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Decision

Matter of: Great Lakes Dredge & Dock Company, LLC

File: B-421676.4

Date: December 19, 2023

Paul R. Hurst, Esq., Amba M. Datta, Esq., and Caitlin T. Conroy, Esq., Steptoe LLP, for the protester.

Jason Shippy, Esq., and Aaron R. Inkenbrandt, Esq., Department of the Army, for the agency.

Michelle Litteken, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to cancel an invitation for bids (IFB) after bid opening and convert the IFB to a negotiated procurement is sustained. While the agency had a compelling reason to cancel the IFB when the bids received exceeded available funding, this reason for cancelation did not provide the agency with the legal authority to convert the IFB to a negotiated procurement.

DECISION

Great Lakes Dredge & Dock Company, LLC, of Houston, Texas, protests the cancellation of invitation for bids (IFB) No. W912BU-22-B-0009, issued by the Department of the Army, Army Corps of Engineers (Corps), for beachfill and periodic nourishment for shoreline areas in New Jersey. The protester also challenges the agency's conversion of the IFB to a negotiated procurement.

We sustain the protest.

BACKGROUND

On January 24, 2023, the Corps issued the IFB under Federal Acquisition Regulation (FAR) part 14 for the periodic re-nourishment and placement of sand to replenish and repair the dune and berm system along the New Jersey coast, between Manasquan Inlet and Barnegat Inlet. Contracting Officer's Statement (COS) at 3; Agency Report

(AR), Tab 2, IFB at 76.¹ In accordance with the Water Resources Development Act of 2007, 33 U.S.C. § 2213(d)(2)(A)(iii), the cost of the project would be shared equally with the project's non-federal sponsor, the New Jersey Department of Environmental Protection (NJDEP). COS at 2.

The Corps received and opened two sealed bids on March 16, 2023, including one from the protester. COS at 3. The protester's base bid was \$67,609,987, and was the lowest bid received.² *Id.* at 3-4. Great Lakes's bid exceeded the agency's independent government estimate (IGE) of \$46,564,970 and the amount of funds (\$60,400,000) available for the project. *Id.* at 4. Because of the variance between the lowest bid and the IGE, the agency analyzed the IGE, held meetings with the two bidders and a prospective bidder,³ and assessed whether additional funding could be made available. *Id.* at 4-7. The Corps was able to obtain \$10,000,000 in additional funding, but the protester's base bid still exceeded the funds available to the agency to award and administer the project. *Id.* at 7.

On May 8, 2023, the Corps issued an amendment that canceled the IFB. COS at 7; AR, Tab 6, IFB amend. 4. In the amendment, the Corps cited two bases for the cancellation: that all otherwise acceptable bids received were at unreasonable prices; and that cancellation was clearly in the public's interest, without specifying the underlying reason. AR, Tab 6, IFB amend. 4 (*citing* FAR 14.404-1(a), (c)(6) and (10)). Subsequently, on May 12, the Corps advised Great Lakes that it was changing the method of procurement from FAR part 14 to a FAR part 15 negotiated procurement by converting the IFB to a request for proposals (RFP). *Great Lakes Dredge & Dock Co., B-421676.1 et al.*, AR, Tab 3, Conversion Notice; AR, Tab 9, Determination & Findings at 6-7.

On May 15, Great Lakes filed a protest with our Office, challenging the agency's decisions to cancel the IFB and convert the IFB to a negotiated procurement. The agency advised our Office that it would take corrective action by reassessing the IGE and reconsidering the decisions to cancel the IFB and convert the IFB to a negotiated procurement, and we dismissed the protest as academic. *Great Lakes Dredge & Dock Co., B-421676.1 et al.*, June 15, 2023 (unpublished decision).

¹ Unless otherwise stated, all citations to the exhibits to the agency report use the Adobe PDF document page numbers.

² The bid schedule consisted of 80 base contract line items and 41 optional contract line items. COS at 3.

³ The agency states that the purpose of these meetings was to gain feedback from industry regarding the specifications and areas of concern that may have contributed to the bids, as well as to aid the agency in decision-making. COS at 6.

As part of the agency's corrective action, the agency revised the IGE, resulting in a \$6,329,106 increase to the base bid IGE.⁴ COS at 4; AR, Tab 9, Determination & Findings at 8. However, even with the increase, the protester's base bid exceeded the revised IGE and, when combined with the agency's estimated internal costs, exceeded the funds available for the project.⁵ COS at 12. Accordingly, the contracting officer again determined it was necessary to cancel the IFB and convert it to a negotiated procurement. *Id.* at 13; see *also* AR, Tab 9, Determination & Findings.

In the determination and findings for the conversion, the contracting officer cited three bases for the cancellation: the bids received were unreasonably high, the bids received exceeded the IGE by more than 25 percent,⁶ and the bids received exceeded available funding. AR, Tab 9, Determination & Findings at 10-11. The contracting officer further explained that "it is in the best interests of the government to cancel [the IFB], convert the solicitation into a negotiated procurement, and proceed with negotiations in accordance with FAR subsections 14.404-1(e) and (f)."⁷ *Id.* at 12. The contracting officer concluded that *cancellation* would be appropriate on any of these bases. However, she acknowledged that the FAR does not permit an agency to *convert* an IFB to a negotiated procurement where the IFB was canceled pursuant to FAR provision 14.404-1(c)(10), which permits cancellation when "clearly in the public's interest." *Id.* at 11.

⁴ The agency also analyzed its estimate of internal costs needed to administer the contract, and the Corps found that its prior estimate of \$4,518,000 was still valid. COS at 8.

⁵ The contracting officer noted that the agency would need to reduce its estimated internal costs by at least 45 percent to have sufficient funds to award the contract to Great Lakes. COS at 12.

⁶ Federal law prohibits the award of a contract for civil works construction where the contract price exceeds the government estimate by more than 25 percent. 33 U.S.C. § 624(a)(2).

⁷ Section 14.404-1(e)(1) of the FAR provides that if an IFB is canceled for the reasons specified in subsections (c)(6) (all bids received are at unreasonable prices or the contracting officer cannot determine the reasonableness of the only acceptable bid received), (7) (bids were collusive or submitted in bad faith), or (8) (no responsive bid received from a responsible bidder) of FAR section 14.404-1, and the agency head authorizes completion of the acquisition through negotiation, the contracting officer shall proceed in accordance with subsection 14.404-1(f). Section 14.404-1(f) permits a contracting officer to negotiate in accordance with FAR part 15 and make award without issuing a new solicitation. In contrast, and as relevant here, FAR section 14.404-1(e)(2) provides that if an IFB has been canceled for the reason specified in subsection (c)(10) (cancellation is in the public interest), the contracting officer shall proceed with a new acquisition.

The agency advised Great Lakes of the cancellation and conversion and issued the RFP on September 7. This protest followed.

DISCUSSION

Great Lakes contends that the three reasons articulated by the Corps for its decision to cancel the IFB do not provide a compelling reason to justify cancellation after bids were opened. Specifically, the protester argues that the agency erroneously concluded that the bidders' prices were unreasonable and exceeded the government estimate by more than 25 percent. According to the protester, both conclusions were based on the agency's comparison of the bidders' prices to an unrealistic IGE. Additionally, the protester argues that the third justification is unsupported because the agency has not demonstrated that it lacks the funds to award the contract. Protest at 2. Great Lakes also argues that the agency does not have the authority to convert the IFB to a negotiated procurement. *Id.*

The Corps responds that it reasonably determined that it lacks sufficient funds to award the contract and pay the agency's internal costs to administer the contract, and it maintains that it has authority to convert the IFB to a negotiated procurement on this basis. Supp. MOL at 1, 6. With regard to the two other bases for the agency's cancellation decision, *i.e.*, its finding that the bidders' prices were unreasonable and that they exceeded the government IGE by more than 25 percent, the agency effectively withdrew them from consideration after our Office asked the agency to respond to the protester's arguments challenging the validity of the IGE used by the agency to support both findings. Supp. MOL at 1 n.1. In this regard, the agency states that while the Corps "does not concede that its IGE was unreasonable, it ultimately proved too burdensome for the Agency to respond to the many points raised by the Protester. The Agency's primary motivation in cancelling the solicitation is it does not have the funding to award the base contract award, and, therefore, seeks a decision from GAO solely on that issue." *Id.*

Generally, when an agency issues an IFB and opens bids, award must be made to the responsible bidder that submitted the lowest responsive bid unless there is a compelling reason to reject all bids and cancel the IFB. FAR 14.404-1(a)(1). The standard for canceling an IFB after bids have been opened differs from the standard for canceling a request for proposals after award, where an agency need only demonstrate a reasonable basis for the cancellation. *Veterans Elec., LLC*, B-415064.2, Feb. 1, 2018, 2018 CPD ¶ 42 at 4. The standard requiring a compelling reason for cancellation applies to IFB procurements because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed at a public bid opening. *United Contracting LLC*, B-407417, Jan. 2, 2013, 2013 CPD ¶ 1 at 2.

An agency's determination that funds are not available is a sufficient reason to cancel a solicitation, as agencies cannot award contracts that exceed available funds. *Welch Constr., Inc.*, B-411879, Nov. 9, 2015, 2015 CPD ¶ 351 at 2; *SeaBox, Inc.*, B-400198, Aug. 25, 2008, 2008 CPD ¶ 163 at 3. A contracting agency properly may cancel an IFB

when sufficient funds are not available, regardless of any disputes concerning the validity of the government estimate. *SeaBox, supra*. It is not our role to question the unavailability of funds; the management of an agency's funds generally depends on the agency's judgement concerning which projects and activities should receive increased or reduced funding. *First Enter.*, B-292967, Jan. 7, 2004, 2004 CPD ¶ 11 at 3.

Within this context, the Corps canceled the IFB pursuant to FAR subsection 14.404-1(c)(10) after finding that Great Lakes's base bid, when combined with the agency's estimate of internal costs to administer the contract, exceeded the available funding for the project.⁸ COS at 12; AR, Tab 9, Determination & Findings at 12. The protester contends that the Corps has not demonstrated that it lacks sufficient funds to make award because the agency's position "is rendered arbitrary by its unsupported estimate of its own internal costs, and its unsupported assertion that New Jersey has only committed \$5 million to complete the project." Comments at 31.

The protester's arguments concerning the reasonableness of the agency's internal cost estimate are unavailing because, as stated above, an agency may cancel an IFB for insufficient funds regardless of any disputes concerning the validity of the agency's estimate. *See First Enter., supra* at 4 (rejecting argument that because the IGE was erroneous and the available funding was premised on the inaccurate estimates, the agency should have sought additional funding).

We also are not persuaded by Great Lakes's argument that New Jersey made an open-ended financial commitment to fund the project. In this regard, the protester generally argues that New Jersey evidenced an intent to provide significantly more than \$5,000,000 in additional funding for the project. Comments at 35. As noted above, after the initial bid opening on March 16, the Corps obtained \$10,000,000 in additional funding, half of which was provided by New Jersey as the non-federal sponsor. COS at 7; MOL at 3; AR, Tab 24, NJDEP Email. The protester's position is premised on an email in which a NJDEP employee stated: "[the] NJDEP is committed to providing additional non-federal cost share funding to award the base bid and move this project forward. As indicated below, current estimates are that the additional non-federal cost share would be approximately \$5M but that number is still to be determined." AR, Tab 24, NJDEP Email at 2. The protester contends that New Jersey promised to "close the gap" and provide whatever funding was necessary to award the contract. Comments at 35.

The record does not support the protester's argument. As an initial matter, the project partnership agreement between the Corps and the NJDEP provides that the state "shall contribute 50 percent of the periodic renourishment costs . . . for each cycle of periodic renourishment." AR, Tab 13. Project Partnership Agreement at 6. Additionally, the protester mischaracterizes the email discussed above. In a prior email, the Corps

⁸ Although the agency states that it "does not concede" its position that the IGE was reasonable, our Office is left with no basis to judge that conclusion where the agency declines to provide its arguments on the matter.

stated that the lowest bid received exceeded the funds available, but the agency thought award might be possible if a decrease in Great Lakes's price could be obtained through negotiations and the agency obtained \$9,500,000 in additional funding. AR, Tab 24, NJDEP Email at 4. The Corps then asked the NJDEP to commit to provide an additional \$5,000,000, and the NJDEP agreed. *Id.* at 2. The record shows that the NJDEP agreed to provide the non-federal cost share, *i.e.*, 50 percent of the additional funding--not a blank check to complete the project.

The agency determined that the protester's bid exceeded the agency's available funding and the protester has not shown otherwise. Under these circumstances, the agency had a compelling reason to reject all bids and cancel the solicitation. Accordingly, we deny Great Lakes's protest of the agency's decision to cancel the IFB.

However, we sustain Great Lakes's protest of the Corps's decision to convert the IFB to a negotiated procurement. The FAR allows an agency to convert a sealed bidding procurement to a negotiated procurement, as the Corps seeks to do here, only where the cancellation is pursuant to FAR section 14.404-1 subsection(c)(6) (only unreasonable prices were received, or only one bid for which price reasonableness cannot be determined); (c)(7) (bids were collusive or submitted in bad faith); and (c)(8) (no responsive bid received from a responsible bidder). FAR 14.404-1(e)(1).

To the extent the agency initially may have argued that the bid prices it received were unreasonable and 25 percent more than the agency's IGE, as explained above, the agency declined to defend the reasonableness of the IGE in the face of the protester's allegations. Instead, the agency advised that it was defending the protest solely based on its determination that the agency lacked sufficient funding to make award and administer the contracts at the prices bid. In this context, since the agency withdrew its defense of the IGE, the agency's election precludes us from reviewing the agency's determination that the bid prices were unreasonable or that it was statutorily prohibited from making an award because the agency reasonably determined that the prices exceeded the IGE by more than 25 percent. Consequently, the sole remaining basis provided to our Office to justify the cancellation (thereby providing the basis for the justification for the conversion) is that the agency lacks sufficient funding to complete the project.

As identified in the agency's justification for its cancellation decision, this remaining cancellation justification falls under the authority of FAR section 14.404-1(c)(10) (for other reasons, cancellation is clearly in the public's interest). Section 14.404-1(c)(10), however, does not provide the agency with the authority to convert the sealed bidding procurement to a negotiated one. Indeed, the FAR expressly precludes a conversion in this circumstance, stating that instead, the contracting officer shall proceed with a new acquisition. See FAR 14.404-1(e)(2).

The agency, relying on our Office's decision in *National Projects, Inc.*, B-283887, Jan. 19, 2000, 2000 CPD ¶ 16, contends that an agency may convert an IFB into a negotiated procurement when the IFB is canceled for insufficient funds. The agency's

position lacks merit. In *National Projects*, the agency canceled an IFB after rejecting all bids as unreasonably priced, citing FAR section 14.404-1(c)(6), although the agency also found that all bids exceeded the agency's available funding. *Id.* at 2. The agency then converted the IFB to a negotiated procurement. The protester argued that the IGE was inaccurate and could not provide a basis to cancel the IFB. *Id.* at 4. Our Office denied the protest on these facts, which are distinguishable from the facts presented here, and did not find that an agency may convert an IFB to a negotiated procurement when the agency cancels the IFB because the agency lacks sufficient funds. Our Office has stated the opposite proposition. See *Kato/Intermountain Elec., A Joint Venture*, B-245807, Jan. 30, 1992, 92-1 CPD ¶ 129 at 4 (“[W]here, as here, the IFB actually was canceled pursuant to subparagraph (c)(10), the FAR does not provide for the contracting officer to convert the procurement to a negotiated one.”); see also *Greenway Enters., Inc.*, B-238943.2, May 4, 1990, 90-1 CPD ¶ 454 (same).

Here, as stated above, the agency's only supported reason for canceling the IFB is its determination that it lacks sufficient funding to award the base contract and that cancellation is therefore in the public interest and appropriate under FAR section 14.404-1(c)(10). Because a lack of sufficient funding does not, however, provide the agency with the legal authority to convert the IFB to a negotiated procurement, we sustain the protest with respect to the agency's action in that regard.

RECOMMENDATION

As discussed above, based on the agency's only supported rationale for canceling the IFB, we find the agency lacked authority to convert the IFB to a negotiated procurement. Accordingly, we recommend that the agency rescind its determination to convert the IFB to a negotiated procurement. We also recommend that the agency reimburse the protester's reasonable costs associated with filing and pursuing the protest, including attorneys' fees. 4 C.F.R. § 21.8(d). The protester's certified claims for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days after the receipt of this decision. *Id.* § 21.8(f).

The protest is sustained.

Edda Emmanuelli Perez
General Counsel