



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United States Elevator Corp.

File: B-225625

Date: April 13, 1987

DIGEST

1. Determination of whether to cancel a solicitation is primarily within the discretion of the contracting agency and will not be overturned absent clear evidence of abuse of discretion.
2. Agency reasonably determined that a compelling reason existed for canceling a solicitation where the specifications were ambiguous with respect to the amount of work which was required and the specifications were disparately interpreted by the bidders.
3. In determining whether an agency properly canceled a solicitation, the question is whether the agency had a reasonable basis for its determination under the circumstances at the time it was made, not whether the correct reason was set forth at that time.

DECISION

United States Elevator Corp. (USEC) protests the cancellation of invitation for bids (IFB) No. DACW57-87-B-0001, by the Department of the Army. USEC contends that the Army contracting officer improperly concluded that the IFB specifications were ambiguous and, therefore, canceled the solicitation, rather than finding that the two low bids were nonresponsive because of the bidders' misinterpretation of the IFB requirements and making award to it as the low responsive bidder.

We find the protest without merit.

The IFB called for bids for 9 months of maintenance services for 23 elevators and escalators at Bonneville Lock and Dam, Washington. The bid schedule included three bid items. One award was to be made for all of the work. There were 23 listed subitems under the first item, each consisting of monthly maintenance charges for separately specified elevator and escalator units. Bid items 0002 and 0003 were listed on the bid schedule as follows:

"0002 Major Repairs as determined necessary by the contractor and approved by the COR.	LS XXXXX	NOT TO EXCEED <u>\$20,000</u> \$ _____
"0003 Repair and replacement parts as determined necessary by the contractor and approved by the COR.	LS XXXXX	NOT TO EXCEED <u>\$10,000</u> \$ _____

** NOTE: Amounts for Items 0002 and 0003 shall be included in the total amount of the bid.

TOTAL \$ _____"

The IFB provisions describing the work to be performed require, in addition to routine maintenance for listed elevator and escalator parts, that, if the condition of the equipment warrants, the contractor shall repair or replace these same listed parts. In addition, with respect to such repair and replacement parts, including labor, prior COR approval is required for parts whose total cost plus labor exceeds \$500, and invoices and signed receipts for reimbursement of such purchases are required to be submitted along with regular monthly payment invoices. The contractor is entitled to reimbursement for the actual cost of these items.

Four bids were received as follows:

<u>"Bidder</u>	<u>Total Bid</u>	<u>Total Price Bid Item 0001</u>	<u>Lump Sum Bid Item 0002</u>	<u>Lump Sum Bid Item 0003</u>
Schindler	\$ 49,231.82	\$38,231.82	\$ 7,500	\$3,500-
Montgomery	50,373.00	27,873.00	15,000	7,500
USEC	55,812.00	25,812.00	20,000	10,000
Otis	106,140.00	76,140.00	20,000	10,000"

After reviewing these bids, the contracting officer concluded that the IFB schedule was ambiguous with respect to the instructions for pricing bid items 0002 and 0003, and determined that cancellation was required. Subsequently, the Army issued an amended solicitation deleting the blank dollar lines under items 0002 and 0003, making it clear that these items required pricing of \$20,000, and \$10,000, respectively. The Army subsequently canceled the solicitation because the contracting officer determined that it contained no specifications to inform bidders what to offer under bid items 0002 and 0003 for major repairs and repair and replacement parts, and contained no standard for the government to evaluate what bidders offered to provide under these bid items. Both canceled solicitations contained the identical specifications. The contracting officer determined that professional inspection would be obtained to determine what repairs to the elevators and escalators are actually required, and that only the repairs specifically identified by this inspection would be procured.

Initially, the Army contends that USEC is not an "interested party" eligible to challenge the cancellation under our Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1986), because USEC is the third low offeror and, thus, would not be in line for award if its protest were upheld. However, USEC is protesting that the specifications were not ambiguous, and under the interpretation propounded by USEC the two lower bids are, arguably, nonresponsive. Thus, USEC is an interested party under our Regulations since, if it were to prevail in the protest, it would be in line for award.

The Federal Acquisition Regulation (FAR) permits cancellation of an IFB after bid opening only when there is a compelling reason. 48 C.F.R. § 14.404-1(a) (1986). The regulation provides that inadequate or ambiguous specifications cited in the IFB may constitute such a compelling reason. FAR, 48 C.F.R. § 14.404-1(c)(1). Contracting officials have broad discretion to determine whether or not appropriate circumstances for cancellation exist, and our review is limited to considering the reasonableness of the exercise of that discretion. Professional Carpet Service, B-212442; B-212442.2, Oct. 24, 1983, 83-2 C.P.D. ¶ 483. Our Office generally regards cancellation after opening to be appropriate when an award under the ostensibly deficient solicitation would not serve the actual minimum needs of the government or when other bidders would be prejudiced by such an award. Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 C.P.D. ¶ 484. Thus, the possibility of prejudice to bidders may

provide a sufficient basis to cancel, where the description of work is sufficiently ambiguous that it is possible that firms had materially different understandings of the work involved. A to Z Typewriter Co.--Reconsideration, B-218281.2, Apr. 18, 1985, 85-1 C.P.D. ¶ 404.

An ambiguity exists if a specification is subject to more than one reasonable interpretation when read in the context of the solicitation as a whole. Energy Maintenance Corp., B-223328, Aug. 27, 1986, 86-2 C.P.D. ¶ 234. USEC contends that in light of the IFB requirement to perform all the required replacement and repair on a cost reimbursement basis, the items 0002 and 0003 lines stating "not to exceed" amounts of \$20,000 and \$10,000 must indicate that bidders are required to perform work up to these amounts and must include this \$30,000 total in their bids in order to be responsive to this requirement. In support of this interpretation, USEC argues that language in the predecessor solicitation for the same work, which was awarded to Montgomery, is substantially identical, and was interpreted by the Army to require inclusion in the bid of the full amounts listed in the solicitation's "not to exceed" lines.

USEC's argument in this respect actually provides good evidence of why the solicitation at issue is ambiguous. -- The prior solicitation contained only the "not to exceed" lines with dollar amounts inserted, not the blank dollar line for these items, and the solicitation required that the "not to exceed" amounts be included in the bid total. It is precisely the addition of the blank dollar amount lines after the "not to exceed" lines which reasonably suggests an interpretation--such as was apparently made by Schindler and Montgomery--that a bidder could include any amount less than the "not to exceed" number in its total bid.

In this respect, the fact that these two bidders so interpreted the language is evidence that bidders were misled as to the actual IFB requirement, and is an indication of the ambiguity of the requirement, which warrants the cancellation. Emerald Maintenance, Inc., B-219453.2, Dec. 10, 1985, 85-2 C.P.D. ¶ 641.

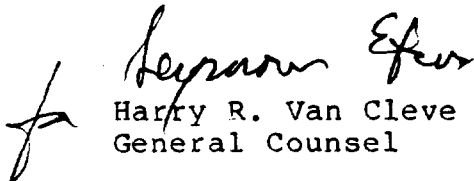
Moreover, as the Army argues, the stated basis for cancellation of the resolicitation is equally applicable to the solicitation at issue, and is proper because the IFB failed to provide specifications to describe the work to be performed under items 0002 and 0003, and failed to provide a standard to evaluate the bids, prejudicing both the interests

of the government and the bidders. Power Equipment, Inc., B-213428.3, Oct. 22, 1984, 84-2 C.P.D. ¶ 427. USEC does not dispute that both solicitations were deficient in this same regard, nor does it question the validity of this basis for cancellation. Rather, USEC posits that since this rationale pertains only to the Army's expressed basis for the cancellation of the resolicitation, it is irrelevant to the original cancellation and should not be considered by our Office. This assumption is incorrect.

In reviewing an agency decision to cancel a solicitation, our Office will consider whether the agency's action is supported by a reasonable basis under circumstances as they existed, not merely whether the basis which the agency advanced at the time it took the action was reasonable, or whether this basis was supplied at the time the determination was made. United States District Court for the District of Columbia, 58 Comp. Gen. 451 (1979), 79-1 C.P.D. ¶ 301; Tri-Com, Inc., B-214864, June 14, 1984, 84-1 C.P.D. ¶ 643; Tosco Corp., B-187776, May 10, 1977, 77-1 C.P.D. ¶ 329.

Finally, USEC's objection that the Army disclosed all of the bids when it provided notice of the cancellation is irrelevant since this was a sealed bid procurement under which the bids are a matter of public record, and bid abstracts are required to be made available for public inspection. FAR, 48 C.F.R. § 14.403(b).

The protest is denied.


Harry R. Van Cleve
General Counsel