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Comptroller General
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Decision

Matter of: National Projects, Inc.

File: B-283887

Date: January 19, 2000

George D. Ruttinger, Esq., Ariel R. David, Esq., and Joseph W.C. Warren, Esq., Crowell & Moring, for the protester.
Eric L. Wilson, Esq., Hensel Phelps Construction Co., and John E. Daniel, Esq., Morgan, Lewis & Bockius, for Hensel Phelps Construction, Co., an intervenor.
Lloyd R. Crosswhite, Esq., and Barbara Bear, Esq., U.S. Army Corps of Engineers, for the agency.
Paula A. Williams, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Determination to cancel invitation for bids after bid opening is unobjectionable where all bids exceeded the funding allocated for the project, irrespective of any dispute concerning the validity of the government estimate or the reasonableness of the price of the low responsive bid.
 2. Protest that agency conducted flawed discussions by not informing the protester that its prices were too high is denied where the agency was not required to do so and the record shows that the agency's conduct of discussions was consistent with the regulatory requirement for discussions.
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DECISION

National Projects, Inc. (NPI) protests the cancellation after bid opening of invitation for bids (IFB) No. DACA63-99-B-0030, issued by the U.S. Army Corps of Engineers, Fort Worth District, for construction of a railhead at Fort Hood in Texas. NPI, the low bidder under the IFB, maintains that the agency had no compelling reason to cancel and convert the IFB to a negotiated procurement. NPI also argues that the subsequent discussions were flawed.

We deny the protest.

As amended, the IFB contemplated the award of a fixed-priced construction contract for a base bid (line item Nos. 0001 through 0010) and nine options (line item Nos. 0011 through 0019, respectively). IFB amend. 0003. The IFB also stated that the agency reserved the right to exercise the options, “either singularly or in any combination for up to 180 calendar days after award of the Base Bid without an increase in the Offeror’s Bid Price.” IFB at 00010-7. The estimated construction cost for this project was between \$25,000,000 and \$50,000,000. Id. at 00100-7.

At bid opening on September 17, 1999, the agency received five bids. The bid prices and the independent government estimate (IGE) for the required work, including options, were as follows:

	Base Bid	Total Bid (base + options)
NPI	\$33,836,287	\$42,108,745
MW Builders	34,777,000	43,788,000
Hensel Phelps	36,818,000	44,318,000
Bidder 4	38,371,154	48,608,095
Bidder 5	42,707,435	51,471,887
IGE	29,085,016	36,132,802

Supplemental Agency Report, exh. 1, Tab 2.

The contracting officer reviewed the bids, which included analyzing the line item prices of each bid, and the IGE. This review revealed an extremely wide disparity among various line item prices and the IGE for those line items; each bid far exceeded the funds available for this project, which was \$32,300,000. Supplemental Agency Report, exh. 1, Tab 7. NPI, the apparent low bidder, submitted a total bid of \$42,108,745, which was significantly above the IGE and the available funding level. The contracting officer asked the Cost Engineering and Specifications Section to review the IGE for reasonableness and accuracy. The Chief of the Section subsequently confirmed the accuracy of the IGE. Supplemental Agency Report, exh. 1, Tab 4.

Since all bids significantly exceeded the IGE and the amount of funds available, the contracting officer decided to reject all bids as unreasonably priced in accordance with Federal Acquisition Regulation (FAR) § 14.404-1(c)(6), and to cancel the IFB. In addition, she decided to complete the acquisition by negotiation consistent with FAR § 14.404-1(f). Supplemental Agency Report, exh. 1, Tab 7. The project requirements were revised, and the revised requirements were issued in request for proposals (RFP) No. DACA63-99-R-0038 on September 21. The amended price schedule in the RFP listed items of work identical to the work specified in the IFB, except that line item Nos. 0003 and 0006 were deleted from the base bid

requirements and listed in the RFP as options 10 and 11 (line item Nos. 0018 and 0019, respectively). Additionally, line item No. 0010 under the IFB was renumbered in the RFP as line item No. 0008 and broken into six sub-line items. RFP at 00010-3 - 00010-6. As amended, the RFP also listed price as the only evaluation criterion. RFP amend. 0001, at 00100-4. On September 22, bidders were notified of the rejection of all bids, provided an explanation for the determination, notified of the cancellation and conversion, and furnished a copy of the RFP.¹ Supplemental Agency Report, exh. 1, Tab 8.

Price proposals were received from three of the five original bidders by the September 27 due date. MW Builders submitted the lowest priced offer of [DELETED] for the basic work and [DELETED] for the base plus eleven option requirements, which remained significantly above the IGE and available funding. Supplemental Agency Report, exh. 3. The contracting officer decided to conduct discussions since all three offers exceeded the IGE and the available funding. On September 27, discussion questions were sent to each offeror, which focused on their proposed costs for the basic work requirements (line item Nos. 0002, 0006, 0008E, 0008F), and for option 11 (line item No. 0019). Each offeror was asked to recommend any revisions to the plans and specifications to reduce costs without reducing the scope of work for each of the line items discussed. *Id.* exh. 5. After telephonic discussions were concluded on September 28, the agency again revised the scope of work by deleting options 1 through 9 (line item Nos. 0009-0017) and by converting options 10 and 11 to options 1 and 2. Supplemental Agency Report, exh. 6, RFP amend. 0002. That same day, the amendment, along with a request for final proposal revisions (FPR), was sent to each offeror with a closing date of September 29. *Id.*

The FPRs, and the revised IGE for the reduced scope of work, were as follows:

	Basic Work	Total Offer (base + options 1 & 2)
Hensel Phelps	\$32,572,000	\$33,397,000
MW Builders	[DELETED]	[DELETED]
NPI	32,993,790	34,073,502
IGE	28,151,706	28,995,226

¹ On September 24, NPI filed an agency-level protest objecting to the cancellation of the IFB and challenging the contracting officer's determination that the bid prices were unreasonable on the grounds that the IGE was inaccurate. Supplemental Agency Report, exh. 1, Tab 10. The Corps denied the agency-level protest by letter dated September 29. Supplemental Agency Report, exh. 7.

Supplemental Agency Report, exh. 9.

MW Builders submitted the lowest priced FPR of [DELETED], which again exceeded the IGE and the funds available. Id. On September 29, the contracting officer requested additional funds from the Corps Headquarters to cover award to MW Builders for the base and options work requirements; the request was denied because a reprogramming action would have been required. Supplemental Agency Report, exhs. 10 and 13. However, authority to award the project not to exceed a total project funding level of \$35,500,000 was granted. Id. at exhs. 11 and 12. The contracting officer determined to award only the base requirement to Hensel Phelps, the low offeror for the base requirement. The options would then be combined into a future follow-on project and the funds remaining after award for the base requirement would be used to cover contingencies, including modifications due to unforeseen site conditions. The contract was awarded to Hensel Phelps on September 30. Supplemental Agency Report, exh. 13. This protest followed a post-award debriefing.

NPI's protest centers around the Corps's rationale for canceling the IFB and converting it to a negotiated procurement. Specifically, the protester maintains that the agency lacked a compelling reason to cancel the IFB since the agency's determination that its bid was unreasonably priced was based on a flawed IGE. In addition, the protester alleges that the agency awarded a contract to Hensel Phelps even though the circumstances that purportedly supported the decision to cancel the IFB also were present during the negotiated procurement. Protester's Comments at 12.

Once 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 IFB. FAR § 14.404-1(a)(1). NPI challenges the agency's determination that the bid prices were unreasonably high based on the IGE because it believes the IGE does not accurately reflect the costs involved for this construction project. Protester's Comments at 7-9.

As an initial matter, although the agency's cancellation notice states that the IFB was canceled because the bid prices received were unreasonably high in comparison to the IGE, the contemporaneous record shows the Corps also canceled the solicitation because the bid prices exceeded the funds available for the project. The protester does not dispute that all five bids exceeded the \$32,300,000 allocated for this project. Protester's Comments at 11 n.6. In addition, the protester "acknowledges an agency's authority to cancel a solicitation because of insufficient funds." Id. A contracting agency has the right to cancel a solicitation when sufficient funds are not available, regardless of any disputes concerning the validity of the IGE or the reasonableness of the low responsive bid price. J. Morris & Assocs., Inc., B-256840, July 27, 1994, 94-2 CPD ¶ 47 at 2 n.1; Armed Forces Sports Officials, Inc., B-251409, Mar. 23, 1993, 93-1 CPD ¶ 261 at 2-3, recon. denied, B-251409.2, May 24, 1993, 93-1

CPD ¶ 402. We therefore conclude that the agency had a compelling reason to reject all bids and to cancel the solicitation.

Nonetheless, NPI questions the Corps's decision to obtain additional funds to make award to Hensel Phelps when "just a few days before," the agency found NPI's bid was unreasonably high and that the available project funds were insufficient, but declined to request additional funding. Protester's Response to the Corps's Reply, Dec. 13, 1999, at 6. In other words, NPI insists that the contracting officer should have sought an increase in project funds in order to make award to NPI under the IFB. Protester's Comments at 11 n.6.

The management of an agency's funds generally depends on that agency's judgment concerning which projects and activities shall receive increased or reduced funding. Armed Forces Sports Officials, Inc., supra. The fact that the contracting officer subsequently elected to seek an increase in funds after discussions were concluded does not render the initial agency decision to cancel unreasonable. Here, the record shows that the agency converted to a negotiated procurement to obtain reduced prices. The agency conducted discussions with the firms for the line items where the agency believed the offerors' prices were too high. The agency also asked the firms to recommend ways to reduce the project costs without reducing the scope for each of the line items discussed. After these discussions, the agency deleted a number of line items. It was only after discussions, and submission of final revised prices that again exceeded the available funds, that the contracting officer decided to seek additional funds. We see nothing unreasonable in the agency's decision to attempt through negotiations to obtain prices in line with its funding, or when that failed, to seek additional funds.

NPI also objects to the conduct of discussions during the subsequent negotiated procurement. In this regard, the protester contends that the agency conducted flawed discussions by not advising the firm whether its prices were too high, and that it was not treated fairly. Protester's Response to the Corps's Reply, Dec. 13, 1999, at 6-8.

As noted above, this solicitation was issued after the January 1, 1998 effective date of the revised discussion rules of Part 15 of the FAR. Those revised rules, at § 15.306(e)(3), provide that "the contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion."

This language clearly gives the contracting officer the discretion to inform the offeror that its price is too high, but does not require that the contracting officer do so. The agency's written discussion questions did advise the protester of the agency's concern about the prices for specific line items. For instance, the protester was asked to support its costs for line item No. 0002, for which it submitted a price of [DELETED], since the IGE for this work was approximately [DELETED]; as to

line item No. 0008F, the protester was asked to verify its price of [DELETED] as the IGE was approximately [DELETED]. We think these discussion questions reasonably should have put NPI on notice that the agency considered its prices for the stated line items high. Further, since the agency had canceled the IFB because prices were too high, and the agency conducted discussions with the offerors concerning their prices, we think the protester reasonably should have known from these agency actions that its prices still were considered high.

Moreover, we have reviewed the discussion questions given to the other offerors, and we find that these offerors were in the same position as NPI. That is, for each line item identified in the discussion questions given to Hensel Phelps and MW Builders, the agency provided basically the same information regarding the IGE for the corresponding line item. On this record, we conclude that the protester's arguments concerning unequal discussions is without merit.

The protest is denied.

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of the United States