinstated.

Pacific West Constructors (PWC) protests the cancellation of invitation for bids (IFB) No. N62474-77-B-6862 issued by the officer in charge of construction (OCC), United States Marine Corps Base, Camp Pendleton, California. The IFB solicited bids for the replacement of existing roofing on military family housing units at Camp Pendleton.

PWC also alleges that there can be no cancellation because the public notice of award set out in a Department of Defense news release prior to the decision to cancel resulted in a binding contract between PWC and the Government. Should we uphold the procuring activity's decision to cancel, PWC, in the alternative, seeks reimbursement for the expense of its bid preparation.

On September 14, 1977, the bids received on the above-described IFB were opened. The bids were as follows:

	Base Bid Item 1	Additive Bid Item 1A
Pacific West	\$1,104,482	\$174,188
Constructors		
Asbestos Roofing Co.	1,115,668	178,000
Eberhard Roofing	1,587,600	406,670

Since the apparent low bidder's bid was in excess of \$1,000,000, the OCC, in accordance with standard Navy procurement procedures, transmitted the information concerning potential award to PWC to the Navy Chief of Information. Subsequently, in the News Release of the Office of Assistant Secretary of Defense (Public Affairs) published on September 30, 1977, there was a one-paragraph statement that PWC was being awarded a \$1,278,670 fixed-price contract for the replacement of existing roofing of family housing at Camp Pendleton.

Also on September 30, 1977, the second low bidder telephonically protested to the procuring activity the proposed award because the specifications were defective on account of inconsistencies in the solicitation drawings and because 38 of the buildings to be reroofed had been reroofed recently under a contract between Asbestos Roofing and the Government. In addition, Asbestos stated that its bid would have been \$200,000 lower if the number of buildings to be reroofed had been correctly shown on the drawings. By a telegram dated October 3, 1977, Asbestos Roofing confirmed its protest and urged the OCC to reject all bids and reissue the IFB with the correct scope of work set out.

A check by the procuring activity of Asbestos Roofing's allegations revealed that there were discrepancies between the number of buildings listed in General Information on NAVFAC Drawing 6097866 and the number of buildings designated for reroofing on NAVFAC Plot Plan Drawings 6097863 and 6097864. Additionally, a check of the 38 buildings shown on NAVFAC Drawing 6097863 with a previous reroofing contract awarded to Asbestos Roofing revealed that all of them had been reroofed recently by Asbestos Roofing.

Based on the results of these checks, the procuring activity decided to cancel the IFB and readvertise, providing corrected drawings. In any event, PWC was telephonically advised on September 30, 1977, by the procuring activity that pending resolution of Asbestos Roofing's protest, no award would be made. By the time the decision to cancel was made, it was too late to retract the DDD public news release of award to PWC. The OCC notified PWC in writing on October 6, 1977, that all bids under the IFB were being rejected on the basis of "significant defects in specifications."

In regard to PWC's contention that a binding contract between it and the Government exists, we note that no award document was executed. The Armed Services Procurement Regulation (ASPR) provides that contract award shall be made by the contracting officer through mailing or otherwise furnishing the bidder a properly executed award document or notice of award on such forms as may be prescribed by the procuring activity. ASPR § 2-407.1 (1976 ed.). ASPR § 16-401.2(c) (1976 ed.) sets out the standard form to be used for the award of construction contracts executed as the result of formal advertising. Therefore, since there was no award made by the OCC to PWC, no formal contract between the Government and PWC ever came into existence. See A.B. Machine Works, Inc., B-187563, September 7, 1977, 77-2 CPD 177.

Furthermore, factors that would estop the Government from denying the existence of a contract have neither been alleged nor demonstrated by PWC. See Leonard Joseph Company, B-182303, April 18, 1975, 75-1 CPD 235.

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Other than making a general claim, PWC has also not established any basis for the recovery of its bid preparation costs. Essentially, bid preparation costs can be recovered where the Government acted arbitrarily or capriciously with respect to a claimant's bid or proposal. Heyer Products Co. v. United States, 135 Ct. Cl. 63 (1956); see also, Keco Industries, Inc. v. United States, 192 Ct. Cl. 773 (1970); and Keco Industries, Inc. v. United States, 203 Ct. Cl. 566 (1974). At the very most, however, the record before us indicates that there may have been negligence in the preparation or issuance of the IFB. Mere negligence, however, by the procuring activity is not sufficient to support a claim for bid preparation costs. Austin-Campbell Co., B-188659, August 9, 1977, 77-2 CPD 99.

As to the cancellation of the IFB, the general rule is that when it is learned after bid opening that the specifications were defective because they were subject to more than one interpretation, the proper course of action is to reject all bids and resolicit on the basis of revised specifications. Johnson Controls, Inc., B-188488, August 3, 1977, 77-2 CPD 75. This is because the bidders did not have the opportunity to compete on an equal basis. Ehrich Construction Company, B-187726, February 14, 1977, 77-1 CPD 105. However, the mere utilization of inadequate specifications is not itself a reason to cancel a solicitation when the Government's needs can nonetheless be satisfied. See The Intermountain Company, B-182794, July 8, 1975, 75-2 CPD 19, and the cases cited therein. If the procuring agency would be getting what it wanted and if competition has not been adversely affected so that no bidder has been prejudiced, an award can be made under a solicitation having defective specifications. 43 Comp. Gen. 23 (1963); see also Thomas Construction Company, Inc., B-184810, October 21, 1975, 75-2 CPD 248, and the cases cited therein.

In all cases, however, each decision to cancel must stand upon its own facts. Edward B. Friel, Inc., 55 Comp. Gen. 231, 240 (1975), 75-2 CPD 164 (1975).

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Paragraph 2 of the Bidding Information portion of the IFB provided that bidders state a price for Base Bid Item 1 and a separate price for Additive Bid Item 1A. The latter item comprises the addition of 38 family housing units in the "Wire Mountain # 1" area as listed on sheet A-4 (NAVFAC Drawing 6097866) of the IFB drawings and shown on sheet A-1 (NAVFAC Drawing 6097863) of the drawings. These 38 houses were the ones that had been reroofed recently for the Government by Asbestos Roofing.

PWC agrees that it is not in the best interest of the Government to spend the amount of its low bid price on Additive Bid Item 1A, \$174,188, in order to duplicate recently completed reroofing. Nevertheless, PWC contends that there is no legitimate reason, compelling or otherwise, to cancel the entire IFB when all that needs to be done is to merely eliminate Additive Bid Item 1A and award a contract for Base Bid Item 1 only. PWC cites our decision in Hampton Metropolitan Oil Co., B-186030, December 9, 1976, 76-2 CPD 471, as support for the proposition that an agency may properly cancel only a portion of a solicitation which provides for multiple awards.

It is true that the provisions of ASPR § 2-404.1(b), which refer only to cancellation of a solicitation, must be read as permitting cancellation of either all or a portion of a solicitation, as required by the circumstances, and not as requiring cancellation of the solicitation completely or not at all. However, as our decision in Hampton Metropolitan Oil Co., supra, pointed out, the issue was whether the Government could reasonably have determined which bid submitted would have resulted in the lowest ultimate cost. We found that since the low bids under other portions of the multiple award solicitation did, in fact, adequately protect the Government, there was no cogent or compelling reason to cancel the other portions.

The main issue here is whether the specifications pertaining to the Base Bid Item 1 portion of the IFB were so inadequate as to have precluded the bidders from competing on an equal basis. PWC points out that there are no allegations that some of the buildings in Base Bid Item 1 have been recently reroofed. Further, PWC argues that the only thing that the General Information

table on NAVFAC Drawing 6097866 is intended to show is the correct totals for the houses in each of the three housing areas covered by both Base Bid Item 1 and Additive Bid Item 1A. In this regard, PWC states that the General Information table has no legend to indicate which of the total number of houses are included within the scope of the reroofing work either for Base Bid Item 1 or for Additive Bid Item 1A.

The Base Bid Item 1 bid combined the Camp Pendleton military family housing areas known as "Deluz" and Wire Mountain #2. The Navy indicates that with respect to the Deluz area, there was no discrepancy between the plot plan drawing for the area and the General Information table as to the total number of Deluz houses included in Base Bid Item 1. The discrepancy for Base Bid Item 1 existed solely in the Wire Mountain #2 housing area. The General Information table listed the total number of buildings for that area as 385. On the other hand, the plot plan, NAVFAC Drawing 6097864, was a schematic drawing showing the arrangement of the buildings in the Wire Mountain #2 area. The legend for this plot plan drawing indicated that the buildings to be reroofed under Base Bid Item 1 were shaded while the buildings not included in the contract were unshaded. By counting each shaded building, the plot plan showed there were 330 buildings in the Wire Mountain #2 area that were included in Base Bid Item 1.

There was also a discrepancy between the General Information table and NAVFAC Drawing 6097867, which is the schedule of housing units for the Deluz and Wire Mountain #2 areas. This drawing listed in columns the particular type of house found at each individual street address in each of the two housing areas. In addition, there was a column next to the address column labeled "Notes" which showed whether a particular street address is in Base Bid Item 1. If the house is not in Base Bid Item 1, the notation "NIC" (not in the contract) appeared in this column. By counting all the NIC marked addresses, there were 55 units in Wire Mountain #2 that were not included in the IFB.

More importantly, both NAVFAC Drawing 6097864 and NAVFAC Drawing 6097867 set forth data which without even having to count each and every house showed that

not all the housing units in Wire Mountain #2 were to be reroofed under Base Bid Item 1. The General Information table had no NIC notation for any of the various types of housing units in the Wire Mountain #2 area. The only NIC notations that appear on the General Information table are ones appearing next to three housing unit types in the Wire Mountain #1 area.

In arguing reliance on the General Information table figure of 385 as the number of houses to be reroofed in Wire Mountain #2, Asbestos Roofing informed the OCC that its bid would have been over \$200,000 lower had it used the figure of 330 instead. We find no support for this statement, however. Because it was the low bidder under IFB No. N62474-76-C-7430, Asbestos Roofing was awarded a contract on June 30, 1976, to reroof all the military housing units in Wire Mountain #1 and a number of military housing units in Wire Mountain #2. More specifically, the award document, taken in conjunction with the drawings which are enclosures to the Navy's report on PWC's protest, shows that 42 houses were to be reroofed in Wire Mountain #2.

The General Information table for the prior solicitation's drawings also listed the total number of buildings in the Wire Mountain #2 area as 385. A comparison of the General Information table with the other solicitation drawings further reveals that Asbestos Roofing could not possibly have relied at all on any of the data set out there in computing its bid under this prior solicitation. Like the General Information table on NAVFAC Drawing 6097866, the prior solicitation breaks down the 385 total for Wire Mountain #2 into subtotals for each of the seven different types of buildings in the area. These subtotals are precisely the same as those that are shown on NAVFAC Drawing 6097866. They are as follows:

Bldg Type No.	No. Bldgs
11B2	75
13C1	80
14C1	70
15B1	38
16B1	22
17C1	59
18C1	41
TOTAL	385

In the General Information table of the prior solicitation's drawings the notation NIC (not in the contract) appears next to building types 15B1, 16B1, 17C1, and 18C1. Using only the General table, it would seem that since building types 11B2, 13C1, and 14C1 have no NIC notation beside them, every one of the buildings in these three types is in the contract, 225 buildings in all. The drawing setting out the schedule of housing units for Wire Mountain #2, however, lists only 32 units under the Base Bid and 10, 6, 4, and 3 for Additive Bid Item 1A, 1B, 1C, and 1D, respectively. Moreover, the total amount of the award for this contract, for 101 buildings including the 59 buildings in Wire Mountain #1, was only \$284,068, demonstrating that Asbestos Roofing had not relied completely upon the General Information table and had computed its bid on a far less number of buildings in Wire Mountain #2 than 225.

Having a set of bids discarded after they are opened and each bidder has learned his competitor's prices is a serious matter, and it cannot be permitted except for cogent reasons. The Massman Construction Company v. United States, 102 Ct. Cl. 699, 719 (1945). Further, the rejection of all bids after they have been opened generally discourages competition since it makes all bids public without award, contrary to the interests of the low bidder, 52 Comp. Gen. 285 (1972). If an award would serve the actual needs of the Government, cancellation after bid opening is usually inappropriate. 49 Comp. Gen. 211 (1969); 48 id. 731 (1969).

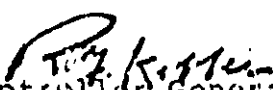
In summary, then, the differences among the drawings were not, on the record, a cogent and compelling reason to cancel the solicitation in toto. Nevertheless, we do not believe that at this point the Base Bid Item 1 portion of the solicitation can be reinstated for award to PWC as the low, responsive, responsible bidder. The OCC's October 6, 1977, written notification that all bids were being rejected gave "expiration of funds" as an additional rationale for canceling the solicitation. On January 11, 1978, we received notification from PWC that it had recently received IFB N6247-78-B-6352 which is a resolicitation for work on Wire Mountain # 2 buildings only.

PWC now alleges that the resolicitation changes nothing from the canceled solicitation except that 13 more buildings have been added in Wire Mountain #2 (a total of 343 buildings) and all the buildings in the DeLuz area have been deleted. PWC protests that because the buildings in the DeLuz area have to still be an immediate requirement, the Government will be issuing two resolicitations, thereby eroding the integrity of the competitive bidding system. It is our understanding, that because of funding problems the entire reroofing project has been transferred from the Marine Corps Base at Camp Pendleton to the Navy Public Works Center in San Diego. Further, we understand that 20 percent of the necessary reroofing work will now be done in-house by the Navy Public Works Center. Consequently, a significant portion of the DeLuz area will be reroofed by the Navy itself.

Executive Branch policy concerning whether to contract out for products or services or whether to perform such work in-house is covered by Office of Management and Budget Circular A-76. Kasper Brothers, B-188276, February 8, 1977, 77-1 CPD 99. The Circular covers construction work. See implementing Department of Defense Instruction 4100.33 (June 16, 1971) at Enclosure 1, page 5 (repair, alteration, and minor construction of buildings and structures). Although the Circular expresses a general preference for contracting with commercial enterprises, we have always regarded the provisions of the Circular as matters of Executive policy which are not within the decision functions of the General Accounting Office. Kasper Brothers, *supra*; See also, Service Is Basic, Inc., B-186332, October 1, 1976, 76-2 CPD 302. Thus, any question whether the Navy properly decided to do 20 percent of the reroofing in-house is not a matter for decision by us.

Under the present circumstances, we conclude that the resolicitation represents a major change in requirement from that of the canceled solicitation. Therefore, because the Navy's procurement needs have changed significantly since the time the decision to cancel was made, the canceled solicitation cannot be reinstated.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States