

Protest of) Date: February 4, 1988
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 AMERICAN CONTRACTORS, INC.)
)
 Under Solicitation No.)
 209986-87-A-0096) P.S. Protest No. 87-123

DECISION

American Contractors, Inc. (American) protests the rejection of all bids and cancellation of Invitation for Bid (IFB) No. 209986-87-A-0096 issued by the Facilities Service Office, Louisville, KY, for the demolition of a building and subsequent construction of a new post office in Cortland, OH. American alleges that it was orally awarded the contract and that the bids were improperly rejected by the contracting officer.

The IFB was issued on August 5, 1987, with a bid opening date of September 3. The Postal Service estimate for the project was \$1,180,000. Three bids were received, and Maybrook Construction Co. (Maybrook) was low at \$1,374,640. American was the second low bidder at \$1,394,000. Maybrook had not acknowledged receipt of Amendment No. 3, and the contracting officer concluded Maybrook's bid was nonresponsive because the amendment had an effect on the price of the project. American thus became the apparent low bidder.

On October 27, the contracting officer rejected all bids and canceled the IFB because all the bids exceeded the Postal Service estimate and the construction cost limit^{1/} for the project. He did so under the authority of Postal Contracting Manual (PCM) 2-404.1 (viii) which allows cancellation after bid opening if it is "clearly in the best interests of the Postal Service."

American protested cancellation of the IFB. It alleges it was told on September 29

^{1/}The construction cost limit is part of the design contract for the facility. An architect/engineer (A/E) contracts to design a facility which will fulfill the requirements of the Postal Service, and the design contract includes a construction cost limit. The A/E commits to design the project so it can be built for a price less than or equal to the cost limit. If the price of the project, as determined by the bids, will exceed the limit, the Postal Service has the right under its contract with the A/E to require the A/E to redesign the project at its own expense so that the project cost will not exceed the construction cost limit. See Special Provisions For Architect-Engineer Contract, Article 1.3.

and on October 2 by postal representatives that it was awarded the contract and that the paperwork would be completed by mid-October. American states that it had relied on the oral award of the contract and did not procure other projects. It states that the Postal Service's actions from bid opening to cancellation were inconsistent with the rationale for cancellation of the IFB, and the solicitation was cancelled solely to avoid protests from Maybrook.

In his report to this office, the contracting officer stated that no oral award or commitment was made by the Postal Service. The IFB was canceled solely due to all bids exceeding the Postal Service estimate and the construction cost limit in the contract for design of the project. The Architect/Engineer is redesigning the project, and new specifications will be issued in order to obtain bids that are within the construction cost limit.

By letter of November 17, Maybrook advised this office that it intended to submit comments on the cancellation of the IFB. On January 8, 1988, after inquiry from this office, Maybrook "protested" that its low bid had been improperly rejected for not acknowledging Amendment No. 3. Maybrook states that it never received written notice of any bid deficiency. It concedes, however, that if the IFB cancellation was based on the bids exceeding the cost limit, the Postal Service would be within its authority to reject all bids. If it is determined that cancellation was improper, then it asks that it be determined to be the low bidder.^{1/}

^{2/}We need not reach the issue of whether Maybrook timely protested or the merits of its protest in view of our disposition of American's protest of the cancellation of the solicitation.

American's allegation that it was orally awarded the contract is disputed by the contracting officer. This allegation presents a factual dispute which gives rise to a breach of contract claim by the protester. Such a dispute is one that can be rectified under the Contract Disputes Act of 1978. Complaints resolvable under the Contract Disputes Act and the contractual provisions implementing the Act are not amenable to resolution under the bid protest procedures, and, therefore, we are without jurisdiction over this issue.^{1/} Ric Marinkovich, P.S. Protest No. 87-63, August 6, 1987.

The contracting officer has discretion in determining when a bid price is excessive. Commercial Fleet Services, Inc., P.S. Protest No. 86-63, October 3, 1986. A decision to reject bids which are considered excessive will not be overturned unless the decision is arbitrary, capricious, or not supported by substantial evidence. Grant Rental, Inc., P.S. Protest No. 79-29, June 13, 1979. Here the bids received were all considerably higher than the government estimate and the construction cost limit. American's bid is 18.0% higher than the government estimate and Maybrook's, 16.5%. In Building Maintenance Specialists, Inc., Comp. Gen. Dec. B-186441, September 10, 1976, 76-2 CPD & 234, the Comptroller General upheld cancellation of the solicitation where the low bid was 7.2% higher than the government estimate.

The protest is dismissed in part and denied in part.

William J. Jones
Associate General Counsel
Office of Contacts and Property Law

[checked against original JLS 3/22/93]

^{3/}The protester may file a claim with the contracting officer and request a final decision. The contracting officer is obligated to respond and state the facts and his reasons for his decision on a claim. Appeal from a final decision is to the Postal Service Board of Contract Appeals or the United States Claims Court.