



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Berendse & Sons Paint Co., Inc.

File: B-262244

Date: November 21, 1995

Tony Berendse for the protester.

Vera Meza, Esq., and Garland E. Yarber, Esq., Department of the Army, for the agency.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation of solicitation after bid opening was proper where solicitation limited the government's right to place work orders such that it would not meet the government's actual minimum needs.

DECISION

Berendse & Sons Paint Co., Inc. protests the Army's cancellation of invitation for bids (IFB) No. DAAC79-95-B-0001, for painting and minor repair of structures at the Red River Army Depot, Texarkana, Texas. Berendse contends that the agency did not have a compelling reason to cancel the IFB after the bids had been opened, and that Berendse is entitled to award as the apparent low, responsive and responsible bidder.

We deny the protest.

The IFB contemplated the award of an indefinite quantity contract for painting and minor repairs to buildings and other structures at the depot, for a base year with 4 option years. The bid schedule consisted of numerous line items (some for removal of lead-based and asbestos-fibered paint), for which bidders entered unit and extended prices based on the estimated quantity for each item. According to the IFB, the maximum dollar value of delivery orders which could be issued by the agency was \$100,000 per year.

Section 2A of the specifications, "Lead and/or Asbestos Abatement," required that contractors directly responsible for removing lead-based paint and/or asbestos-fibered paint be licensed by the state and demonstrate prior experience with abatement projects of similar scope by submitting at least three references from previous customers. Contractors were also required to submit a notarized

statement listing any citations, penalties, terminations, and legal proceedings or claims related to their abatement work. Section 2A stated that "[f]ailure to submit requested information/documentation or the submission of incorrect information/documentation will result in automatic disqualification of the bid package."

The agency evaluated bids based on the total price for all line items for the base year and the option years. Berendse was the low bidder with a total price of \$1,852,908 (averaging \$370,581.60 per year), and the government estimate was \$3,173,683.10 (\$634,736.62 per year).

Another bidder, Lewis Environmental Service, complained that all the other bids, including Berendse's, should have been rejected as "nonresponsive" for failing to include the licensing and qualifications information required by section 2A of the specifications; Lewis was the only bidder which had provided such information with its bid. Although the contracting officer concluded that the information regarding licensing and qualifications concerned responsibility rather than responsiveness, he decided to cancel the IFB due to the IFB's ambiguous requirements in this regard and because the IFB was otherwise deficient.

Section 2A of the reissued IFB was corrected to require that licenses and qualifications be submitted by the lead and/or asbestos abatement contractor/subcontractor and approved by the agency prior to the commencement of abatement work under a delivery order (rather than submitted with the contractor's bid), and to reserve the right of the agency to reject abatement subcontractors proposed for use on any delivery order "for any reason that serves the best interests of the government or building occupants." In addition, faulty estimated quantities for nine of the line items were corrected and various standard clauses added.¹ Finally, the maximum dollar amount for delivery orders in any 1 contract year was increased from \$100,000 to \$1,000,000.

Because of the potential adverse impact on the competitive bidding system of canceling an IFB after prices have been exposed, any cancellation after bid opening must be based on a compelling reason. FAR § 14.404-1(a)(1); Ferguson-Williams, Inc., B-258460; B-258461, Jan. 24, 1995, 95-1 CPD ¶ 39. Under FAR § 14.404-1(c), an IFB may be canceled and all bids rejected after bid opening but before award when "[i]nadequate or ambiguous specifications were cited in the invitation," and where

¹Among the standard clauses added in the revised IFB were "Audit and Records--Sealed Bidding," Federal Acquisition Regulation (FAR) § 52.214-26; "Subcontractor Cost or Pricing Data--Modifications--Sealed Bidding," FAR § 52.214-28; "Performance of Work by the Contractor," FAR § 52.236-1; and "Subcontracts (Fixed-Price Contracts)," FAR § 52.244-1.

"[f]or other reasons, cancellation is clearly in the public's interest." Contracting officials have broad discretion to determine whether a compelling reason to cancel exists, and our review is limited to considering the reasonableness of their decision. H. Angelo & Co., Inc., B-260680.2, Aug. 21, 1995, 95-2 CPD ¶ 74. In this regard, we generally consider cancellation after bid opening to be appropriate when an award under the solicitation would not serve the actual minimum needs of the government. McGhee Constr., Inc., B-250073.3, May 13, 1993, 93-1 CPD ¶ 379; Bangar Contractors Corp., B-240071, Oct. 16, 1990, 90-2 CPD ¶ 295.

In this case, the agency had a compelling reason to cancel the IFB because award would not have resulted in a contract which would satisfy the government's actual minimum needs. Under the IFB as initially issued, the contractor would not have been obligated to accept further delivery orders once the total amount of work ordered by the agency reached \$100,000 in any 1 year. Given that actual orders anticipated to be placed with the contractor significantly exceeded the \$100,000 per year limitation, as indicated by Berendse's own low total bid price and the government estimate, it was entirely possible that the government would be unable to satisfy its minimum requirements for work in excess of \$100,000 per year under the initial IFB. By revising the IFB to allow the agency to order up to \$1,000,000 of work per year, the agency will be assured of its ability to satisfy its minimum needs under this IFB. Since award under the initial IFB would not have satisfied the government's needs, we find that there was a compelling reason to cancel the IFB and resolicit with a corrected IFB.² See Zeta Constr. Co., Inc., B-244672, Nov. 5, 1991, 91-2 CPD ¶ 428; Holk Dev., Inc., B-236765.2, Jan. 18, 1990, 90-1 CPD ¶ 65.

The protest is denied.

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²Although this was not the primary reason given by the agency for canceling the solicitation, information justifying the cancellation of a solicitation can be considered no matter when the information surfaces or should have been know. Ferguson-Williams, Inc., *supra*; McGhee Constr., Inc., *supra*. In view of our determination that the solicitation's understatement of its yearly order limitations constituted a compelling reason to cancel, we need not decide whether the other changes would have justified the cancellation.