



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Booth & Associates, Inc.--Advisory Opinion

File: B-277477.2

Date: March 27, 1998

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DIGEST

1. Agency properly reinstated a bid, previously rejected as nonresponsive, which failed to include a completed supplemental schedule of individual hourly rates where the schedule was not used in the evaluation of bid prices, and its omission did not affect the bidder's promise to perform as specified.
2. Agency decision to cancel and revise an invitation for bids (IFB), after bid opening, was proper where the record shows that the IFB contained a material defect--an ambiguity in how to complete the pricing schedule--that resulted in competition on an unequal basis.

DECISION

The United States District Court for the District of Utah requests an advisory opinion from the General Accounting Office (GAO) with respect to the complaint of Booth & Associates, Inc. Booth is seeking injunctive relief to prevent the Department of the Air Force from revising invitation for bids (IFB) No. F42650-97-B-0034 and soliciting bids on that revised solicitation. The Air Force elected to revise the IFB after reviewing a protest filed at GAO by Redcon, Inc. (file number B-277477), challenging a decision by the Air Force to reject Redcon's bid under the IFB as nonresponsive. Upon review, the Air Force concluded that Redcon's bid was improperly rejected, and that the solicitation was ambiguous and should be revised and reissued. When notified of the Air Force decision, Redcon withdrew its protest to our Office.

After Booth asked the court to bar the Air Force from revising the solicitation, both parties agreed to a stay in the proceedings pending receipt of a decision from GAO. By order dated November 13, 1997, the court asked GAO to consider the following questions: (1) would Redcon have prevailed on its protest? and (2) was the United States justified in deciding to revise the solicitation and resolicit bids from the technically acceptable bidders?

In accordance with the court's request for an advisory opinion, the parties provided us with a copy of the briefs filed at the court, and the administrative record, which includes the filings made to our Office. No further pleadings were requested or received.

As described below, we conclude that the Air Force acted properly in deciding to revise the solicitation in this procurement, and resolicit for bids. Underlying this decision, we agree with the Air Force's assessment that the Redcon protest would have been sustained if GAO had reached a decision on the merits.

BACKGROUND

On July 29, 1996, the Air Force issued request for proposals (RFP) No. F42650-96-R-0042, as the first part of a two-step procurement for design and drafting services in support of weapons modification programs at Ogden Air Logistics Center, Hill Air Force Base, Utah. The solicitation anticipated award of an indefinite quantity, indefinite delivery contract covering a 1-year base period, followed by four 1-year options, with delivery orders to be issued to the successful offeror as requirements were identified.

Upon receipt and evaluation of unpriced technical proposals, the agency concluded that the proposals submitted by Booth, Redcon, and Mesa Associates were technically acceptable. The agency then issued IFB No. F42650-97-B-0034 to the three acceptable offerors, and requested submission of sealed bids by 2 p.m. on March 20, 1997.

The IFB required bidders to complete a pricing schedule using a composite hourly rate for the design and drafting services, which was multiplied by a government-provided estimate of staff-hours to obtain a price. Separate entries were to be made for the base year and for each of the 4 option years, at contract line item numbers (CLIN) 0001, 0101, 0201, 0301, and 0401, respectively. Immediately following each of these entries were separate CLINs (CLINs 0002, 0102, 0202, 0302, and 0402) for data and drawings which were not priced separately. At the end of each of the CLINs related to a performance period, the pricing schedule included a summary line for the bidder to enter the total cost for that performance period. IFB at 3, 5, 6, 7, and 9.

Only one CLIN was different from the recurring CLINs described above. At CLIN 0003, bidders were required to enter a price for the first delivery order during the base year. (The effort for the first delivery order had been identified in the initial statement of work included in the RFP.) The line where bidders entered their total price for the base year was found after CLINs 0001, 0002, and 0003, but there were no instructions about whether the price for CLIN 0003 was to be added to the price for CLIN 0001--which purported to be the price for all needed effort during the base period--or included within it. IFB at 3.

At the end of the IFB's pricing schedule was a block of instructions followed by two additional one-line schedules, called schedule 1 and schedule 2. IFB at 9. The instructions and one-line schedules are set forth below:

The hourly calendar year (CY) labor rates listed below in schedules 1 and 2 will be used to price all labor required to perform within the scope of the basic contract. Either the offeror's composite rates or individual rates, at the discretion of the administrative contracting officer (ACO), may be used for pricing the contractor effort for each delivery order. All rates shall include any teaming or subcontractor arrangements, and shall be fully burdened to include all applicable overhead, G&A and profit.

Schedule 1 and 2 applies to the following contract line items: 0001, 0101, 0201, 0301, and 0401.

Schedule 1 (FFP)

OFFEROR'S COMPOSITE LABOR RATES

	<u>CY97</u>	<u>CY98</u>	<u>CY99</u>	<u>CY00</u>	<u>CY01</u>	<u>CY02</u>
Design/Drafting Services						

Schedule 2 (FFP)

OFFEROR'S INDIVIDUAL LABOR RATES

	<u>CY97</u>	<u>CY98</u>	<u>CY99</u>	<u>CY00</u>	<u>CY01</u>	<u>CY02</u>
*Description/Code						

*Job classifications are by company description including an applicable labor codes used for payroll records.

In addition to the language quoted above, CLINs 0001, 0101, 0201, 0301, and 0401 (IFB at 2, and 4-8) include the following language:

For the purposes of evaluation, amounts applicable to this line item are determined by multiplying the offeror's proposed composite labor rates, under schedule I below, by the government's estimated man-hours. The amount of labor hours and associated rates for subsequent delivery orders issued against the basic contract may be negotiated based on either the offeror's proposed rates established under

schedule I or schedule II at the discretion of the administrative contracting officer (ACO).

Essentially the same information is set forth in the IFB at clause L-900(c). IFB at 27. The solicitation also advised at clause M-16C that the composite hourly rate would be used for evaluation purposes, and "the amount proposed for the first delivery order (CLIN 0003) will be used in conjunction with all other line items in evaluating the offeror's total proposed price." Id.

Upon receipt of bids from Booth, Redcon, and Mesa, the Air Force noticed two problems. First, the bids seemed to show that the companies had two different interpretations of the impact of CLIN 0003 on the total price for the base year. Redcon and Mesa had added the prices for CLIN 0003 and CLIN 0001 together to compute their total base year price. In contrast, Booth's total price was the same as its CLIN 0001 price. Second, the Air Force noticed that Redcon had not entered individual labor rates on schedule 2. Instead, Redcon had typed "N/A" on schedule 2, apparently indicating that Redcon did not believe the information was needed by the Air Force.

In response to the discrepancy in the treatment of CLIN 0003, the contracting officer asked each bidder to clarify its bid for the base year. At that time, Booth confirmed that its price for CLIN 0003 was included in its price for CLIN 0001; therefore, the total price was the same as the CLIN 0001 price. As a result of Redcon's failure to provide individual labor rates under schedule 2, the contracting officer concluded that the bid was nonresponsive. At the conclusion of the agency's review, the final bid amounts were calculated as follows:

Booth	\$ 2,468,100
Redcon	\$ 2,517,150
Mesa	\$ 2,807,372

After determining that Booth was the lowest-priced, responsive and responsible bidder, the Air Force awarded the contract to Booth on June 26, 1997.

On July 11, Redcon filed a protest with our Office arguing that its bid was wrongly rejected as nonresponsive, and that Booth was improperly allowed to include its CLIN 0003 price within its price for CLIN 0001. Since Booth's CLIN 0003 price was \$76,696.66, Redcon correctly pointed out that if Booth had been required to add its CLIN 0003 price to its CLIN 0001 price--as did Redcon and Mesa--Redcon would have been the lowest-priced bidder.¹

¹With the addition of the \$76,696.66 bid for CLIN 0003, Booth's total bid would have risen to \$2,544,796.66.

By letter dated August 13, the Air Force advised our Office that it was taking corrective action in response to the protest by revising its solicitation, and requesting new bids from all bidders, including Redcon. Underlying this decision, the record shows that the Air Force concluded that it had improperly rejected Redcon's bid for failing to complete schedule 2. Administrative Record (Admin. Rec.) at 110421. In addition, the Air Force concluded that the IFB should be revised to clearly state whether the price for CLIN 0003 was to be included within the basic performance period price. Id. In response to these actions, Booth filed its request for injunctive relief with the court on September 11.

ANALYSIS

With respect to the first question put to our Office by the court, regarding the likelihood of Redcon's success in its protest challenging the rejection of its bid as nonresponsive, we conclude that a decision on the merits would have upheld Redcon's contention.

Redcon's bid was initially rejected by the Air Force as nonresponsive to the IFB because it failed to include an entry under schedule 2 at the end of the price schedule. Under schedule 2, bidders were to identify the individual labor categories and hourly rates to be paid by the bidder for calendar years 1997 through 2002. Ultimately, however, the Air Force concluded that Redcon's failure to complete schedule 2 was not a matter of responsiveness.

The test for responsiveness is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the solicitation, so that upon acceptance the contractor will be bound to perform in accordance with all of the IFB's material terms and conditions. Mike Johnson, Inc., B-271943, Aug. 14, 1996, 96-2 CPD ¶ 66 at 2. Material terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services offered, Seaboard Elecs. Co., B-237352, Jan. 26, 1990, 90-1 CPD ¶ 115 at 4, and the Federal Acquisition Regulation (FAR) authorizes rejection of any bid that fails to conform to them. FAR § 14.404-2. A solicitation requirement is not material, however, if the government does not need the information in order to evaluate bids or the information otherwise does not have an impact on the bidder's promise to perform as specified. American Spare Parts, Inc., B-224745, Jan. 2, 1987, 87-1 CPD ¶ 4 at 3.

We think Redcon's failure to complete schedule 2 at the end of the price schedule was not a material omission from its bid. First, the individual labor rates and categories in schedule 2 were not used to determine a bidder's price. Rather, the schedule 2 rates were requested to permit the agency to price future delivery orders if the use of such rates would lead to a lower overall price for the delivery order than the composite rate. To evaluate bid prices, the IFB clearly advised that the agency would use the bidder's composite hourly rate. IFB, clause M-16C. Since

Redcon provided its composite rate for each performance period, the agency had no difficulty determining Redcon's bid price.

As an example of the immaterial nature of this omission on the evaluation of bid prices, the Air Force's brief considers a hypothetical bidder who completes schedule 2 using individual rates far in excess of the average composite rates of approximately \$25 per hour. Air Force Memorandum of Law, Nov. 13, 1997, at 12 n.6. Even if we assume this bidder entered rates of \$1,000 per hour on schedule 2, it would still be evaluated as the low bidder and receive award if its composite rates (together with its price for the first delivery order) were the lowest received. In addition, the agency would be in no different a position in the circumstance where the low bidder inserts very high individual rates in schedule 2 than it is in the situation here--where a bidder has failed to complete schedule 2. Either way, the bidder receives the award, and the contract price will never be higher than the composite rate identified for each CLIN (and for the first delivery order).

Redcon's failure to complete schedule 2 also had no impact on its obligation to perform the drafting services required here. Redcon's bid appropriately promised to provide all the drafting services ordered during the base year and each of the option years at its composite hourly rate. Since Redcon's failure to complete schedule 2 had no impact on bid evaluation or on Redcon's promise to perform as offered, we conclude that the Air Force properly decided that Redcon's bid was, in fact, responsive. See American Spare Parts, Inc., supra, at 4.

Nonetheless, the initial review of bids led the Air Force to conclude that Redcon's bid was not the lowest received, and thus, even though its bid was ultimately viewed as responsive, Redcon would not be in line for award. As discussed below, however, an ambiguity in the bid schedule made it impossible to determine which bid offered the lowest price to the government. At this juncture the Air Force elected to cancel the solicitation and begin anew.

With respect to the court's second question--whether the agency appropriately decided to cancel and resolicit bids in this procurement--we conclude that the agency's actions were proper.

Because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed, a contracting agency must have a compelling reason to cancel an IFB after bid opening. FAR § 14.404-1(a)(1); Days Inn Marina, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23 at 2. A compelling reason to cancel a solicitation exists where material solicitation terms are ambiguous or in conflict. P.J. Dick, Inc., B-259166, B-260333, Mar. 6, 1995, 95-1 CPD ¶ 131 at 4. Contracting officials have broad discretion to determine whether a compelling reason to cancel exists, and our review is limited to considering the reasonableness of that decision. H. Angelo & Co., Inc., B-260680.2, Aug. 21, 1995, 95-2 CPD ¶ 74 at 3.

In its brief detailing the decision to revise the pricing schedule in this IFB and resolicit, the Air Force claims that either of the problems identified in the pricing schedule--the uncertainty about whether CLINs 0001 and 0003 were additive, or the uncertainty about completing schedule 2--would have formed a valid basis for the agency's actions. We conclude that the CLINs 0001 and 0003 ambiguity was sufficient to support the cancellation decision.

As discussed above, the record here shows that the IFB was ambiguous because it provided no explanation about whether CLINs 0001 and 0003 were additive in determining the total price for the base year. The ambiguous nature of the IFB is highlighted by the fact that the bidders took differing approaches to completing the price schedule. Booth concluded that the IFB's base year staff-hour estimate included the effort for the first delivery order. Hence, Booth's CLIN 0001 price and its total price for the base year were the same.² The other two bidders, Redcon and Mesa, concluded that the base year staff-hour estimate did not include the effort for the first delivery order. These bidders added their prices for CLINs 0001 and 0003 to calculate the total price for the base year.

Since the ambiguity in the IFB about the relationship between CLINs 0001 and 0003 caused the bidders to use different approaches in completing the price schedule, the agency could not tell from the face of the bids which bid offered the lowest price to the government. Specifically, the record shows that Booth's bid was low only if the bid's base year total included the price for CLIN 0003 (an interpretation of the schedule inconsistent with its interpretation by the other bidders, and apparently inconsistent with the agency's interpretation). If Booth's base year total failed to include the price for CLIN 0003 (and thus the total needed to be adjusted upward), Booth's bid would have been second low.³ Rather than permit Booth, or any other

²As also explained above, the contracting officer asked Booth to verify its bid for the base year, and whether the base year bid included the price for CLIN 0003. Booth verified that the bid was correct, and that the price for CLIN 0003 was included within its base year total. Admin. Rec. at 110009-10.

³While Booth purported to "verify" its bid after bid opening, nothing on the face of the bid indicated which reading of the bid was intended at the time the bid was submitted. Thus, Booth's ambiguous bid could not be accepted here because the bid was low under only one reading of the bid; under the other reasonable reading, Booth's bid was not low. A low bid with an ambiguity in its price may be accepted if the ambiguity in the bid does not affect the evaluation, the bid is low under either interpretation of the ambiguity, and the low bidder agrees to accept the interpretation which is more favorable to the government. Grove Roofing, Inc., B-233747, Feb. 23, 1989, 89-1 CPD ¶ 196 at 3. However, if the bid is low under only one of the two reasonable interpretations, the bid must be rejected. Id. There is no (continued...)

bidder, to choose which reading of the schedule should prevail, we believe the agency reasonably concluded that the solicitation was ambiguous, that it misled bidders into competing on an unequal basis, and that it should be revised. P.J. Dick, supra, at 4 (IFB properly canceled where solicitation was ambiguous about whether state sales taxes should be included in bid prices and the record showed that bidders had differing approaches to including such taxes in their bids); see Temps & Co., 65 Comp. Gen. 640, 643 (1986), 86-1 CPD ¶ 535 at 4 (IFB that failed to advise bidders whether option prices would be evaluated in determining the successful bid was defective).

As a final matter, we note that Booth argues that there was no compelling reason for the Air Force to cancel this invitation and resolicit because Redcon's assertion that the IFB was ambiguous was untimely, and this portion of the protest should therefore have been dismissed on procedural grounds. Booth points out that under our Bid Protest Regulations, a protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening, must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1) (1997). In Booth's view, the ambiguity in the IFB was an obvious defect in the IFB and any challenge to it was therefore untimely. Thus, Booth contends that since Redcon could not have prevailed at GAO, the Air Force could have ignored Redcon's complaints and proceeded with award to Booth.

In our view, the propriety of the Air Force's actions is unrelated to whether Redcon's challenge to the rejection of its bid raises a question that could have been asked prior to bid opening. As the discussion above illustrates, the agency had no basis for selecting one method of bid evaluation over the other to determine the total price for the base performance year, as either approach appears equally reasonable. Thus, with or without a protest from Redcon, or any other bidder, the Air Force could reasonably conclude--at any time--that the material flaw in the IFB's pricing schedule provided a compelling basis for canceling this solicitation, and beginning anew. See Earthworks of Sumter, Inc., B-232067.2, Jan. 5, 1989, 89-1 CPD ¶ 9 at 4.

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³(...continued)

basis to allow a bidder, after bid opening, to decide which interpretation should be applied.