

DECISION



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

PL-2
McConnell
120066

FILE: B-206999.6

DATE: December 6, 1982

MATTER OF: Downtown Copy Center

DIGEST:

An agency's cancellation of a solicitation after bid opening is not unreasonable where the estimated quantities in the solicitation for the major portion of work are based on quarterly reports of the incumbent contractor, one of which an audit has called into question, and it reasonably appeared that the incumbent contractor could have had an unfair competitive advantage.

Downtown Copy Center (DCC) protests the cancellation of solicitation No. IFB-82-03 by the Federal Communications Commission (FCC). The solicitation sought a contractor to supply services, including personnel and equipment, for the search, duplication, and sale to the general public of certain documents maintained by the FCC. The contractor was also to furnish coin-operated copiers for use by the public.¹

¹This contract apparently falls within section 11 of the Federal Advisory Committee Act, 5 U.S.C. Appendix (1976). While we have held that the act does not require the application of any particular procurement procedures, CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225, this procurement was conducted under the Federal Procurement Regulations.

DCC has also filed suit against the FCC in the United States Claims Court, seeking injunctive and declaratory relief.² Downtown Copy Center v. The United States, Civil Action No. 527-82C. By order dated October 29, 1982, the court requested an advisory opinion from our Office. This decision is in response to that request.

The central issue of the case is whether the existence of inaccuracies in the solicitation's volume estimates provided a reasonable basis for cancellation of the solicitation after bid opening. As discussed below, we conclude that the cancellation was justified. We therefore deny the protest.

The FCC issued the solicitation on February 18, 1982. Section C of the solicitation contained a bidding schedule for services for the initial year of the contract and two one-year options. The schedule listed 13 categories of services, such as duplication services and search services, and provided an estimate of the yearly volume of work projected for each category. A footnote to the schedule cautioned that estimated volumes were not to be construed as actual requirements.

The solicitation specified that award would be made on the basis of the lowest bid as determined by

²The Federal Courts Improvement Act of 1982, Pub. L. 97-164, which became effective October 1, 1982, established the United States Claims Court and the United States Court of Appeals for the Federal Circuit, replacing the United States Court of Claims and the United States Court of Customs and Patent Appeals. Under the Act, the United States Claims Court has jurisdiction "[t]o afford complete relief on any contract claim brought before the contract is awarded * * *." 96 Stat. 39, § 133(a), April 2, 1982.

multiplying the unit prices bid for each item by the estimated quantities specified and then adding the totals for each of the three years. The contractor would retain the revenue generated from sales under the contract. DCC was the incumbent contractor and had held the contract, through option exercises and extensions, for the previous seven years.

At a pre-bid conference on March 4, prospective bidders requested copies of DCC's quarterly reports, which were the source of some of the solicitation's volume estimates. On that same day, the FCC issued an amendment to the solicitation substantially increasing the estimated volumes. The FCC subsequently received additional requests from prospective bidders to make available DCC's quarterly reports. In a letter dated March 18, the FCC responded by stating that it only had on file three quarterly reports for 1981 and one for 1977. The letter set forth figures from those reports for April 1981 to December 1981.

The FCC opened bids on April 16. DCC's low bid of \$1,087,777.50 was the lowest of the six received. On April 29, the third low bidder, TS Infosystems Inc. (TSI), filed a protest with this Office contending that the solicitation contained inaccurate volume estimates and that DCC was nonresponsible because of allegedly poor service it was rendering under the current contract.³ Automated Datatron Incorporated (ADI), the second low bidder at \$1,093,291, protested to this Office on April 30, alleging that DCC's bid was mathematically unbalanced.

After bid opening, the FCC requested the Defense Contract Audit Agency (DCAA) to audit DCC's records to determine whether the firm had submitted an unbalanced bid and whether DCC's quarterly reports were accurate.

³We dismissed TSI's protest on procedural grounds. TS Infosystems, Inc., B-206999.3, May 18, 1982, 82-1 CPD 479. On June 11, TSI requested that we reconsider our decision and that request was pending when the FCC canceled the solicitation.

The DCAA reviewed DCC's records for the last quarter of 1981 and, in a July 2 report, stated that it found no basis to challenge DCC's proposed prices. The DCAA cautioned, however, that its conclusion was based on the assumption that the solicitation's volume estimates were accurate. That assumption, the DCAA explained, might not be realistic for the following reasons:

1. The audit of duplication services for the last quarter of 1981 revealed a disparity of 38 percent between DCC's quarterly report figure of 457,428 copies and DCAA's audit figure of 632,695 copies.

2. The DCAA was unable to verify the volume of copies from coin-operated machines since DCC did not maintain independent meter readings for those machines but relied on meter readings from maintenance records.

3. DCC was unable to provide time records to substantiate the charges for search services. In addition, invoices for those services were not always consistent with respect to the method of billing.

4. DCC did not retain the supporting data that were the bases of its quarterly reports.

On September 8, the FCC canceled the solicitation, stating that "the estimates * * * were probably in error and could have given an unfair advantage to the incumbent contractor." TSI and ADI subsequently withdrew their protests. On September 21, DCC filed a protest with the FCC, challenging the cancellation. The FCC denied the protest on September 30. DCC subsequently brought its action before the Claims Court on October 13 and filed this protest on October 15.

The FCC contends that it was reasonable to assume, based on the DCAA report, that the solicitation's volume estimates were inaccurate and that the inaccuracies could have been prejudicial to the other bidders vis-a-vis DCC. In this regard, the FCC asserts that the Government had a duty to include in the solicitation the most accurate information available. Since one of DCC's quarterly reports was shown to be inaccurate and the supporting data for the report inconsistent or missing, the FCC continues, it was reasonable to conclude that the volume estimates based on those reports did not represent the most accurate information. The FCC also asserts that since DCC had access to accurate volume estimates, it was reasonable to believe that DCC might have had an unfair advantage, particularly since the difference between the bids of DCC and ADI was only \$5,513.50.

DCC challenges the FCC's assertion that the inaccuracies in the volume estimates were sufficient to justify cancellation. First, DCC alleges that the FCC's reliance on the 38 percent disparity in one category of services for one quarter of the year was improper. In this regard, DCC offers the affidavit of Dr. Charles R. Mann, a statistical analyst who reviewed DCC's duplication services records for all of 1981. Dr. Mann states that his review of the records indicates that, while the DCAA's figures for the last quarter of 1981 were essentially correct, DCC's volume of duplication services for that entire year was 2,309,362 copies, or only 17.73 percent more than the estimate of 1,900,000 copies that the solicitation projected for the first year of the contract.

DCC also asserts that inaccuracies in the solicitation's overall volume estimates were minimal. DCC states that Dr. Mann examined DCC's records for the volume of coin-operated copying in 1981 and found that the solicitation underestimated that volume by only 106,533 copies, or approximately 7 percent. Since the FCC did not allege that any of the remaining solicitation estimates were inaccurate, DCC believes that it can be assumed that they are correct. On this basis, DCC calculates the overall percentage of error in the solicitation's volume estimates at 10.11 percent. Neither 10.11 percent nor 17.73 percent, DCC asserts, represents a substantial error.

DCC also argues that it clearly had no prejudicial "insider's" advantage since the figures in its

reports represented the volume of work that the firm believed to be accurate. In addition, DCC asserts that, since the FCC failed to show that DCC would have been displaced as low bidder or that any bidder would have altered its prices based on different estimates, the FCC has not proved the existence of prejudice here.

The cancellation of an invitation for bids after bid prices have been exposed can have a deleterious effect on the competitive bid system. For that reason, cancellation is improper unless there is a cogent and compelling reason which justifies the cancellation. Massman Construction Co. v. United States, 60 F. Supp. 635 (Ct. Cl.), cert. denied 325 U.S. 866 (1945); Federal Procurement Regulations (FPR) § 1-2.404-1(a). A contracting officer, however, has broad discretion in determining whether a cogent and compelling reason exists, Marmac Industries, Inc., B-203377.5, January 8, 1982, 82-1 CPD 22, and thus a determination to cancel a solicitation after bid opening is not legally objectionable unless there clearly is no reasonable basis for it. Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91.

Cancellation obviously is appropriate where the supplies or services sought by the solicitation are no longer needed, see FPR § 1-2.404-1(b)(2), or where, because of deficient specifications, award under the solicitation would not satisfy the Government's needs. Keco Industries, Inc., B-191856, April 5, 1979, 79-1 CPD 234. In addition, there are certain situations where, despite the strong public policy against cancellation after bid opening, such cancellation is appropriate in light of other equally important considerations concerning the competitive bid system. For example, under certain circumstances an agency's failure to solicit its incumbent contractor would prevent the full and free competition envisioned by the procurement statutes; cancellation and resolicitation to remedy that problem is appropriate. See Scott Graphics, Inc.; Photomedia Corp., 54 Comp. Gen. 973 (1975), 75-1 CPD 302. Similarly, where estimates in a solicitation are found to be other than a reasonably accurate representation of actual anticipated requirements, cancellation is required to preclude the possibility of an award that would not result in the lowest cost to the Government and to provide bidders an opportunity to structure

their bids on a more realistic representation of anticipated needs. Edward B. Friel, Inc., 55 Comp. Gen. 231 (1975), 75-2 CPD 164; Photo Data, Inc., B-188912, July 29, 1977, 77-2 CPD 62. Perhaps even more significantly, cancellation is appropriate whenever it reasonably appears that for some reason fair and equal competition--or competition on an equal basis--might have been thwarted. Photo Data, Inc., supra; 49 Comp. Gen. 251 (1969); see also The Franklin Institute, 55 Comp. Gen. 280 (1975), 75-2 CPD 194.

In this case, we believe the contracting officer had a reasonable basis for the determination to cancel. Although the DCAA report reflected DCC's records for only one quarter of one year and concerned only four of the 13 categories under the solicitation, the report did indicate a 38 percent discrepancy between the volume of duplication reported by DCC during the last quarter of 1981 and the DCAA's audit figures for that period, and that discrepancy was substantial. In addition, the DCAA found DCC's record-keeping to be so lacking that the DCAA was unable to verify the incumbent's quarterly estimates for search services and coin-operated copying, the other two categories in which DCC's quarterly reports formed the basis for the solicitation's volume estimates. Those three categories represented the major items of work under the solicitation, as exhibited by the fact that the bid prices for that work constituted between 77 and 80 percent of the total price bid by each of the three lowest bidders. Finally, the FCC, for whatever reason, apparently did not have on file a complete set of quarterly reports for any one of the seven years that DCC had been performing the contract. Thus, the FCC had no historical data by which to verify the volume estimates but, practically speaking, had only volume figures from DCC's quarterly reports filed in 1981, a portion of which the DCAA report called into question.

The record does not indicate whether the FCC's lack of data stems from the agency's apparent failure to demand continuous and more complete information from DCC during the contract or from DCC's apparent failure to supply that information. In either case, it resulted in a situation where, we think, the contracting officer could reasonably view the validity of

the solicitation estimates as questionable. While the DCAA's conclusion regarding one quarter of one year did not automatically warrant a conclusion that a 38 percent discrepancy was likely for the other quarters, neither did it provide the contracting officer with any basis for confidence in the reliability of the other figures reported to the agency by DCC. Moreover, while DCC's statistical expert states that his review showed a 17.73 percent discrepancy for the entire year and not a 38 percent discrepancy, we cannot say that the contracting officer acted unreasonably in relying on the reported 38 percent disparity or that, given the large volume (1.9 million copies) involved, even a 17.73 percent variation is not a significant one.

Moreover, given the small difference between the DCC and ADI bids (approximately \$5,500 on bids exceeding \$1 million), we think the contracting officer could reasonably believe that DCC could have had an unfair advantage, or at the very least could appear to have had such an advantage, in light of the apparent understated estimates. While DCC argues that no bid would have been different if more accurate estimates had been used, we think it is more reasonable to conclude otherwise and that DCC could have had the benefit of an unfair advantage as a result. This advantage, we think, could have manifested itself in how DCC, as the only bidder in a position to know that significantly more duplicating work and perhaps other work would be required than indicated by the invitation for bids, chose to structure its pricing. Obviously, given the small difference between the two low bids, if DCC chose to bid lower than it otherwise would have on the basis of its superior knowledge, it might well have been the low bidder solely for that reason. Similarly, if the second low bidder would have bid lower on the basis of more realistic higher estimates, DCC might have been displaced as low bidder. See Photo Data, Inc., supra. Although the record doesn't establish that either of these possibilities in fact would have occurred, the importance of protecting the integrity of the competitive bidding system and of preventing even the appearance of an unfair competitive advantage provides sufficient basis for canceling a solicitation in the face of a reasonable possibility that a bidder had an unfair advantage. See 49 Comp. Gen. 251, supra.

We note DCC's further assertion that it could have gained no undue competitive advantage because it did not know, any more than its competitors did, that the data in its quarterly reports was inaccurate. The simple answer to that is that it is just not reasonable to expect that DCC would not or should not have known the actual volumes of work provided. Even if DCC in fact was not aware of the discrepancies when it computed its bid, DCC must be charged with constructive knowledge of the actual figures.

In the course of these proceedings, the FCC has advanced various other reasons for canceling the solicitation. DCC challenges them on the basis that they were developed in response to the Claims Court suit and the protest and were not identified by the contracting officer in the notice of cancellation as a basis for cancellation. We point out that while the cancellation notice did only refer to inaccurate estimates and unfair competitive advantage, that would not estop the agency from establishing that it did have other reasons for canceling. The record before us, however, is not fully developed with respect to these other reasons, and we were not able to develop the record further in view of the court's request that we issue this decision by December 6. Therefore, we have not considered whether the other reasons advanced by the FCC independently justify the cancellation.

The protest is denied.

Milton J. Aroslan
for Comptroller General
of the United States