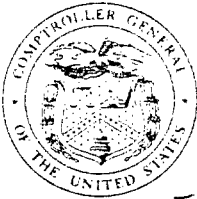


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DECISION



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

[Protest Against IFB Cancellation]

FILE: B-196856 DATE: July 8, 1980
MATTER OF: McCain Trail Construction Co.

DIGEST:

1. Agency determination that adequate funds are not available is sufficient reason to reject bids and cancel solicitation irrespective of dispute as to Government's estimates.
2. Agency properly rejected late modification from low bidder when low bid, both as modified and originally submitted, was not acceptable because it exceeded agency's funding for project.
3. Low bidder is not entitled to bid preparation costs based on its claim that solicitation, which was canceled after opening because of inadequate funds, contained erroneous notice of estimated price range, was issued without adequate funds and should have been canceled prior to opening; since agency reasonably believed it had adequate funding when solicitation was issued and reasonably determined to proceed with bid opening after revised estimates were received three days prior to bid opening date.

McCain Trail Construction Co. (McCain) protests the cancellation of invitation for bids (IFB) No. RLO-79-90 issued by the Forest Service, United States Department of Agriculture (Forest Service), and requests that it be awarded bid preparation costs. For the reasons stated below, the protest and claim are denied.

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The solicitation, which was issued on August 8, 1979, with bid opening scheduled for September 18, called for bids for the construction of trails and bridges along the Resurrection River Trail in the Chugach National Forest. The solicitation provided that award would be made on one of four options depending on the funding available. Option I described the most elaborate project, while Options II-IV described more modest plans in descending order of complexity.

Although the solicitation contained the notation "Estimated Price Range \$400,000 to \$700,000," the Forest Service estimated on July 30 that Option I would cost \$774,155.50, Option II \$498,074.50, Option III \$479,948.50 and Option IV \$236,361.50.

Initially, the Forest Service intended to fund the project by reprogramming \$462,000 of its fiscal year 1979 funds. On July 12, the local Forest Service Office learned that the funds requested could not be reprogrammed. Although the contracting officer still hoped to be able to reprogram other 1979 funds, he was assured of \$263,956.45 from the 1980 appropriation to cover the project.

On August 27-31 bidders were taken to view the project site. Subsequently, on September 10, the Forest Service personnel who prepared the original estimates revised the estimates upward. Option I was estimated to cost \$934,003.50, Option II \$657,922.50, Option III \$552,286.50 and Option IV \$308,699.50. The revised estimates were not received in the contracting office until September 15. Although the revised estimates indicated that even the least elaborate option would exceed the available funding, bids were opened as scheduled on September 18. The protester was the only firm to bid on Options I, II and IV and was the low bidder on Option III. Since its bids of \$909,756 for Option I, \$832,095 for Option II, \$566,180 for Option III and \$450,876 for Option IV all exceeded the agency's available funding, the solicitation was canceled on October 9.

Prior to the cancellation, McCain offered to reduce its \$566,180 bid for Option III to \$476,273.75 which was below the Government's original estimate of \$479,948.50 and revised estimate of \$552,286.50 for that option.

McCain contends that it should be awarded a contract based on Option III since its reduced bid was a late modification within the meaning of Federal Procurement Regulations (FPR) § 1-2.305 (1964 ed. amend. 51) and was therefore entitled to consideration. Additionally, McCain argues that the Government's decision to cancel the solicitation was arbitrary and capricious because there was no compelling reason for taking such action.

A late modification of the otherwise successful bid shall be considered if the contracting officer finds that the terms of the bid have been made more favorable to the Government. FPR § 1-2.305. We recently held in Sony Industries, B-197300, June 4, 1980, 80-1 CPD that a late modification reducing a bid which, as originally submitted, exceeded a temporary funding limit, could be accepted where the original bid was reasonable and additional funding would have been obtained to support the award even if the reduction had been rejected. Here, McCain's bid both as originally submitted and as modified exceeded available funding, thus the proposed modification could not have been accepted. See King-Fisher Company, B-192480, November 3, 1978, 78-2 CPD 321.

Our Office has long recognized that the authority vested in a contracting agency to cancel a solicitation is extremely broad and in the absence of bad faith or abuse of discretion a decision to cancel a solicitation will not be disturbed. King-Fisher Company, supra. However, to protect the integrity of the competitive bidding system, FPR § 1-2.404-1 requires a compelling reason to cancel a solicitation after all bids have been opened and bid prices exposed. We have held an agency determination that adequate funds are not available for contract obligation to be sufficient

reason to reject bids received and cancel a solicitation. Emerson Construction Company, Inc., B-190702, December 15, 1977, 77-2 CPD 468 and cases cited therein.

McCain cites a number of our decisions supporting agency cancellations and attempts to distinguish them from this case, mainly on the basis of the inadequacy of the Forest Service's estimates. However, we have held that agencies have an unquestioned legal right to cancel a solicitation because of a lack of funds irrespective of disputes over the validity of the Government's estimates. Somers Construction Company, Inc.--Reconsideration, B-193929, July 24, 1979, 79-2 CPD 54. Thus, we believe the Forest Service was justified in canceling the solicitation.

McCain contends that it is entitled to bid preparation costs because the agency arbitrarily and in bad faith solicited bids for a project which it knew it could not fund. In support of this position, McCain states that the estimated price range set forth in the solicitation as well as the agency's revised cost estimates for each of the four project options exceeded the assured fiscal year 1980 funding. The protester also maintains that the contracting officer acted in bad faith by failing to cancel the solicitation after receiving the revised estimates.

As a general rule, bid preparation costs can only be recovered where the Government has acted arbitrarily or capriciously with respect to a claimant's bid or proposal, Fortec Constructors, B-188770, August 7, 1979, 79-2 CPD 89. One of the recognized grounds for recovery under this general standard is subjective bad faith on the part of procuring officials. See Keco Industries, Inc. v. United States, 492 F. 2d. 1200 (Ct. Cl. 1974).

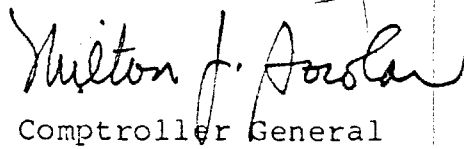
We disagree with McCain's contention that the Government acted arbitrarily by issuing the solicitation when its estimates exceeded available funds. The Forest Service's July 30 estimates for the project ranged from \$236,361.50 for Option IV to \$774,155.50 for Option I. At the time the solicitation was issued

on August 8, the Forest Service was assured of 1980 fiscal year funds totaling \$263,361. Since the Forest Service reasonably believed that fiscal year 1980 funds alone would be more than adequate to cover the Government's July 30 estimate for Option IV it did not act improperly in issuing the solicitation. Further, although Forest Service agrees that the estimated price range set forth in the solicitation exceeded the available funding, it states that this was a mistake. The record, however, does not demonstrate that this was other than a good faith error. Moreover, we disagree with McCain's assertion that the stated price range represents a guaranty by the agency that at the time the solicitation was issued sufficient funding existed for the project. Publication of the estimated price range is not intended to disclose the Government's official estimate nor to relieve bidders of the responsibility of preparing their own independent bid. Instead the purpose of supplying bidders a cost range is merely to describe information concerning the relative magnitude of construction projects. See Scott Glass, Inc.--Reconsideration, B-185864, August 17, 1976, 76-2 CPD 164.

McCain's final argument in support of its claim for bid preparation costs is that the contracting officer must have been aware that new higher estimates were being prepared prior to the time of their completion; therefore, he acted arbitrarily by not canceling the solicitation at the earliest possible time. We disagree. Although it may be that the contracting officer knew as early as September 10 that the estimates were being revised those estimates were not received until September 15. We do not believe that the contracting officer was obligated to cancel the solicitation based on oral advice that the estimates were being revised. While the actual estimates were received three days before bid opening, and while the invitation could have been canceled at that time, we do not believe the contracting officer's decision to proceed with bid opening was unreasonable since 25 potential bidders would have had to be notified.

The bidders were located in both Alaska and Oregon, and part of the time available to make the notifications included a weekend. Under the circumstances, we cannot say that the contracting officer was clearly wrong in believing that all potential bidders could not be notified prior to bid opening or that the decision to go ahead with bid opening was arbitrary.

The protest and claim are denied.

A handwritten signature in cursive script, reading "Milton J. Jordan".

For the Comptroller General
of the United States