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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Davis Constructors, Inc.

File: B-232954; B-232955

Date: January 12, 1989

DIGEST

1. Protest allegations that agency improperly canceled invitation for bids and converted the procurement to a negotiated one are untimely filed where they are based on information the protester received more than 10 working days before protest was filed.
2. Allegations that request for proposals (RFP) contained defects and ambiguities and that insufficient time was provided to prepare and submit proposals concern alleged defects on the face of the RFP, and thus are untimely where not raised prior to closing time for receipt of initial proposals.
3. Protest that discussions improperly were not held in negotiated procurement, hence precluding protester from submitting its best and final offer, is denied where agency found that acceptance of low offer would result in lowest overall cost to the government, and the solicitation provided that award might be made without discussions and warned offerors that their initial offer should be their best offer.

DECISION

Davis Constructors, Inc. protests the cancellation of invitation for bids (IFB) No. DACA63-88-B-0080, the conversion of the requirement to a negotiated procurement, and the award of a contract to Tom Page & Company, Inc., under request for proposals (RFP) No. DACA63-88-R-0243, issued by the Army Corps of Engineers for the construction of a survival equipment shop at Laughlin Air Force Base in Del Rio, Texas. We dismiss the protest in part and deny it in part.

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The project was initially solicited under the IFB, issued on June 28, 1988. The government's estimate to complete the project was \$667,076. Eight bids were received, ranging from \$900,000 (that of Davis, the apparent low bidder), to \$1,811,800. As the low bid exceeded the government estimate by approximately 35 percent, the contracting officer questioned the design branch as to whether the estimate was fair and reasonable. After the estimate was reaffirmed, the contracting officer canceled the solicitation on the ground that all bids were unreasonable, and converted the procurement into a negotiated one pursuant to Federal Acquisition Regulation (FAR) §§ 14.404-1(c)(6) and (e)(1), and § 15.103. By letter dated September 1, the contracting officer notified bidders of the cancellation due to unreasonable prices and conversion to a negotiated procurement, and attached a copy of the RFP. The cover letter stated that award "may be made without discussion to the responsible offeror whose offer will result in the lowest overall cost to the government." The RFP itself provided that the government "may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint." The closing date for receipt of proposals was September 14.

The RFP called for the same work as the IFB, but in a few areas the technical specifications and drawings in the IFB were found to overstate the government's minimum needs, and therefore appropriate corrections were made in the RFP. Although the IFB contained only one aggregate job line item, the price schedule in the RFP was restructured into a base bid item and three option items. A new government estimate was prepared in the total amount (base bid plus options) of \$741,338.

Two offerors, Davis and Page, the awardee, submitted proposals in response to the RFP. Page's total price was \$883,295, as compared to its original IFB price of \$1,811,800, and Davis' total price was \$906,950, as compared to its original IFB price of \$900,000. The contracting officer again requested review of the government estimate, and on September 20 it was increased to \$889,215 (base bid plus options). On September 29, award was made to Page as the low responsible offeror. Allocated funds permitted award only of the base bid item in the amount of \$845,145. On September 30, Davis filed a protest with our Office. Performance of the contract has been stayed pending resolution of the protest.

Davis objects to the cancellation of the original solicitation, claiming that the bids were not unreasonably

high and that they only appeared so because the government's estimate was unreasonably low. Davis further objects to alleged discrepancies between the cover letter to the RFP and the RFP itself in regard to the evaluation of offers, and alleges defects in the RFP requirements for the option items. The protester also alleges it was afforded insufficient time to prepare its proposal under the RFP. Finally, Davis objects to the lack of discussions in the negotiated procurement and claims that it was thereby prevented from submitting its best and final offer.

Davis' allegations are, for the most part, untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1988), require that protests based on alleged improprieties apparent on the face of a solicitation be filed before the closing date for receipt of offers in order to be timely; other protests must be filed no later than 10 working days after the basis of protest was or should have been known. 4 C.F.R. § 21.2(a)(2). Davis was advised of the cancellation of the IFB and the reason therefor and the conversion of the procurement to negotiation in the Corps' September 1 letter, and thus should have raised its objections in this regard no more than 10 working days of its receipt of that letter. Because the firm did not protest until September 30, its protest of the cancellation and conversion is untimely. Similarly, Davis' protest alleging defects and ambiguities in the RFP and insufficient time for preparation of its proposal concern alleged deficiencies apparent on the face of the RFP which should have been raised prior to closing on September 14. See Koch Construction, Inc., B-232585, Sept. 26, 1988, 88-2 CPD ¶ 287, aff'd, B-232585.2, Nov. 7, 1988, 88-2 CPD ¶ 452. Again, however, Davis elected to participate in the negotiated procurement, and filed this protest only upon learning that it was not the successful offeror. Hence, these allegations also are untimely and will not be considered.

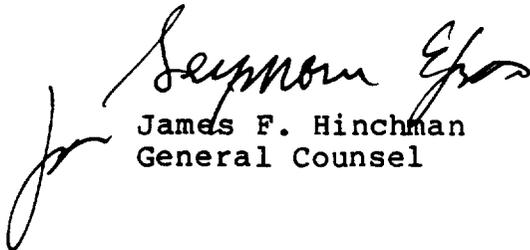
We note that much of Davis' concern here seems to stem from the fact that, on resolicitation, the price received was similar to Davis' original bid; Davis points to this fact as evidence that the unreasonableness determination and cancellation were not warranted in the first place. The record clearly shows, however, that the original estimate was prepared based on a detailed, lengthy (more than 200 pages of data) analysis of the cost factors involved in the requirement, and the contracting officer actually confirmed the accuracy of the estimate before cancelling the IFB.

Although the estimate was increased twice, once after cancellation of the IFB and again after receipt of proposals

under the RFP, the increases did not result from any determination that the estimate had been erroneous; rather, the upward adjustments reflected the agency's view that the estimate, even if technically correct, simply was not realistic enough in terms of the prices actually offered. Thus, for example, the anticipated profit in the estimate was increased from 6.1 to 8.6 percent not because the original figure was deemed to be insufficient but because, in light of the prices that had been received, it did not realistically indicate the profit currently commanded by firms performing this kind of work. We thus find nothing improper in the contracting officer relying on the estimate as the basis for the cancellation. See King Machine Inc., B-218960, B-219377, Aug. 20, 1985, 85-2 CPD ¶ 199.

Davis' allegation regarding the lack of discussions in the negotiated procurement does appear to be timely. However, it is without merit. An agency may make award based on initial proposals where the solicitation advises offerors of that possibility and the competition or prior cost experience clearly demonstrates that acceptance of an initial proposal will result in the lowest overall cost to the government. FAR § 15.610(a)(3); Maico Hearing Instruments, Inc., B-229925, Jan. 15, 1988, 88-1 CPD ¶ 42. Here, both the solicitation and its cover letter clearly stated that award might be made without discussions, and the solicitation further cautioned that offerors' proposed prices should represent their best offer. The agency found that the awardee's base price was the most advantageous price to the government in light of the offers received in response to the RFP and the IFB, and in comparison with the revised government estimate. Davis has presented no evidence to the contrary. Under these circumstances, award without discussions was proper. Id.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel