



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

3/252

B-178106

August 14, 1973

Cole and Groner
1730 K Street, NW.
Washington, D. C. 20006

Attention: Herbert Adelman, Esquire

Gentlemen:

By letter dated March 1, 1973, and subsequent correspondence, you protest on behalf of your client, the J. V. Bailey Company, Incorporated (Bailey) of Rapid City, South Dakota, the rejection of all bids under invitation for bids (IFB) No. DACW45-73-B-0048, dated November 29, 1972, issued by the United States Army Corps of Engineers (Corps), Omaha District, Omaha, Nebraska. It is your contention that the Army's rejection of all bids after bid opening is not supported by cogent and compelling reasons.

The solicitation is for the construction of an anchored concrete retaining wall to provide erosion protection at Chalk Island, which is below the Gavins Point Dam, Lewis and Clark Lake, Yankton, South Dakota. Bids were opened on January 4, 1973, and four bids were received as follows:

<u>Bidder</u>	<u>Bid</u>
J. V. Bailey Co., Inc.	\$242,900.00
Industrial Builders, Inc.	\$254,025.00
Brower Construction Co.	\$384,195.00
Eagle Construction Corp.	\$422,550.00
Government Estimate	\$240,024.80

However, on January 24, 1973, the Deputy District Engineer determined that Bailey was a nonresponsible contractor, and the Small Business Administration (SBA), Denver, Colorado, was so notified. Prior to a final determination by the SBA of Bailey's responsibility, all bids were rejected by letter dated February 5, 1973. You protested the rejection of all bids to the contracting officer, who denied the protest by letter of February 20, 1973. Thereafter, you protested to our Office.

PUBLISHED DECISION
53 Comp. Gen. _____

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The contracting officer explained his reasons for cancelling the solicitation in his letter of February 20, as follows:

While it is true that the provisions of the contract would have allowed a contractor a total of 300 days to complete the work, there are certain phases of the work which would have had to be accomplished while the water was at its lowest level. If the contract would have been awarded, the first order of work would have been to excavate the slope of the island to proper grade, and establish a shelf or work area in order to start the trench for the lower section of the concrete wall. The lowest excavation for the trench would have been at Elevation 1150.00 MSL which is approximately 10 feet below the power plant tailwater (1159.80) with the present water discharge of 20,000 CFS. The Gavins Point Power Plant is scheduled to start increasing water releases in mid March, and it is expected that full plant capacity of 34,000 to 35,000 CFS will be reached in 5 days. Tailwater elevation for this discharge in 1972 was about 1163.2 MSL. If spillway releases are required, this will raise the tailwater even higher, making the work in the trench excavation that much more complicated.

Due to the lateness in the non-navigation season, it is felt that a contractor would not have the time to do the excavation of the slope, establish the work shelf and excavate the trench prior to the scheduled increased releases. If award was made immediately, it would be nearly the 1st of March before work could be started near the tailwater surface, leaving the contractor only 15 days before he was faced with the higher releases. With this particularly in mind, the decision was made that the proposed work be withdrawn for the present and readvertised so that a later award of contract can be made allowing the Contractor to work during the entire non-navigation season. It is our position that if the work could be started in December of 1973, a contractor would have a full 3½ months to complete the lower section, and be clear of the tailwater by the start of the increased flows in mid March 1974.

You contend that there is no cogent and compelling reason to justify the rejection of bids since the projected tailwater conditions were contemplated by and contained in the solicitation, and since there have been no changes in the specifications. You state that the tailwater conditions would not prevent Bailey from completing the project on time irrespective of when the award is made.

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Alternatively, it is your position that since the solicitation contains no date by which notice to proceed with the contract work must be given, the Corps could award the contract to Bailey and delay giving notice to proceed until December 1973, in which case Bailey would make no claim for additional compensation. In addition, you set forth several reasons for your belief that the contemplated readvertisement would result in increased costs to the Government. Finally, it is your belief that there is in this case an obvious inference that the Corps followed the "easier" course of bid rejection rather than contest the question of Bailey's responsibility at the SBA.

This Office has held that where no cogent or compelling reason exists for the rejection of bids, such rejection is improper. B-146213, July 26, 1961; see also 39 Comp. Gen. 396 (1959); 36 Comp. Gen. 62 (1956). However, we have consistently recognized that the administrative authority to reject all bids and readvertise the solicitation is very broad.

The record indicates that the cost of performing the initial phase of the work (the excavation work) is much less during a period of low tailwaters than during a period of high tailwaters. Therefore, the ideal time to start the work is in December, thereby allowing the contractor to work during the entire non-navigation season, which apparently ends in mid-March.

However, the invitation was not issued until November 29, 1972, and bids were opened January 4, 1973. Nevertheless, the Corps planned to make a prompt award in order to permit the contractor to complete the initial phase before mid-March. As indicated above, the Corps' plan was frustrated and the invitation was cancelled.

We believe that it would have been better procedure for the Corps to have issued the solicitation early enough so that an award could have been made by December. A contracting agency should provide for performance meeting its requirements under the least onerous conditions, thus expanding competition, minimizing cost (and presumably price), and making satisfactory performance more likely. While we believe the deficiency in the procurement should have been recognized before bids were exposed, we do not think a procurement contrary to sound principles should be continued solely because of administrative deficiencies. It is clear that the work may be performed at a later time consistent with the Government's needs under less onerous conditions. Although you insist that a readvertisement of the procurement will result in increased costs, the administrative conclusion on this point is supported by the record.

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Finally, you have suggested that an award could have been made to Bailey under this solicitation and the Corps then could have waited until December 1973 to give the contractor notice to proceed with the work. As the contracting officer points out, both the amount of work and the type or quality of work might change substantially after another navigation season has passed. Under the circumstances we believe it would be improper for the Corps to award a contract for the work before its needs are firmly established. See 47 Comp. Gen. 103, 107 (1967).

Accordingly, we believe that cancellation of the solicitation was a proper exercise of administrative discretion. Your protest is therefore denied.

However, we have pointed out to the Secretary of the Army by letter of today, copy enclosed, our views in the matter.

Sincerely yours,

Paul G. Deabling,

For the Comptroller General
of the United States