



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: News Printing, Inc.

File: B-274773.2

Date: February 11, 1997

William H. Spriggs, Esq., Spriggs & Hollingsworth, and Edward W. Gray, Esq., and Christopher E. George, Esq., Gray Manuel & Lafalce, for the protester.
Richard D. Lieberman, Esq., Sullivan & Worcester, for Graphic Data LLC, an intervenor.

Kerry L. Miller, Esq., Government Printing Office, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency properly canceled invitation for bids after bid opening where agency reasonably determined that solicitation's quantity estimate no longer represented the using agency's actual needs.

DECISION

News Printing, Inc. (NPI) protests the cancellation of invitation for bids (IFB) No. D306-S, issued by the Government Printing Office (GPO) for patent printing, production and distribution services required by the United States Patent and Trademark Office (PTO). NPI contends that GPO's reason for canceling the solicitation after bid opening--a deficient quantity estimate--does not constitute a compelling basis for cancellation.

We deny the protest.

The PTO's patents are issued and distributed to each customer by means of an annual "soft" package or paper set. On July 26, 1996, GPO--which is responsible for procuring all the PTO's patent printing and associated production/distribution needs--issued the IFB, which contemplated the award of a 1-year requirements contract to the lowest-priced, responsive, responsible bidder for printing, producing and distributing an estimated quantity of 40 soft patent sets.

By the August 26 bid opening date, eight bids were received. NPI was the apparent low bidder; GraphicData LLC--the incumbent--submitted the next low bid. On October 4, the PTO advised GPO of a 25- to 30-percent reduction (at least 21,091,200 pages) in its patent printing requirements. On October 21, because of the

substantial decrease in the PTO's printing/distribution needs, the contracting officer canceled the procurement.¹ On November 4, NPI filed this protest against the cancellation.

Although GPO, as a legislative branch agency, is not subject to the Federal Acquisition Regulation (FAR), including the requirement that a compelling reason exist to cancel an IFB after bid opening, FAR § 14.404-1, the applicable provision of GPO's Printing Procurement Regulation likewise requires a compelling reason to cancel an IFB after bid opening. Printing Procurement Regulation, Chapter XI, Section 2; City Wide Press, Inc., B-231469, Aug. 10, 1988, 88-2 CPD ¶ 127 at note 1. Determining whether a compelling reason exists involves the exercise of the contracting agency's judgment; we review such a determination only to ensure that it is reasonable. HLC Indus., B-265700, Nov. 17, 1995, 95-2 CPD ¶ 227.

NPI contends that because the IFB contemplated award of a requirements-type contract, GPO was not obligated to order any particular quantity--and consequently, the 25- to 30-percent reduction in the PTO's patent printing/distribution needs did not provide a compelling reason to cancel the IFB.

The agency reports that in May of 1996, PTO determined that its 1997 patent printing requirements would be substantially lower than initially reported to GPO because numerous foreign customers had canceled their soft package subscriptions and opted instead for PTO's CD-ROM patent sets. However, PTO's change in customer needs was not communicated to GPO until after bid opening.

GPO states that the significant decrease in its estimated quantity provided a cogent and compelling reason to cancel because of the government's obligation to use due care in determining estimated quantity needs and because of the possibility of government liability for the knowing use of an inaccurate estimate. In this regard, GPO reports that a recent opinion by the GPO Board of Contract Appeals (BCA), GraphicData, Inc., GPO BCA No. 35-94 (June 14, 1996), found GPO liable for inaccurate estimates set forth in this procurement's predecessor solicitation.

We think GPO properly canceled the procurement. It is undisputed that the canceled IFB's quantity estimate was overstated by 25- to 30-percent, representing more than 21 million pages, clearly more than a de minimis amount. Although the nature and use of a requirements contract presupposes--to some extent--uncertainty about the quantity of actual purchases, accurate estimates are essential to enable bidders to prepare reasonable, intelligent bids, and, often, to ensure the lowest cost

¹In accordance with the GPO's Printing Procurement Regulation, Chapter XI, Section 2, Paragraph 1(b), the contracting officer obtained the GPO Contract Review Board's full concurrence in the cancellation decision.

to the government. Respiratory & Convalescent Specialties Inc., B-255176, Feb. 14, 1994, 94-1 CPD ¶ 101. Because the risks associated with variance between actual and estimated purchase quantities are borne by the contractor, the government is obligated to use its best information in preparing quantity estimates so bidders can appropriately assess and apportion risk and other contract performance costs into their unit prices. In this regard, the Court of Federal Claims has found a contractor under a requirements contract entitled to recover damages arising from reliance on overestimated and therefore defective solicitation estimates, where, as here, the estimates were not verified before the solicitation containing them was issued. Crown Laundry and Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 523 (Cl. Ct. 1993). Additionally, as pointed out by the agency, in GraphicData, Inc., *supra*, the GPO BCA held that even where the government exercised due care in preparing the estimates, a contractor is entitled to recover damages arising from defective estimates if the contractor establishes that a substantial variance between the government's actual needs and the stated solicitation estimates caused it to incur unbargained for costs as a result of its reliance on the inaccurate estimates in preparing its bid price. Given the government's obligation to use accurate estimates, we think the overstated estimate in this case provided a cogent and compelling basis for cancellation.

NPI nonetheless contends that instead of canceling and resoliciting, GPO could cure the solicitation's inclusion of a defective estimate by treating the reduction as a permissible contract variation. In this regard, in addition to requiring bidders to propose a unit price for the estimated quantity of 40 soft patent sets, the canceled IFB also required a separate unit price for each additional 5 patent sets or fraction thereof. NPI argues that GPO could regard the reduction in its estimated quantity as a "variation in quantity" pursuant to Printing Procurement Regulation, Chapter I, Paragraph 9(a)(2), which provides as follows:

"When it is determined that quantity variation will be permitted, provision shall be made in the [IFB] to that effect and the extent of the allowable variation shall be specified. Where the specifications allow a quantity variation, the contractor's offered additional rate or running rate, as applicable, shall be used to increase or decrease the invoice amount in accordance with any allowable variation."

In essence, NPI argues that by referring to the bidders' prices for the additional sets of five copies, GPO could calculate the prices it would have received had the accurate estimate (27 sets) been included in the IFB. We find this argument unpersuasive.

First, the cited "variation in quantity" clause only applies where the solicitation expressly permits a variation in quantity under the contract. Printing Procurement Regulation, Chapter I, Paragraph 9(a) (clause applies "[i]f variation in quantity is

permitted"). The IFB here does not do so--and in fact could not reasonably be expected to include the clause given that, as GPO reports, the variation in quantity provision is only used in contracts calling for fixed quantities which also allow for variations in the precise ordered quantity--not to requirements contracts which, by nature, do not specify any precise ordered quantity. Moreover, by its terms the IFB specified that the bid prices for additional copies applied to those copies in excess of 40; it is not reasonable to conclude, as NPI urges, that those prices were intended by the IFB--or understood by the bidders--to be used to adjust the bidders' prices for the basic estimated quantity of 40 sets.

In any event, NPI's theory of price adjustment ignores the fundamental flaw in the canceled IFB--the use of a materially defective estimate, and the potential agency liability which could inure from the estimate's use. Without correction of the estimate--the only basis upon which bidders can intelligently prepare their bids--the government would have conducted a competition rooted in other than its actual requirements, contrary to the fundamental obligation to obtain full and open competition. See Site Support Servs., Inc., B-270229, Feb. 13, 1996, 96-1 CPD ¶ 74; Heritage Reporting Corp., B-248860.2, Oct. 23, 1992, 92-2 CPD ¶ 276. In this regard, the inclusion of a general variance in quantity provision does not toll or excuse the government's liability for failing in its obligation to use accurate and reliable estimates. Womack v. United States, 389 F.2d 793, 801 (Ct. Cl. 1968).

The protest is denied.

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