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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Specialized Steel Contractors, Inc.

File: B-408022; B-408022.2

Date: May 14, 2013

Frank V. Reilly, Esq., for the protester.
Steven Fitten, Esq., and Eric Meza, Esq., International Boundary and Water Commission, for the agency.
K. Nicole Willems, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly cancelled an invitation for bids, after bid opening, where the agency concluded that funds were unavailable to perform the requirement and the requirement did not constitute a valid agency need.

DECISION

Specialized Steel Contractors, Inc. protests the cancellation, after bid opening, of invitation for bids (IFB) No. IBM12B0008, issued by the United States Section of the International Boundary and Water Commission (USIBWC), for a levee rehabilitation project adjacent to the Rio Grande, between the towns of Ysleta and Fabens, Texas.¹

We deny the protest.

The agency issued the solicitation on August 6, 2012, with the bid opening date scheduled for September 6, 2012. The agency amended the IFB on August 31, 2012, and postponed bid opening indefinitely pending resolution of legal questions concerning the propriety of using USIBWC funds for portions of the levee project

¹ The USIBWC is an international body composed of the United States Section and the Mexican Section. The United States Section of the USIBWC is a federal government agency and is headquartered in El Paso, Texas.

involving property owned and operated by the El Paso County Water Improvement District. Agency Report (AR) at 1.

The agency amended the IFB again on September 17, 2012, and set a new bid opening date of September 21, 2012. At this time, however, additional questions arose within the agency regarding the availability of funds for the contract since Fiscal Year (FY) 2012 was coming to a close, and the agency did not know whether FY 2013 funds would be available. AR at 1-2.

Notwithstanding the unresolved funding issues, the agency proceeded with bid opening on September 21, 2012. The agency received two bids, with the protester submitting the apparent low bid. On September 24, the intended contract was submitted for a legal review, however, the review could not be completed by the end of the fiscal year, and, as a consequence, the agency did not make award before available FY 2012 funds expired on September 30. AR at 2.

On February 1, 2013, agency officials decided to cancel the solicitation, under FAR § 14.404-1. This decision was based on a number of factors including legal concerns about whether USIBWC funds could be properly used for the contract, a determination by the Acquisitions and Engineering Support Divisions that the existing width and condition of the levee in question was adequate for flood control operations, lack of FY 2013 funds for the project, and the apparent lack of a tangible benefit to be derived from proceeding with the project. The agency ultimately canceled the solicitation on February 11, 2013, when the contracting officer posted a notice of cancellation on the Federal Business Opportunities website. Contracting Officer's Statement of Relevant Facts at 2.

The protester asserts that the agency did not have a compelling basis to cancel the solicitation, and that the cancellation was defective because the agency did not follow proper procedures.

Regarding the protester's first argument, once bids have been opened, award must be made to the responsible bidder with the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the IFB. FAR § 14.404-1(a)(1). In this case, the agency had several compelling reasons for cancellation. First, the agency determined that funding was not available for the project. At the time of cancellation, no FY 2013 funds were available to award the contract. Contracting Officer's Statement of Relevant Facts at 2. A contracting agency has the right to cancel a solicitation when sufficient funds are not available. National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16 at 4. Second, the contracting agency determined that the existing levee meets its needs and, as a consequence, the government would not receive any benefit if it proceeded with the project. Cancellation of bids before award but after bid opening is permitted, when supplies or services being contracted for are no longer required. FAR § 14.404-1(c)(3).

Turning to the protester's second contention, that the agency failed to follow proper procedures in cancelling the solicitation, the protester asserts that the agency's cancellation was in violation of FAR § 14.404-1(c), which requires the agency head to provide a written cancellation determination. The protester's complaint is based upon the fact that the Commissioner of the USIBWC did not issue a written determination of the cancellation. We find no violation of that provision. As explained by the USIBWC, it follows the Department of State's regulatory guidance when carrying out acquisitions and, in this instance, it relied upon 48 C.F.R. § 614.404-1, which delegates the authority to make FAR § 14.404-1(c) cancellation determinations to the head of the contracting activity (HCA). Here, the record reflects that the agency made a determination in writing that the "Chief of Acquisition" and the contracting officer effectively adopted and then executed, consistent with the applicable delegations. AR at 1; AR Exh. 12, IBWC Management Request to Cancel Solicitation, Feb. 1, 2013; See Windsor Maintenance Company, B-235745, Oct. 4, 1989, 89-2 CPD ¶ 305.

The protester also asserts that the cancellation decision was improper since it was made without the concurrence of the office of the legal adviser, as required by 48 C.F.R. § 614.404-1. The record, however, reflects that agency attorneys were involved throughout the course of the procurement, and the agency explains that the cancellation decision was made based on guidance from the agency's legal advisor. AR at 2; IBWC Management Request to Cancel Solicitation, Feb. 1, 2013. Accordingly, we have no basis to conclude that the agency failed to obtain the concurrence of counsel before deciding to cancel the solicitation.²

The protest is denied.

Susan A. Poling
General Counsel

² The record reflects that the agency's legal advisor issued a final written opinion, albeit after the solicitation had been cancelled, explaining why circumstances required the agency to cancel the solicitation. See Agency's Response to GAO's Request for Information, Apr. 24, 2013, Ex. 1, Legal Opinion.