



Comptroller General
of the United States

Washington, D.C. 20548

K. Riback

145792

Decision

Matter of: Phil Howry Co.
File: B-245892
Date: February 3, 1992

Phil Howry for the protester.
William Richards, Esq., and Lester Edelman, Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Compelling reason to cancel invitation for bids after bid opening existed where invitation when read as a whole created an ambiguity concerning whether bid guarantees were required, and one of the two bidders was misled by the ambiguous bid guarantee requirement.

DECISION

Phil Howry Co. protests the cancellation after bid opening of invitation for bids (IFB) No. DACA63-91-B-0093, issued by the Department of the Army, Corps of Engineers for a modified record fire range at Fort Hood, Texas. Howry, the apparent low bidder, contends it should have been awarded the contract because the Army lacked a compelling reason to cancel the IFB.

We deny the protest.

The IFB, a 100-percent small disadvantaged business set-aside, was issued on May 2, 1991, and bids were opened on August 30. The results of the bid opening were as follows:

<u>Bidder</u>	<u>Price</u>
Howry	\$1,291,600
JT Construction	\$1,662,453

Howry did not include a bid guarantee with its bid, but JT Construction did submit one. After bid opening, the agency discovered an inconsistency in the solicitation. Item 13B of Standard Form (SF) 1442 contained in the IFB states that a bid guarantee is not required. However, Section 100 of the IFB "Instructions, Conditions, and Notices to Bidder"

contains a section titled "Bonds," which states that a bid bond and performance and payment bonds are required when the bid amount exceeds \$25,000, and also states that "Each bidder shall submit with his bid a Bid Bond (Standard Form 24), . . ." It concludes by notifying the bidder in bold face type that failure to include a bid bond or other bid security "on time" may be cause for rejection of the bid as nonresponsive. Additionally, Section 700 of the IFB, "Contract Clauses," in paragraph No. 85 titled "Bid Bond" states that the bidder shall furnish a separate bid bond in the proper form and amount by the time set for bid opening or the bid may be rejected.

The contracting agency states that it did not discover the problem until after bid opening and says it intended to require the submission of bid bonds as well as performance and payment bonds in this solicitation for a construction contract. Since the conflicting IFB provisions concerning the bond requirement, in the contracting officer's view, made the solicitation ambiguous, he concluded that it would be in the best interest of the government to cancel the solicitation and readvertise the requirement at a later date.

Howry contends that the IFB, particularly the SF 1442, clearly did not require a bid guarantee. The protester also contends that the bid guarantee has no "material impact" on the bid results and may be waived, and that the contracting officer should have noticed the inconsistency in the IFB prior to bid opening. In the alternative, the protester argues that if a bid guarantee is necessary, it has already complied with the requirement because it has agreed to furnish any of the required performance and payment bonds. From this, the protester concludes that there was no compelling reason to cancel the IFB.

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting officer must have a compelling reason to cancel an IFB after bid opening. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1). Contracting officers have broad discretion to determine whether or not compelling circumstances for cancellation exist, and our Office will review that decision to ensure that the determination is reasonable. Total Protech, Inc., B-233264, Feb. 28, 1989, 89-1 CPD ¶ 211. In this regard, the regulations specifically state that an IFB may be canceled where the agency determines that the IFB contains inadequate or ambiguous specifications. FAR § 14.404-1(c)(1). Specifications must be sufficiently definite and free from ambiguity so as to permit competition on an equal basis. Heeco, Inc., B-228394, Dec. 8, 1987, 87-2 CPD ¶ 565. An ambiguity exists if a solicitation requirement is subject to more than one


reasonable interpretation when read in the context of the solicitation as a whole. United States Elevator Corp., B-225625, Apr. 13, 1987, 87-1 CPD ¶ 401.

We find that the Army properly canceled the solicitation because read as a whole it contained an ambiguity that apparently misled one of the two bidders as to whether bid guarantees were required. While the language in SF 1442 may have led Howry to the conclusion that a bid guarantee was not required, the fact remains that the "Instructions to Bidders" and "Contract Clauses" sections of the IFB state that a bid guarantee is required, and JT Construction did in fact submit a bid guarantee. The fact that these two bidders so interpreted the IFB is an indication of the ambiguity of the requirement and that the competition was conducted on an unequal basis. This, in our view, warrants the agency's cancellation of the solicitation. Brener Bldg. Maintenance Co., Inc., B-235370.2, Sept. 20, 1989, 89-2 CPD ¶ 251.

Furthermore, contrary to the protester's assertion, the requirement for a bid guarantee is material, and also, contrary to the protester's contention that an "agreement" to submit the bond was sufficient, a firm's failure to meet such a requirement at bid opening by submitting an adequate bid guarantee with its bid makes the bid nonresponsive.¹ Water & Power Technologies, Inc., B-244639, July 16, 1991, 91-2 CPD ¶ 63.

Finally, concerning Howry's argument that the contracting officer should have noticed the inconsistency in the IFB regarding the bid guarantee prior to bid opening, while it is unfortunate that the error in the solicitation was not detected sooner, either by the contracting agency or a bidder, a procuring agency is not precluded from canceling a solicitation based upon the post-opening discovery of a sufficient reason to cancel. See Ace-Federal Reporters, Inc., B-237414, Jan. 31, 1990, 90-1 CPD ¶ 144.

The protest is denied.


for James F. Hinchman
General Counsel

¹The Miller Act (40 U.S.C. § 270a-270f (1988)) mandates the use of performance and payment bonds for any construction contract exceeding \$25,000. The bid guarantee was called for because a performance and payment bond was required for this construction contract. FAR § 28.101-1(a).