

CANCELLATION OF BIDS AND THE INDEPENDENT GOVERNMENT ESTIMATE

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Readers of this blog are aware that in a procurement using sealed bidding, award must be made to the responsible bidder who submits the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the Invitation for Bids (“IFB”). Federal Acquisition Regulation (“FAR”) 14.404-1(a)(1). An IFB may be canceled after bid opening if the prices of all otherwise acceptable bids are unreasonable. FAR 14.404-1(c)(6). Finally, an agency may complete the acquisition through negotiation, after canceling the IFB, where all otherwise unacceptable bids are unreasonably priced. FAR 14.404-1(e)(1). The Government Accountability Office (“GAO”) reviews an agency determination of unreasonable prices, but considers that such a determination is a matter of administrative discretion that it will not disturb unless the determination is unsupported or there is a showing of fraud or bad faith by contracting officials. *Norfolk Dredging Co*, B-417213, March 26, 2019 is an excellent example of an IFB cancellation based on all prices being unreasonable.

In *Norfolk*, the Corps of engineers sought dredging services near Charleston, SC. Five bids were receiving, ranging from a low of \$138.9 million to a high of \$322.9 million. Although revised twice, the Independent Government Estimate (“IGE”) was \$84.4 million. Norfolk’s low bid was 24.8 percent above the IGE, but the contracting officer determined that all bids (including Norfolk’s) were unreasonably high in comparison to the IGE. Norfolk protested the agency’s decision to cancel the IFB and convert to negotiated procurement, arguing that the IGE was unreasonable.

The GAO reviewed the record and found that the revised IGE was reasonable because there were no demonstrable flaws, and the mere disagreement with the outcome was insufficient to sustain the protest.

Upon finding the IGE reasonable, the GAO had no basis to conclude that the agency’s determination that Norfolk’s bid was unreasonably high as compared to the IGE, and was therefore unreasonable. The GAO noted that in its cases, it has found that an agency may reject a bid as unreasonably priced when the bid exceeds the IGE by as little as 7.2 percent. Given the 24.8 percent disparity between the IGE and Norfolk’s price, GAO concluded that the agency’s determination that Norfolk’s price was unreasonably priced, the protest was denied, and the agency was permitted to cancel the IFB and convert the acquisition to a negotiated procurement.

The GAO rejected one other argument in a footnote. Norfolk argued that because its bid was within 25 percent of the IGE, its price must be deemed reasonable. GAO disagreed, noting that although 33 U.S.C. § 624 (Limitation on Improvement Work by Private Contract) prohibits the agency from awarding a dredging contract to a bidder whose price exceeds an IGE by more than 25 percent, it does not *require* the agency to award a dredging contract to a bidder whose price is within 25 percent of that estimate, if the agency does not believe the bid price is fair and reasonable, which was precisely the case here.

Takeaway. The IGE will be supported as a reasonable price, unless there are demonstrable flaws in it. If the agency does not believe the bid price is fair and reasonable (and GAO has found that an increase over the IGE of 7.2 percent may be deemed unreasonable), it may cancel the IFB, and reopen the procurement as a negotiated buy.

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