

Ayer



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of:           Huntington Construction, Inc.  
File:                 B-230604  
Date:                June 30, 1988

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## DIGEST

Air Force award of a construction contract containing additive items to other than the apparent low bidder determined at the time of bid opening on the basis of funds then available, because funding subsequently was reduced, was inconsistent with applicable regulations; the solicitation instead should have been canceled and the requirement resolicited, as the regulations clearly do not provide for a post-bid opening redetermination of the low bidder.

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## DECISION

Huntington Construction, Inc., protests the Department of the Air Force's award of a contract to Pavex Corporation under invitation for bids (IFB) No. F02601-88-B-0013 for the construction of a ground-launched cruise missile disassembly facility. Huntington was the apparent low bidder as determined by funding available at bid opening. Huntington contends that the agency improperly displaced it as the low bidder when, after bid opening, the Air Force reduced the available funding by deleting both an additive item and that item's funding, and used the revised funding figure to recalculate the apparent low bidder.

We sustain the protest.

The IFB incorporated the provision at Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 52.236-7082 (DAC 84-14) entitled "Additive or Deductive Items." That provision is required by DFARS § 36.303 for construction projects for which available funding may be

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insufficient for all desired work. It states that award will be made to the bidder offering the low aggregate amount for the base item, plus or minus (in order of priority listed in the schedule) those additive or deductive bid items providing the most features of the work within the funds determined to be available before bid opening. The clause further provides that after the low bidder is determined on that basis:

". . . award in the best interests of the Government may be made to him on his base bid and any combination of his additive or deductive bid for which funds are determined to be available at the time of the award, Provided that award on such combination of bid items does not exceed the amount offered by any other conforming responsible bidder for the same combination of items."

The competitors were advised that \$188,117 was available at the February 17, 1988, bid opening, and Huntington was determined to be the apparent low bidder by \$23,653 for the base item (construction of a road) and four additive items (a fence, a road, lighting, and a metal building).

	<u>Protester</u>	<u>Awardee</u>	<u>Govt. Cost Est.</u>
Base item	\$ 77,000	\$ 37,056	\$ 41,190
Add. 1	20,000	21,288	19,193
Add. 2	20,000	24,606	40,598
Add. 3	15,000	39,136	48,730
Add. 4	25,000	58,567	38,406
	<u>\$157,000</u>	<u>\$180,653</u>	<u>\$188,117</u>

Two days after bid opening, the agency deleted the requirement for additive 4, so as to free \$38,406 (the government estimate for the additive) for the separate purchase of two higher priority items also required for operation of the disassembly facility, a defueling system and utility connections for administrative trailers. The contracting officer then, in effect, made a second, lower determination of the amount of funding available (\$149,711) for the construction, and a second determination of the apparent low bidder, displacing Huntington and substituting Pavex instead, since Pavex's bid was lower by \$9,914 for the base item and additives 1, 2 and 3 combination. On February 23, the agency awarded the contract to Pavex.

Huntington protested the award on March 4, arguing that as the lowest bidder as of bid opening it was entitled to the contract. The Air Force nevertheless authorized continued

performance of the contract on the grounds that prompt completion of the facility is necessary to meet United States obligations under the Intermediate Range Nuclear Force treaty. Work on the contract was basically completed by April 1.

The agency reports that all of the work--including the disassembly facility, the defueling system and the utility connections--had to be accomplished within a \$200,000 statutory cost limitation, although the defueling system and utility connections were to be procured separately. The Air Force admits, however, that the award was inconsistent with the provisions of the additive/deductive clause because the act of decreasing the available funding below the amount announced at bid opening displaced Huntington despite the solicitation statement that the amount of funding determined to be available before bid opening "shall be controlling for determining the low bidder." The agency states that, instead, it should have canceled and resolicited the requirement to insure that all parties were competing on an equal basis. We agree.

The additive/deductive clause and regulations are clear as to the basis on which the low bidder must be determined: the funding available when bids are opened. This method of bid evaluation was adopted in response to allegations that the selection of low bidders was being manipulated after bid opening through the amount of funds made available for contracting. Valley Construction Co., B-184391, Dec. 15, 1975, 75-2 CPD ¶ 393. Moreover, we have urged the general adoption of this method of bid evaluation for construction procurements because, in our view, it strengthens the integrity of the procurement process. See H.M. Byars Construction Co., 54 Comp. Gen. 320, 332 (1974), 74-2 CPD ¶ 233; Rock, Inc., B-186961, Nov. 9, 1976, 76-2 CPD ¶ 394. We note that the protester argues that improper fund manipulation is exactly what occurred here.

We recognize that the clause only provides the agency with direction on how to treat a post-bid-opening increase in available funding, and that the instant procurement involves a post-bid-opening decrease in available funding. Nevertheless, in view of the clause's purpose--to prevent the agency from manipulating the selection of the low bidder by designating the low bidder on the basis of the amount of funds available prior to bid opening--it follows that once the low bidder is determined at bid opening the clause properly limits the award to that firm on those combinations of items for which its bid is low, regardless of a later increase or a decrease in available funding. Valley Construction Co., B-184391, supra; B-170168, Sept. 10, 1970.


Consequently, we agree with the Air Force that the restrictions are equally applicable to any post-bid-opening change in funding, whether it is an increase or a decrease, which has the effect of altering the apparent low bidder. In other words, under these rules there is only one proper awardee, the designated apparent low bidder--assuming the firm is otherwise responsive and responsible. In view of the foregoing, we think if any bidder was entitled to award in the procurement, it was the protester.

The agency argues that Huntington was not prejudiced by the improper award to Pavex since no contract should have been awarded at all in the procurement. Consequently, the agency urges that the protester is not entitled to either bid preparation costs, which Huntington claims in the amount of \$1,750.00, or the cost of pursuing the protest, claimed as \$3,431.50. (As stated above, the contract work has been completed.)

We disagree. We first note that although the protester could not have received the award in the procurement, given the fact that Huntington was not low on the combination of items actually purchased, the contract work commenced on March 1, just 3 days before the protest was filed on March 4. The agency, which admits its award error, could have terminated the award and initiated corrective action in the form of a resolicitation at that time.

More importantly, however, since even the Air Force concedes it should have canceled the solicitation and issued a new one, the award to Pavex clearly deprived the protester of a proper chance at winning a resolicitation. We have held that a protester is entitled to its bid preparation and protest costs, where the agency's improper action precludes the cancellation and resolicitation of the requirement since the improper action prevents the protester from having a fair opportunity to compete for the award. Consolidated Construction, Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529.

The protest is sustained. The protester should submit its claim for costs, which is for a total of \$5,181.50, directly to the Air Force. If the parties cannot agree on the amount due, our Office will determine the amount. 4 C.F.R. § 21.6(f) (1988).

*for*   
Comptroller General  
of the United States