

**DECISION**

24140  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

**FILE:** B-209148.2**DATE:** January 31, 1983**MATTER OF:** Spruill Realty/Construction Co.**DIGEST:**

1. Agency properly canceled solicitation after bid opening on the basis of excessive bids where the low responsive bid was more than 50 percent greater than the Government estimate and insufficient funds were available.
2. Protester has not met burden of proof to establish that it was discriminated against by agency where it fails to present evidence which establishes fraud, abuse of discretion, or arbitrary actions which indicate that it was treated unfairly or unequally.

Spruill Realty/Construction Co. (Spruill) protests the decision by the Army to cancel invitation for bids (IFB) No. DAKF40-82-B-0306 for a roof replacement project at Fort Bragg. The Army determined to cancel the IFB after bid opening because the bids were excessive and insufficient funds were available. Spruill contends that the cancellation decision was improper and that it was based on discriminatory bias against its firm. Spruill requests that we direct the Army to award it the contract and that we direct the appointment of referees to administer the contract award procedure at Fort Bragg.

We find the protest without merit.

The Government estimate for the work in question was \$106,691. The two apparently responsive bids received at bid opening on September 10, 1982, were Spruill's bid for \$161,000 and a bid from Bowie K. Enterprises for \$174,360. A third bid for \$119,513 from Clancy & Theys Construction Company (Clancy) was rejected as late. Clancy protested this rejection to our Office, but withdrew its protest after the IFB was canceled. This decision to cancel the IFB was effected on September 23, 1982, based on the contracting officer's determination of "excessive bids received."

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The authority vested in the contracting officer to decide whether or not to cancel an invitation and readvertise is extremely broad. Scott Graphics, Inc., et al., 54 Comp. Gen. 973 (1975), 75-1 CPD 302. Defense Acquisition Regulation (DAR) § 2-404.1(b) (Defense Acquisition Circular No. 76-17, September 1, 1978), authorizes cancellation for a compelling reason, where "all otherwise acceptable bids received are at unreasonable prices." DAR § 2-404.1(b)(vi), supra. Our Office has stated that a determination concerning price unreasonableness is a matter of administrative discretion which we will not question unless the determination is unreasonable or there is a showing of fraud or bad faith. Omega Container, Inc., B-206858.2, November 26, 1982, 82-2 CPD 475; Culligan Incorporated, Cincinnati, Ohio--Reconsideration, B-189307, November 7, 1977, 77-2 CPD 345. In this respect, we have recognized that a determination of price unreasonableness properly may be based upon comparisons with such factors as Government estimates, past procurement history, current market conditions, or any other relevant factors, including any which have been revealed by the bidding. Freund Precision, Inc., B-199364, B-200303, October 20, 1980, 80-2 CPD 300.

In this instance, the contracting officer appears to have made his determination initially on the basis of comparison of the bid with the Government estimate. Spruill's low bid was more than 50 percent above the estimate. We believe that this discrepancy provides a reasonable basis for the determination. We have found cancellation to be justified where the low responsive bid was as little as 7.2 percent greater than the Government estimate. Building Maintenance Specialists, Inc., B-186441, September 10, 1976, 76-2 CPD 233. While Spruill objects that the Government estimate was unreasonably low, it has provided no substantiation for this allegation beyond its general assertion that the work in question is difficult and dangerous. The unsupported statement of the protester that the Government's estimate is too low is insufficient to warrant the conclusion that the rejection of bids due to unreasonable prices is unreasonable. Penn Landscape & Cement Work, B-196352, February 12, 1980, 80-1 CPD 126.

We note that Spruill has complained that the Army's determination to cancel was somehow influenced by, or made by reference to, what Spruill characterizes as Clancy's

"illegal bid" and "illegal protest." The Army has made no reference to Clancy's bid or to its protest in either the material substantiating the cancellation determination or in its report to our Office. In any event, we have specifically held that the bid of an unacceptable bidder may be relevant to the determination of what is a reasonable price. Strand Aviation, Inc., B-194411, June 4, 1979, 79-1 CPD 389.

In addition, in its report, the Army has indicated that the project was funded from special funds which were available only in the amount of \$106,691. Accordingly, the Army argues that under our decision, Genco Tool and Engineering Co., B-204582, March 1, 1982, 82-1 CPD 175, the cancellation was proper. Spruill asserts that the IFB includes funding limitation information which indicates that funding in the amount of \$193,141 was available for the project, that is, substantially in excess of its bid price.

In Genco, supra, we held that an agency determination that funds are not available for contract obligation is a sufficient reason for cancellation of a solicitation and that it is not GAO's role to question the unavailability of funds. Moreover, even if funding had been available at one time, this would not have provided a sufficient basis to challenge the agency's unquestioned legal right to cancel a solicitation because of lack of funds, since the internal management of an agency's funds generally depends on the agency's judgment concerning which projects and activities should receive greater or lesser funding. Somers Construction Company, Inc.--Reconsideration, B-193929, July 24, 1979, 79-2 CPD 54. Moreover, statutory limitations prevent the award of contracts when funds are not available, even if the determination is not made until after bid opening as the result of a funding shortage which arises at that time. TIMCO, B-186177, September 14, 1976, 76-2 CPD 242.

In our view, either the determination of price unreasonableness or the determination of the unavailability of funds provided a proper and sufficient basis for cancellation in this instance. Spruill has objected to the inconsistency between the Army's initial determination and the reason offered in its report to our Office. However, our review is based on whether the agency action is supportable, not on whether it is properly documented or

supported at the time it is taken. Monarch Enterprises, Inc., B-201688, June 15, 1981, 81-1 CPD 483; Honeywell Information Systems, Inc.--Reconsideration, B-193177.2, January 19, 1981, 81-1 CPD 26. Moreover, the issues of price reasonableness and the sufficiency of funding are obviously related in nature. Valley Cement Construction, Inc., B-188429, May 25, 1977, 77-1 CPD 366.

Spruill has speculated that the cancellation determination was motivated by racial prejudice and discrimination on the part of the Army. In support of this, Spruill points to an alleged pattern of awards and cancellations under previous IFB's for construction projects for which it has competed at Fort Bragg. Spruill alleges that in several instances when it was the low bidder, IFB's were canceled on the basis that its low bid was significantly in excess of the Government estimate, while, in other instances where contractors other than Spruill were low bidders, awards were made despite the fact that the bids were similarly in excess of Government estimates. However, we note that in each of the three instances cited in which Spruill's bid was low and the solicitation was canceled, the bid was very substantially above the Government estimate--more than 100 percent--which suggests that under the above articulated standard, the contracting officer was acting properly within his discretion in determining that cancellation was warranted.

The one instance which Spruill cites in which award was made to another low bidder where the bid was allegedly almost 85 percent above the Government estimate would not necessarily have been objectionable in view of the substantial discretionary latitude afforded to the contracting officers in this area. See Culligan, supra. In particular, we have held that a contracting officer acted reasonably in canceling a solicitation on the basis of price unreasonableness where the low bid exceeded the Government estimate by 16 percent, but also properly accepted a low bid which exceeded the Government estimate by more than 20 percent on resolicitation. Fowler's Refrigeration and Appliance, Inc.,--Reconsideration, B-201389.2, May 11, 1981, 81-1 CPD 368.

In reviewing the procurement history recited by Spruill, we do not find evidence of discriminatory intent on the part of the Army. Spruill has failed to meet its burden of affirmatively proving its allegation of discrimination. Prejudicial motives may not be attributed to the contracting officer on the basis of inference and supposition. PSI Associates, Inc., B-200839, May 19, 1981, 81-1 CPD 382; Evelyn Gonzalez International, B-200074, April 27, 1981, 81-1 CPD 323.

We deny the protest.

*Milton F. Rowland*  
for Comptroller General  
of the United States