

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60196

FILE: B-183579

DATE: November 20, 1975

MATTER OF: Edward B. Friel, Inc.; Free State Builders, Inc.;
Michael O'Connor, Inc.

DIGEST:

097702
497702

1. Omission of one line item, which may have substantial cost impact in relation to other 53 items in IFB for acoustical ceiling work, does not constitute compelling reason to reject all bids and readvertise since other items are valid representation of Government's needs and alternate methods exist to satisfy need of omitted item.
2. Where agency receives mathematically unbalanced bids and determines that quantity estimates in IFB are valid representation of actual needs, award may be made to low bidder notwithstanding its bid is unbalanced.

This decision concerns the General Services Administration (GSA) invitation for bids (IFB) GS-03B-49523 issued for a term contract for acoustical ceiling and associated work in the North Area buildings, Washington, D. C. Any resultant contract would cover all requirements which may arise during a 1-year term for 53 specified items. The evaluation formula contained in the IFB was based upon estimated quantity requirements weighted to reflect the expectancy that 90 percent of the work would be performed during normal Government working hours. As of bid opening on March 28, 1975, the three low evaluated bids were:

Michael O'Connor, Inc. (O'Connor)	\$157,370.25
Edward B. Friel, Inc. (Friel)	197,474.00
Free State Builders, Inc. (Free State)	207,474.00

Both Friel and Free State protested to our Office on April 10, 1975, against the acceptance by GSA of O'Connor's bid alleging that it was so materially unbalanced that it did not represent the actual lowest cost to the Government. In its May 16 report to us, GSA defended the validity of the estimated quantities contained in the IFB and proposed to award the contract to O'Connor notwithstanding that the bid was unbalanced.

In its comments of May 20, 1975, submitted in response to the GSA report, Free State raised a new issue: the IFB was deficient because it omitted a line item for acoustical plaster ceiling removal. By report dated June 20, 1975, GSA responded to that matter, stating:

"After this oversight in the coverage of the prospective contract had been called to our attention, the regional office reviewed the prospective requirements for removal of that type of ceiling to ascertain the probable quantity of the item and to determine whether it would be practical to have such requirements performed by GSA's own work forces so as to permit award of the contract despite the omission.

"It has been concluded that the probable quantity would exceed GSA's in-house capabilities and a contract for acoustical ceiling work cannot be awarded without this particular removal item."

GSA's June 20 letter also forwarded a copy of the Findings and Determination of the contracting officer to reject all bids, cancel IFB GS-03B-49532, and resolicit the requirement. This action was predicated on Federal Procurement Regulations (FPR) § 1-2.404-1 (b)(1) (1964 ed. amend. 121), which permits cancellation of an IFB when it is in the best interest of the Government because inadequate specifications are cited in the IFB.

The foregoing action prompted a protest on June 25, 1975, from O'Connor. O'Connor maintains that the new issue raised by Free State is untimely under our Bid Protest Procedures (40 Fed. Reg. 17979, April 24, 1975), which requires that protests based upon solicitation improprieties apparent on the face of the solicitation must be protested prior to bid opening in order to be timely filed and considered on its merits. Since the omission should have been known to Free State, as the incumbent contractor, prior to the date of bid opening, O'Connor urges that this basis of protest is untimely. Moreover, O'Connor maintains that the omission of a requirement for acoustical plaster ceiling removal is not a compelling reason to reject all bids after they have been opened and publicly exposed. O'Connor states its belief that removal of the plaster ceiling is unnecessary in virtually all of the contract work since installation of most acoustical ceiling is accomplished by "dropping" the ceiling on forms and installing the new ceiling at a lower level.

O'Connor alternatively suggests that the acoustical plaster ceiling removal be accomplished (1) under separate procurement; (2) by GSA personnel; or (3) under another of GSA's term contracts for a different area that contains a line item for acoustical ceiling plaster removal. O'Connor states that separate contracting for the services would only amount to an administrative inconvenience, and is not a compelling reason to cancel the IFB. O'Connor states that it is commonplace in the construction industry for a project to involve more than one contractor and scheduling is always accommodated by the parties. In support of its second suggestion, O'Connor notes that the GAO Building is the only building in the North Area (the subject of this contract) that is expected to require removal of acoustical plaster ceiling. Therefore, GSA's forces should be sufficient to do the work. Concerning its third suggestion, O'Connor notes that section 0110 of the IFB gives the Government "* * * THE RIGHT TO ADD TO OR DELETE FIELD OFFICES IN [THE] CONTRACT." O'Connor maintains that since this provision is in the term contract awarded for the South Area, and that contract contained a line item for removal of acoustical ceiling plaster, the GAO Building could be added to that existing contract for the South Area. Thus, GSA would be free to award the North Area contract to O'Connor and still receive the acoustical plaster ceiling removal.

Concerning the timeliness of the issue raised by Free State, O'Connor is correct that the issue is untimely under our Bid Protest Procedures. Ordinarily, it would not be considered on its merits. However, GSA correctly notes that its exercise of its administrative discretion (to determine that it is in the best interests of the public to reject all bids and readvertise) is not subject to the timeliness constraints of our Bid Protest Procedures. Thus, at any time during our consideration of a bid protest, GSA may exercise its administrative prerogative to determine whether information before GSA, regardless of when or how that information surfaces, indicates that it is in the best interests of the public to reject all bids and readvertise. However, the information so raised may be scrutinized in our bid protest forum upon a protest to our Office (subject to our Bid Protest Procedures) that no compelling reason exists to cancel an IFB. This is precisely what has occurred here.

Generally, the discretion afforded an agency to determine that it is in the public interest to reject all bids and readvertise is limited only by the necessity that after bids have been publicly opened, a compelling reason must exist to cancel the IFB. FPR § 1-2.404-1(a) (1964 ed. amend. 121). The fact that inadequate or deficient specifications have been cited in an IFB does not per se require cancellation of an IFB once bids have been opened and

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prices exposed. 52 Comp. Gen. 285 (1972). Consideration must be given to the best interest of the Government and whether bidders have been treated fairly and equally. See Edward B. Friel, Inc., B-183381, September 22, 1975, 75-2 CPD 164.

GSA cites, in support of its action, several decisions of our Office which have upheld the propriety of a cancellation of an IFB after bid opening to revise the specifications when it is discovered that the IFB did not include all of the Government's requirements (B-170548, December 17, 1970; B-174476 (1), December 7, 1971); 49 Comp. Gen. 135 (1969); or the Government's requirements differed from those expressed in the solicitation (49 Comp. Gen. 584 (1970); 47 Comp. Gen. 103 (1967)).

We find the cited decisions distinguishable from the instant case. In B-170548, supra, the agency canceled an IFB for lodging requirements because it omitted the requirement for providing certain meals. While the agency intended to issue one invitation for both services, through oversight it issued two IFB's, one for each service. We received a protest against the agency's proposed cancellation of the two IFB's so that one IFB for both services could be issued. We held that while we saw no valid reason why the required services would not be received as a result of two awards, we acquiesced in the cancellation because the agency maintained that the consolidated procurement would be more cost effective in the long run. In this case, there is no allegation that cancellation and resolicitation of the entire requirement would be more cost effective.

B-174476(1), supra, concerned an invitation for three items of prefabricated living quarters. The claimant submitted the low bids on items 2 and 3. After bids were opened, the agency decided to materially upgrade the requirements of item 3. At that time, a local contractor who qualified as an Indian enterprise negotiated a contract under the Buy Indian Act, 25 U.S.C. § 47 (1970 ed.), with the agency (Bureau of Indian Affairs) for the housing units encompassed by item 3. Claimant was awarded only item 2 and alleged that he should be reimbursed the profit he lost that he would have made on item 3 had it been awarded. Under those circumstances, we held that the agency did not abuse its discretion to reject all bids for item 3 because of the substantial changes needed in the scope of work. In that case, the agency requirements changed after bid opening and only a single item not representing the Government's actual needs was deleted. Award was made on the remaining items since they could be performed separately. This is the thrust of O'Connor's position.

Our decision at 49 Comp. Gen. 135 (1969), involved an invitation that was canceled because the evaluation formula stated in the IFB did not provide for consideration of all cost factors (FPR § 1-2.404-1 (b)(3) (1964 ed. amend. 121)). Since that is one of the specific examples in the FPR cited as providing valid justification for canceling an IFB, we find this fact situation distinguishable also.

GSA also cites 49 Comp. Gen. 584 (1970) for the proposition that GAO will not disturb an agency determination to cancel an IFB where the Government's requirements differed from those expressed in the IFB. The IFB, as originally issued in that case, called for bids for a heat pump and air conditioning units in accordance with certain specifications and drawings. After bids were opened, the base commander directed that certain changes be made in the construction and location of some walls. The net effect was that the size of the heat pump was reduced and additional ducting required. We sustained the cancellation of that IFB on the basis that the changed specifications were so substantially different than those advertised that the bids submitted would no longer satisfy the new requirement. We believe that situation distinguishable from the present one since here the bids for all listed items will in fact satisfy the Government's needs.

Lastly, in 47 Comp. Gen., supra, an IFB for dredging services was canceled because it was determined that if a portion was not advertised substantial savings might accrue to the Government. We held that the possibility of the substantial monetary savings was sufficient reason to uphold the cancellation. As in many of the foregoing cases, this case concerned the deletion of an unnecessary requirement, as opposed to the inclusion of an omitted item.

While O'Connor has offered alternate ways for GSA to satisfy its stated need for acoustical ceiling plaster removal, and GSA has proffered its view that none of those ways is practicable, we think that at least one is. Under the previous term contracts, for the North and South Areas, the GAO Building was originally in the South Area. Due to a reorganization of areas during the term of the contracts, the GAO Building was shifted to the North Area. This is permissible under the Special Conditions of the contract, section 0110, which states "THE GOVERNMENT RESERVES THE RIGHT TO ADD TO OR DELETE FIELD OFFICES IN THIS CONTRACT." Each area is divided into field offices. After the reorganization, and since the preceding North Area term contract did not have a provision for removal of acoustical ceiling plaster and the South Area contract did, removal was accomplished under the South Area contract. We perceive no impediment to GSA's doing the same under the present situation. While this method may not be as

convenient as if it were included in the North Area term contract (GSA terms it "not practical"), we do not equate inconvenience with a compelling reason for cancellation. As stated in FPR § 1-2.404-1 (a), supra:

"Preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * * As a general rule, after opening, an invitation for bids should not be cancelled and readvertised due solely to increased requirements for the items being procured. Award should be made on the initial invitation for bids and the additional quantity should be treated as a new procurement."

Note that it is preferred to treat new quantities as a separate procurement where additional quantities of the items rise after the IFB has been issued.

On August 25, GSA reported to our Office the projection that possibly 125,000 square feet of plaster may be removed under the term contract. An average of the past two contracts results in a cost estimate of \$83,750. It seems to us that an estimated quantity of work of this magnitude would be sufficient to generate adequate competition for a separate procurement.

We recognize that the quantities are only estimates and carry no obligation that the estimated amounts be ordered. However, in view of the large estimated dollar amount of this single item, as compared with the totality of the 53 items advertised; in view of the possibility that prices for a resolicitation may reflect inflationary pressures; and in view of the auction atmosphere that would be generated by a resolicitation, particularly in light of the unbalancing aspects here raised, we are not persuaded that a compelling reason exists to cancel the instant IFB. We recommend that IFB -49532 be reinstated and award made thereunder in accordance with that which follows.

We now turn to the protest basis submitted by Free State and Friel, e.g., O'Connor's low bid was so materially unbalanced that it does not represent the best offer to the Government and must be rejected. As indicated earlier, our Office has very recently had occasion to clarify our position on the issues of unbalanced bidding. In Edward B. Friel, Inc., supra, we stated:

"B-168205(1), June 30, 1970, describes unbalanced bidding as follows:

'* * * The term "unbalanced" * * * is applied to bids on procurements which include a number of items as to which the actual quantities to be furnished is not fixed, in which a bidder quotes high prices on items which he believes will be required in larger quantities than those used for bid evaluation, and/or low prices on items of which he believes fewer will be called for. * * *'

"Our Office has recognized the two-fold aspects of unbalanced bidding. The first is a mathematical evaluation of the bid to determine whether each bid item carries its share of the cost of the work plus profit, or whether the bid is based on nominal prices for some work and enhanced prices for other work. The second aspect--material unbalancing--involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is not materially unbalanced unless there is reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will not result in the lowest ultimate cost to the Government. See Mobilease Corporation, [54 Comp. Gen. 242 (1974), 74-2 CPD 185]. We think the controversy in this case largely involves a question of how it is determined that material unbalancing is present.

"We believe that, as a general rule, the inquiry into material unbalancing begins with an examination of the solicitation and its evaluation formula. The determination that a mathematically unbalanced bid has been submitted has the effect of calling into question the accuracy of the solicitation's estimate of the anticipated quantity of work and, thus, the evaluation basis upon which bids or offers are being considered for award. If, after examination, the contracting agency believes that the solicitation's estimate is a reasonably accurate representation of actual anticipated needs, then the mathematically unbalanced low bid may be accepted. See R & R Inventory Service, Inc., 54 Comp. Gen. 206 (1974), 74-2 CPD 163; Cf. 51 Comp. Gen. 792 (1972).

"On the other hand, in cases where the contracting agency concludes after examination that the solicitation's estimate is not a reasonably accurate representation of actual anticipated

needs, we have indicated that the solicitation should be canceled. See B-159684, October 7, 1966; B-164429, August 21, 1968."

O'Connor's bid is unbalanced. In that event, applying the above stated rule, our inquiry concerns the validity of the estimated quantities in the IFB. GSA addressed this issue in its July 24, 1975, report to our Office as a result of Free State's assertion of May 20, 1975, that the omission of the acoustical plaster ceiling removal from the instant IFB cast doubt as to the validity of the estimated quantities. Further, Free State, as the incumbent contractor, asserts that the estimates do not reflect the actual past history of the work. In support of this argument, Free State has submitted from its records a comparison of the Government estimates for the previous North Area term contract and the actual quantities ordered under its contract.

GSA states that its estimates and evaluation formula considered the actual quantity take-off of the preceding year. In addition, it considered the experience generated during the 8 months of the existing contract, extrapolated to give 12 months projections. This extrapolation process is explained to have resulted from the fact that the IFB was necessarily prepared with sufficient lead-time to permit submission of bids, evaluation and award. Thus, the IFB was issued on February 14, 1975, or eight months into the existing contract. To this, GSA considered when the work would probably be performed (90 percent during normal Government working hours - 10 percent during other than normal Government working hours), to arrive at its evaluation formula. The effect of new buildings - J. Edgar Hoover Building, Labor Department Building, Tax Court Building and planned renovations to some older buildings - Justice Department Building and Federal Home Loan Bank Board was also included in the quantity estimates. Further, activity under the previous South Area contract was considered.

On this basis, GSA asserts that if we conclude that an award should be made under the original IFB, its estimates are valid. In support of this conclusion GSA has disputed the figures submitted by Free State by submitting copies of orders issued which vary from the quantities proffered by Free State. GSA emphasizes that even if Free State's figures were correct, they were not adjusted to account for the factors described above.

We view GSA's process in determining its estimated quantity as reasonable. Free State's computations do not appear to change

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the basic validity of GSA's approach. Therefore, we agree with GSA that award should be made to the low responsive, responsible bidder under IFB -49532.

A handwritten signature in cursive script, appearing to read "R. F. K...", is written above the typed name.

Deputy Comptroller General
of the United States