

DECISION

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

FILE: B-221629

DATE: April 7, 1986

MATTER OF: Jim Cooley Construction, Inc.

DIGEST:

1. Protest against rejection of bid and cancellation of solicitation is untimely and will not be considered on the merits when it is filed several months after the cancellation.
2. Protest that solicitation encourages unbalanced bidding is timely under 4 C.F.R. § 21.2(a)(1) (1985) because it was filed prior to bid opening. However, whether bidders will submit unbalanced bids by transferring costs to circumvent statutory cost limitation applicable to one item can only be determined after bid opening, when validity of government cost estimates can be examined and it can be determined whether bidders' prices for items were proximate to cost estimates.

Jim Cooley Construction, Inc. (Cooley), protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DACA56-85-B-0052, issued by the United States Army Corps of Engineers (Corps) for the repair and construction of an addition to the Tinker Air Force Base passenger terminal and the subsequent cancellation of the IFB and resolicitation of the requirement by the Department of the Air Force.

We dismiss the protest.

The IFB schedule issued by the Corps contained three items: item 1, repair work; item 2, alteration and addition; and item A-1, an additive item. Under the Military Construction Act, bid item 2 was subject to a cost limitation of \$200,000. The Corps rejected the five bids, including Cooley's low aggregate bid, received by bid opening because all exceeded the cost limitation on item 2.

Since the IFB did not notify bidders of the statutory cost limitation and all bids exceeded the limitation, the Corps canceled the IFB and notified Cooley of the cancellation by letter dated September 24, 1985.

On December 12, 1985, the United States Air Force's Oklahoma City Air Logistics Center (Air Force) issued IFB No. F34650-86-B-0029 for the same work in the canceled Corps solicitation. The Air Force IFB contains a notation that the bid item for alteration is subject to a statutory cost limitation of \$200,000.

Cooley protests that the Corps should have waived the statutory cost limitation and that, as the low bidder under the Corps solicitation, it should be awarded the contract, especially since the cost limitation was not specified in the Corps IFB. This protest ground is untimely and will not be considered on the merits. Our Bid Protest Regulations require that protests not based on alleged improprieties in a solicitation must be filed not later than 10 working days after the basis of protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1985). If Cooley believed that rejection of its bid and cancellation of the Corps IFB were improper, it should have filed a protest with our Office not later than the 10th working day after it received the Corps' September 24, 1985 letter notifying it that all bids were rejected and the IFB was canceled. Because Cooley did not protest until January 13, 1986, its protest on this ground is untimely. See Brink Construction Company, B-219413; B-219413.2, July 11, 1985, 85-2 C.P.D. ¶ 43.

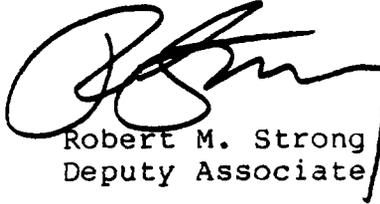
Cooley also protests that bidders will be encouraged by the Air Force resolicitation to submit unbalanced bids. Cooley notes that the Air Force IFB schedule contains only two items--one for repair and one for alteration--that the alteration item is subject to a statutory cost limitation, and that award will be made to only one contractor. Cooley argues that such a solicitation encourages the allocation of costs to the other item to meet the statutory requirements applicable to the alteration item.

The Air Force considers this protest ground untimely since Cooley was mailed a copy of the Air Force IFB on December 12, 1985, and its protest letter is dated January 9, 1986, more than 10 days after the basis of its protest was known or should have been known. We disagree. Our Bid Protest Regulations require that protests based upon alleged improprieties in a solicitation which are apparent

prior to bid opening be filed prior to bid opening.
4 C.F.R. § 21.2(a)(2) (1985). Cooley's contention regarding unbalanced bidding concerns a solicitation impropriety and was timely filed on January 13, 1986, before bid opening. See Aritech Corp., B-189107, Aug. 9, 1977, 77-2 C.P.D. ¶ 102.

Cooley's contention that bidders will submit unbalanced bids under the Air Force IFB by transferring costs from one item to another to circumvent the statutory cost limitation is premature and speculative at this time. It is only after opening, when the validity of government cost estimates can be examined and it can be determined whether bid prices for items were proximate to the cost estimates, that such an allegation can be proven. See ABC Siding & Remodeling, B-213390, July 10, 1984, 84-2 C.P.D. ¶ 32. Moreover, the Cost Limitation clause, incorporated by reference in the solicitation, provides for the rejection of a bid if it is materially unbalanced.

The protest is dismissed.



Robert M. Strong
Deputy Associate General Counsel