



Comptroller General  
of the United States

34703

Washington, D.C. 20548

## Decision

**Matter of:** P.J. Dick, Inc.  
**File:** B-259166; B-260333  
**Date:** March 6, 1995

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.  
Mark S. Shaffer, Esq., for Dick Enterprises, an interested party.  
C. Joseph Carroll, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.  
Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Cancellation of solicitation, as materially defective, after bid opening, was proper where terms in the solicitation regarding the applicability of state sales taxes and requirement for inclusion of such taxes in bidders' prices were in conflict.

### DECISION

P.J. Dick, Inc. protests the cancellation of invitation for bids (IFB) No. X00-0211 by the Department of Justice, Federal Bureau of Prisons, after bid opening, due to the agency's determination that defective terms in the IFB materially misled bidders and precluded equal competition. The protester contends that cancellation was improper because the IFB's terms were not defective, and seeks award as the apparent low bidder.

We deny the protest.

The IFB, issued on July 15, 1994, sought bids for major building and site work for the construction of a federal correctional institution near Elkton, Ohio. The IFB contemplated the award of a fixed-price contract to the low, responsive, and responsible bidder for the base bid and combination of alternate items sought by the agency. Section 1.7 of the IFB's Summary of Work, labeled "Miscellaneous and General Provisions," advised bidders, among other things, that "[m]aterials for the [p]roject are not exempt from the [s]tate sales taxes." The IFB elsewhere

incorporated by reference Federal Acquisition Regulation (FAR) § 52.229-3, labeled "Federal, State, and Local Taxes," which provides:

"(a) . . . '[a]ll applicable [f]ederal, [s]tate, and local taxes and duties,' as used in this clause, means all taxes and duties, in effect on the contract date, that the taxing authority is imposing and collecting on the transactions or property covered by this contract.

. . . . .

"(b) The contract price includes all applicable [f]ederal, [s]tate, and local taxes and duties.

. . . . .

"(h) The [g]overnment shall, without liability, furnish evidence appropriate to establish exemption from any [f]ederal, [s]tate, or local tax when the [c]ontractor requests such evidence and a reasonable basis exists to sustain the exemption."

The following three bids were received at bid opening on September 22:

<u>Bidder</u>	<u>Base Bid</u>	<u>Base Bid Plus Alternates</u>
P.J. Dick	\$50,680,000	\$62,060,000
Dick Enterprises	\$52,397,000	\$63,556,000
Mellon Stuart Construction, Inc.	\$53,256,000	\$65,109,000

Based on information received from subcontractors, Dick Enterprises and Mellon filed agency-level protests on September 23 and October 4, respectively, claiming that the apparent low bidder, P.J. Dick, had improperly failed to include state sales taxes in its bid even though the IFB expressly stated that "[m]aterials for the [p]roject are not exempt from the state sales taxes"; the protesters alleged that under the terms of the IFB, all prices bid were to include state sales taxes for materials without consideration of any exemption from those taxes. Both Dick Enterprises and Mellon stated that their bids included sales taxes on their materials and asserted that they were prejudiced by the inclusion of section 1.7(c) in the IFB in conjunction with P.J. Dick's exclusion of certain state sales taxes from its price. The firms' agency-level protests stated that although FAR § 52.229-3, incorporated by reference into the IFB, states that the contract price is

to include "applicable" state sales taxes, the IFB's direction to bidders that materials for the project are not exempt from such taxes led the protesters to reasonably believe their bids should include all sales taxes (i.e., that no exemptions were allowed); the agency-level protests challenged the IFB as ambiguous if any exemptions from the state sales taxes are allowed and bidders were permitted to exclude such taxes from their bids. Dick Enterprises's agency-level protest also stated that the contracting officer had verbally advised the firm shortly before bid opening that the IFB was correct in stating that the materials for the project were not exempt from state sales taxes and that all bids were to include state sales taxes.

All three bidders were advised by letter of October 18 from the agency that the IFB was canceled due to the IFB's conflicting provisions (regarding the applicability and inclusion in prices of state sales taxes). This protest followed.

P.J. Dick contends that the IFB is not defective and that the agency therefore had no reason to cancel the IFB. The protester contends that the IFB's provision at section 1.7(c), that "[m]aterials for the [p]roject are not exempt from the state sales taxes," merely states that the contractor is not entitled to an exemption from all state sales taxes as an agent of the federal government. P.J. Dick contends that the provision at section 1.7(c) is consistent with FAR § 52.229-3 which allows limited exemption of certain state sales taxes as provided under Ohio State law. P.J. Dick contends that regardless of the statement of no exemption under section 1.7(c), the IFB recognized and allowed for limited exemption from state sales taxes by incorporation of FAR § 52.229-3, which, the protester contends, provides that the contract price is to include only applicable state sales taxes and the agency, if requested by the contractor, is to provide information, without liability, to support the contractor's claim of exemption after award. The protester states that it independently researched the Ohio State tax laws and found that (citing Ohio Stat. Ann. § 5739.02(B)(13)):

"Ohio state law provides an exemption from state taxes to contractors only for 'building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract . . . with the United States Government or any of its agencies.'"

As a result, P.J. Dick calculated its bid to exclude from the firm's price those state sales taxes that the protester believed did not apply to the contract (i.e., tax on

materials to be incorporated into the structure), P.J. Dick contends that the IFB did not prevent this method of bidding, that the firm should not be penalized by cancellation of the IFB due to the other two bidders' lack of research of the Ohio State sales tax laws which, the protester contends, allow a limited exemption for this project. The protester asserts that preservation of the integrity of the competitive bidding system requires that the protester receive the award of a contract under the canceled IFB.

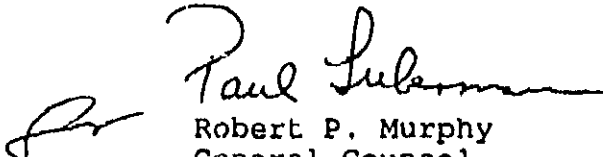
Because of "the potential adverse impact on the competitive bidding system of canceling an IFB after prices have been exposed, any cancellation after bid opening must be based on a compelling reason. FAR § 14.404-1(a)(1); Werres Corp., B-255379; B-255381, Feb. 25, 1994, 94-1 CPD ¶ 153; Pavel Enters., Inc., B-249332, Nov. 9, 1992, 92-2 CPD ¶ 330. A compelling reason to cancel a solicitation exists where material solicitation terms are ambiguous or in conflict. See United States Elevator Corp., B-225625, Apr. 13, 1987, 87-1 CPD ¶ 401. Contracting officials have broad discretion to determine whether appropriate circumstances for cancellation exist, and our review is limited to considering the reasonableness of their decisions. Werres Corp., *supra*. Here, we conclude that the agency had a compelling reason to cancel the IFB because the solicitation was misleading and contained conflicting terms.

As the protester states, since the IFB provides (pursuant to FAR § 52.229-3) that applicable state sales taxes must be included in the bid, a bidder might reasonably assume that all state sales taxes need not be included in the bid's price. However, as the two other bidders pointed out, since section 1.7(c) of the IFB clearly advised that materials for the project are not exempt from the state sales taxes, they reasonably understood the IFB to require that all state sales taxes are to be included in the bids' prices without application of any limited or total exemption from those taxes. Since the express direction of section 1.7(c) resulted in conflicting instructions to the bidders regarding how to price their bids, we think the agency properly canceled the IFB.

The protester asserts that the two IFB provisions do not conflict because section 1.7(c) refers to a general exemption for contractors acting as agents for the government; P.J. Dick contends that such an exemption is not available under the IFB for project materials and that the section is intended to notify bidders of this rule. We think this position is not supported by the language itself and believe that the two other bidders reasonably relied on the instruction of section 1.7(c) in the preparation of their bids.

P.J. Dick also argues that the alleged conflicting instructions did not prejudice the other bidders. P.J. Dick alleges in its protest submissions that if the state sales taxes were added to its bid, it would still be the low bidder for purposes of award under the canceled IFB. The record, however, remains unclear as to what, if any, specific exemptions are in fact permitted under the contract and how, with any degree of certainty, the application of such exemptions would affect the prices bid under the canceled IFB. Dick Enterprises asserts that if it were entitled to claim certain tax exemptions, its bid would be low. Under these circumstances, the agency reasonably concluded that there was prejudice to the other bidders because of the conflicting instructions.

The protest is denied.<sup>1</sup>

  
 Robert P. Murphy  
 General Counsel

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<sup>1</sup>The agency resolicited the procurement, deleting the initial IFB's section 1.7(c), as IFB No. X00-0222. On February 6, 1995, P.J. Dick filed a protest (B-260333) against the agency's stated intention to conduct the bid opening under the new IFB without waiting for a decision by our Office on the firm's protest of the cancellation of the initial IFB. Under the terms of the Competition in Contracting Act of 1984, the agency is not precluded from proceeding with bid opening under the resolicitation. 31 U.S.C. § 3553(c) (1988). Accordingly, we dismiss the challenge for failure to state a valid basis of protest. 4 C.F.R. § 21.3(m) (1994).