



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: EDL Construction, Inc.

File: B-281499

Date: February 12, 1999

Robert W. Moore and Robert E. Moore, for the protester.
William A. Wilcox, Jr., Esq., International Boundary and Water Commission, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Determination to cancel invitation for bids after bid opening is unobjectionable where the agency could not find reasonable the sole bid submitted because it was significantly higher than the government estimate, and the agency subsequently determined that the solicitation specifications no longer reflected its actual needs.

DECISION

EDL Construction, Inc. protests the cancellation after bid opening of invitation for bids (IFB) No. 98-04, issued by the United States Section of the International Boundary and Water Commission (Commission), for various improvements at the South Bay International Wastewater Treatment Plant (SBIWTP) in San Diego County, California. The Commission rejected EDL's bid, the only one submitted, and plans to resolicit the requirement under a revised solicitation.

We deny the protest.

The IFB, issued as a total small business set-aside on June 8, 1998, contemplated the award of a fixed-price contract for various improvement projects at the SBIWTP, including: installation of a 30-inch emergency sewer connection replacement, demolition of existing piping and isolation valve, and grading improvements; installation of an 18-inch gravity sewer pipe; installation of access ladders and platforms for five influent pumps; repair of existing security gate no. 5; and installation of gate control improvements at gate nos. 2, 3 and 4. The IFB requested a single price for all of the work.

At bid opening on August 20, EDL's bid of \$974,334 was the only one received by the agency.¹ After bid opening, the agency contacted the other bidders on the

¹The IFB had been sent to 29 prospective bidders.

bidder's mailing list to determine why they had not submitted bids. Some firms had been unable or unwilling to bid, others cited repeated delays in the procurement process. The agency also conducted a price analysis to determine the price reasonableness of EDL's bid. The agency reviewed its independent government estimate (IGE) of \$832,200 and, after finding its estimate reasonable and fair, noted that EDL's price of \$974,334 was \$142,134 or 17 percent higher than the government estimate.

Based on the significant difference between EDL's bid and the government's estimate, the contracting officer concluded that she could not find EDL's price reasonable. Additionally, the agency determined that the scope of the work had changed since the IFB was issued. In particular, the agency no longer requires the repair of gate no. 5, but instead requires a wider entrance road on the south side of the grit bin storage area, and construction of the Primary Effluent Return Connection (PERC) Project. The PERC project is a system to pump treated effluent back to Mexico in the event of a failure of the South Bay Ocean Outfall. The Commission determined that the changed requirements are material and will have a significant cost impact. By revising the specifications, the agency also anticipates cost savings in certain contract administration services.

On October 21, pursuant to FAR § 14.404-1(c)(6), the Commission canceled the IFB on the basis that only one bid was received and the contracting officer could not determine the reasonableness of the bid price and, pursuant to FAR § 14.404-1(c)(2), because the specifications required revision. The agency determined to cancel and resolicit the requirement, so notified the protester on November 5, and this protest to our Office followed.

In its protest, EDL challenges, in essence, the validity of the Commission's position that the needs have changed in a manner which requires revising the IFB specifications, and the propriety of the agency's conclusion that the protester's bid price cannot be determined reasonable. Specifically, EDL asserts that the PERC project "was not needed to complete this project as defined in the [Commerce Business Daily] or [a] project requirement at time of BID." Comments at 3. EDL also questions the Commission's failure to examine EDL's worksheets and argues that its bid was only 14.6 percent higher than the IGE. EDL argues that the agency improperly failed to promptly notify the protester of the cancellation and argues that the agency led the protester to believe that, because only one bid had been received, the agency would convert the IFB to a negotiated procurement and conduct discussions with EDL. The protester complains that the agency "waited 15 days after canceling the invitation and continued to take phone calls and messages in regards to negotiating this project." Comments at 2.

An IFB may be canceled after bid opening where there is a compelling reason to do so. FAR § 14.404-1(a)(1). Such a reason exists when only one bid is received and the agency cannot determine the reasonableness of the bid price. FAR § 14.404-1(c)(6); Hoboken Shipyards, Inc., B-223581, B-223965, Sept. 19, 1986, 86-2 CPD ¶ 324 at 2. Here, the agency's determination was based on a comparison of the EDL bid with the IGE, which has not been shown to be incorrect. The record shows, and our calculations confirm, that EDL's price was substantially (more than 17 percent) higher than the government estimate. While EDL complains that the Commission should have examined its worksheets, there is no requirement that the agency do so; a determination of price reasonableness may be based upon comparisons with government estimates, past procurement history, current market conditions, and any other relevant factors. FAR § 15.404-1(b)(2); Hoboken Shipyards, Inc., *supra*, at 3. In view of the significant difference in the IGE and EDL's price, we conclude that the agency's determination concerning EDL's bid price was reasonable. Since cancellation of an IFB is permitted where the only bid received cannot be determined to be reasonable, there is no basis to object to the agency's cancellation of the IFB.

Additionally, cancellation after bid opening is proper when an award under the solicitation would not serve the actual needs of the government. Environmental Safety Consultants, Inc., B-241714, Feb. 26, 1991, 91-1 CPD ¶ 213 at 2. Here, as noted above, the agency determined that its needs had changed since it issued the IFB. These changes require revisions to solicitation specifications which appear to be sufficiently material to warrant cancellation of the IFB. *Id.* While EDL complains that the "PERC project was not needed," the determination of an agency's needs and the best method of accommodating them is primarily within the agency's discretion, which we will not question unless the record clearly shows that it was without a reasonable basis. Cycad Corp., B-255870, Apr. 12, 1994, 94-1 CPD ¶ 253 at 2-3. The protester offers no support for its contention in this regard, and there is nothing in the record to suggest that the PERC project is not needed by the agency. Accordingly, the need to revise the solicitation specifications provided a valid and independent basis for the agency to cancel and resolicit.

Finally, the protester alleges that the agency misled EDL to believe the requirement would be negotiated and did not promptly notify EDL of the agency's determination to cancel the IFB. While the record shows that the protester repeatedly contacted the agency regarding the status of the procurement, the agency reports that its personnel never stated that the original IFB would be converted to a negotiated procurement. Thus, EDL's presumption to the contrary was misplaced. With respect to the allegedly delayed notification to EDL, FAR § 14.404-1(c), which provides the underlying authority for cancellation here, does not contain any particular time constraints for notifying bidders of a cancellation and, in any event,

failure on the part of an agency to provide timely notification would be a procedural matter which would not affect the validity of the agency's determination. See Continental Serv. Co., B-258807, Feb. 15, 1995, 95-1 CPD ¶ 88 at 4.²

The protest is denied.

Comptroller General
of the United States

²The protester received the agency report on December 9, 1998, and, because of document disputes was granted an extension of time in which to file its comments. In its comments on the protest, filed with our Office on December 21, the protester alleged, for the first time, that Malcolm Pirnie, Inc., which prepared the IGE and reviewed EDL's bid price, has a conflict of interest because it "will benefit financially from the cancellation of this IFB." Comments at 2. This allegation is not for consideration on the merits because it is untimely. Under our Bid Protest Regulations, this allegation, which in any event is not supported in the record, was required to have been filed within 10 days of when the protester knew or should have known the basis for protest. Bid Protest Regulations § 21.2(a)(2) (1998). EDL was provided with the information that should have put it on notice of this protest ground on December 9, upon receipt of the agency report, but did not raise the issue until its comments filed more than 10 days later.