



Comptroller General
of the United States

Washington, D.C. 20548

257123

Decision

Matter of: McGhee Construction, Inc.

File: B-250073.3

Date: May 13, 1993

Timothy S. Kerr, Esq., Starfield & Payne, for the protester.
Major Bobby G. Henry, Jr., Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

In a sealed bid procurement for construction services, a procuring agency had a compelling reason to cancel the solicitation after bid opening where additional substantial construction services, not provided by the solicitation but integrally related to the work solicited, were required, and where the agency reasonably determined that performance of the additional construction services under a separate contract would subject the agency to unacceptable risks of delays and claims, and to additional administrative costs and burdens.

DECISION

McGhee Construction, Inc. protests the post-bid opening cancellation of invitation for bids (IFB) No. DABT10-92-B-0036, issued by the Department of the Army for the replacement of a tile roof, and interior repairs and painting of the printing plant at Fort Benning, Georgia. McGhee contends that the agency does not have a compelling reason to cancel the IFB and that it is entitled to award as the low, responsive and responsible bidder.

We deny the protest.

The IFB was issued on May 12, 1992, as a 100-percent total small disadvantaged business set-aside, to be performed in several phases to allow the printing plant to continue operation. The IFB was amended several times, in part, to require lead paint abatement and to extend the bid opening date to August 7. The Army received 4 bids, including McGhee's bid of \$661,000, by the bid opening date. The bids of the apparent low bidder and McGhee, the second low

bidder, were rejected as nonresponsive, and McGhee protested to our Office.

Prior to submission of the agency's report on the protest, the contracting officer canceled the IFB because of "a patent ambiguity in the scope of work" relating to the lead paint abatement. Since the agency canceled the underlying solicitation, we dismissed McGhee's protest.

McGhee protested the agency's post-bid opening cancellation of the IFB. McGhee argues that the solicitation, when read as a whole, was not ambiguous, and therefore the agency did not have a compelling reason to cancel, as required by Federal Acquisition Regulation (FAR) § 14.404-1(a)(1) (FAC 90-3), and that McGhee should receive the award as the low responsive bidder. The agency submitted a report explaining its determination why the IFB's lead paint abatement specifications were inadequate and ambiguous.

After McGhee filed its comments on the agency's report disputing the agency's determination to cancel the IFB, the agency submitted two affidavits from its chief of engineering at Fort Benning, who states that he inspected the printing plant to assess the risks and safety violations "resulting from the deteriorated roof allowing rain water to leak on printing equipment and electrical panels." The chief asserts that "in his professional opinion" approximately 75 percent of the steel window frames would have to be replaced and estimates that this construction would result in an additional cost of approximately \$300,000 and a construction time of approximately 120 calendar days. The Army's engineer also states that the downspouts on the printing plant were causing excessive "ponding" adjacent to the building, and that the downspouts needed to be connected to the existing storm drains and landscaping service performed; this additional work was estimated to cost approximately \$21,000 and to take 120 calendar days. The Army argues that the window frame replacement must be done concurrently with and as an integral part of the interior repairs and painting covered by the IFB, while the downspout work should be done concurrently with the roof tile replacement and repair.

McGhee does not refute the agency's arguments concerning the need to replace the window frames and perform the downspout work,¹ but argues that we should not consider these arguments since they were first raised after the protester's comments on the agency's report defending its cancellation

¹The agency provided pictures of the printing plant building that graphically demonstrate the need to replace the window frames and connect the downspouts to the storm drains.

for other reasons, McGhee also contends that the window frame repairs and downspout work are divisible from the solicitation work, and could be awarded under a separate contract, and therefore the agency does not have a compelling reason to cancel the IFB.

An IFB may be canceled after bid opening when there is a compelling reason to do so. FAR § 14.404-1(a)(1); Alliance Props., Inc., 64 Comp. Gen. 854 (1985), 85-2 CPD ¶ 299. Generally, a compelling reason for cancellation exists when the solicitation's requirements must be changed after bid opening to express properly the agency's minimum needs, such that the government's actual minimum needs will not be met or bidders would be prejudiced thereby. Westinghouse Elec. Corp., B-217455, Aug. 30, 1985, 85-2 CPD ¶ 251. In reviewing the protest of a post-bid opening cancellation of an IFB, we examine the record to determine whether the contracting officer's judgment is supported by a reasonable basis. Marann Inventories, Inc.--Recon., B-237651.4, July 20, 1990, 90-2 CPD ¶ 54. In this regard, we will consider all information relating to whether there is a compelling reason to cancel, no matter when the information justifying cancellation becomes known or should have become known. Independent Gas Producers Corp., B-229487, Mar. 2, 1988, 88-1 CPD ¶ 217.


As noted above, it is unrefuted that the steel window frames must be replaced and the downspouts connected to the storm sewers to make the printing plant structurally sound and useable, and that the IFB does not provide for these services. The Army states that the window frame replacement and downspout work are integral to the proper performance of the IFB work and that the window frame replacement must either be performed before or concurrent with the IFB work. Specifically, the interior plaster repair and painting required by the IFB cannot be performed prior to the replacement of the window frames, since the frame replacement will itself require significant plaster replacement and painting. Furthermore, the Army states that performing the window frame and downspout work under a separate contract, as suggested by the protester, would, in addition to increasing the government's administrative costs and burdens, adversely impact the phased delivery schedule of the IFB (which is necessary to accommodate the continued operation of the printing plant), resulting in numerous delays of the IFB contract work and potentially subjecting the government to extensive delay claims.

In our view, the window frame and downspout work can reasonably be said to be integrally and logically related to the construction services sought by the IFB, such that it could most efficiently be performed under one contract, since the division of the required work into two contracts would

result in unwarranted schedule delays and would unnecessarily subject the government to potential delay claims. Thus, we find reasonable the agency's assessment that performance of all these services under one contract reflects the government's actual minimum needs. See I.T.S. Corp., B-242725, May 31, 1991, 91-1 CPD ¶ 518. Since the IFB does not adequately reflect the agency's needs, the Army had a compelling reason to cancel the solicitation.²

We also disagree with McGhee's apparent belief that the Army should be precluded from canceling the IFB because of the agency's lack of advanced planning concerning the additional construction services required at the printing plant. Procuring agencies are not precluded from canceling an IFB after bid opening where award under the solicitation would not meet the agency's needs, even where the failure of the solicitation to specify the agency's minimum needs is arguably the result of a lack of advance planning. Americorp, B-225667, Apr. 14, 1987, 87-1 CPD ¶ 404.

The protest is denied.


for James F. Hinchman
General Counsel

²Since we have determined that the need to perform all of the construction services under one contract is a compelling reason to cancel the IFB, we need not consider McGhee's contentions concerning the other grounds relied upon by the Army in canceling the IFB. Roy McGinnis & Co., Inc., B-243626.2, Aug. 26, 1991, 91-2 CPD ¶ 196.