DECISION

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

27189

FILE: B-210491, B-210491.2, B-210491.3 **DATE:** January 10, 1984

MATTER OF: International Alliance of Sports Officials

DIGEST:

1. Agency's rejection of sole responsive bid on the basis of unreasonable price, resulting in cancellation of the solicitation, is proper when the bid price is significantly higher than either the government's estimate or prices submitted by other, albeit, ineligible bidders.

2. Agency is not prohibited from issuing new solicitation for same requirements after cancellation of solicitation even if there is a protest of the cancellation pending before GAO.

3. Where record does not include any evidence that bidders were owned or controlled by government employees, award to any of those firms would not be prohibited by regulatory provision generally precluding entering into contracts with firms owned by government employees.

4. Where solicitation is issued on unrestricted basis, nonprofit associations may compete with commercial concerns for government contract.

International Alliance of Sports Officials (IASO) protests the cancellation of invitation for bids (IFB) No. DAKF10-83-B-0019 and the award of a contract to anyone other than itself under IFB No. DAKF24-83-B-0100, a subsequent procurement for the same requirements. The protest is denied.

IFB -0019

IFB -0019, a 100 percent small business set-aside, was issued by the Department of the Army for sports officiating services at Ft. Stewart and Hunter Army Airfield, Georgia. The following bids were received:

Bidder	Hunter	Ft. Stewart	Total
Hinesville Officials Association	-	$95,085	-
Savannah Officials Association	$43,240	-	-
Savannah Umpires Association	$38,937	-	-
IASO	$50,275	$124,675	$174,950
Government estimate	$37,280	$102,110	$139,390

Hinesville Officials, Savannah Officials, and Savannah Umpires represented in their bids that they were nonprofit organizations. Nonprofit organizations do not qualify as small businesses, see 13 C.F.R. § 121-3.2(i); Defense Acquisition Regulation (DAR) § 1-701.1, and therefore these bids were rejected as "nonresponsive." The Army then evaluated IASO's bid--the only remaining bid--in light of the government estimate (which was derived from the prices paid under prior contracts for the same services) and the other bids received. The Army found that IASO's bid was 25 percent greater than the government estimate and, broken down into components, was 31 percent higher than the apparent low bid for Ft. Stewart and 29 percent higher than the apparent low bid for Hunter Airfield. On these bases, the Army determined that IASO's price was unreasonable and consequently canceled the solicitation.

In its initial protest which was filed after bids were opened under IFB -0019, IASO made two arguments: (1) that nonprofit associations do not qualify as "small business concerns" and therefore are ineligible for award under a small business set-aside and (2) that IASO had been subjected to "unfair competition" in that nonprofit associations do not incur as many costs as for-profit commercial concerns and therefore it becomes "almost impossible" for the latter to compete.

IASO's first ground for protest was, in effect, sustained when the Army rejected the bids of the nonprofit associations and the second ground became academic.

After the Army determined IASO's bid to be unreasonable and canceled IFB -0019, IASO supplemented its protest. Principally, IASO questions the propriety of

the determination that its price was unreasonable, arguing that it is unfair to compare the price of a for-profit commercial concern with those of nonprofit associations.

The record indicates that past contracts for these services have been performed by nonprofit organizations. IASO argues that since these organizations are ineligible for award under IFB -0019, it is improper to use those prior contract prices or, for that matter, bids from such organizations responding to this solicitation as the basis for determining the reasonableness of the bid of a commercial concern, such as itself. IASO maintains that nonprofit organizations can charge less than commercial concerns because they have to include only labor costs in their price and that members of these organizations return a percentage of their earnings to the organization to cover its general and administrative expenses. On the other hand, IASO states, the bid of a commercial concern must include labor costs, general and administrative expenses, project manager's salary, general liability insurance, workers' compensation insurance, and profit margin. IASO argues that since the Army improperly relied on the prices of nonprofit organizations in developing the government estimate, the estimate ignores the realities of the commercial world and does not reflect the prevailing market price. IASO concludes that its price was reasonable and that it is entitled to award as the only responsive, responsible bidder under the solicitation.

The Army responds that it is irrelevant whether a bidder can justify the particular costs which account for its bid; what is relevant is the comparison of that bid with the government estimate and other bids received. The Army states that prior contract prices, particularly the price for the previous contract for the identical services, represent the prevailing market price for the required service and therefore it was reasonable to compute its estimate on the basis of those prior contracts and to then compare IASO's price to that estimate in determining its reasonableness. On this basis, it concludes, IASO's bid was excessive and the solicitation was properly canceled.

As a general rule, cancellation of an advertised solicitation after bid opening is improper absent a cogent and compelling reason. IFR, Inc., B-209929, May 17, 1983, 83-1 CPD 524. However, DAR § 2-404.1(b)(vi) authorizes cancellation for a compelling reason, where "all otherwise

acceptable bids received are at unreasonable prices." Our Office has stated that a determination concerning price unreasonableness is a matter of administrative discretion which we will not question absent a showing of fraud or bad faith. Photo Data, Inc., B-208272, March 22, 1983, 83-1 CPD 281. In this respect, we have recognized that a determination of price unreasonableness may be based upon a comparison 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. Omega Container, Inc., B-206858.2, November 26, 1982, 82-2 CPD 475.

We agree with the Army that whether a bid is unreasonable does not depend upon whether that bidder can account for every element in its bid price and can demonstrate that its price does not include exorbitant markups. In other words, a bidder's price may accurately reflect the costs unique to it plus a moderate profit and yet not be reasonable if the government can obtain the same supplies or services from the marketplace for substantially less. Here, it is clear that officiating services are available from several sources other than IASO at prices substantially less than what IASO bid. In determining what it reasonably should expect to pay in the Savannah area for sports officiating services, we do not see how the Army could ignore the existence of local organizations offering to perform the same services as IASO for approximately 30 percent less.

We do not believe it was improper for the Army to have compared IASO's bid with those submitted by the nonprofit organizations. This case is analogous to Omega Container, Inc., supra, in which we upheld a contracting officer's determination that the protester's sole responsive bid submitted under a small business set-aside was unreasonably high because it was significantly higher than prices previously paid for the same item and the bid price submitted by another firm which was ineligible for award because it was not a small business concern.

IASO has not shown that the contracting officer acted fraudently or in bad faith in determining IASO's bid to be unreasonable. We therefore have no basis to object to the cancellation of IFB -0019.

IFB -0100

After canceling IFB -0019, the Army resolicited for the same requirements under IFB -0100, an unrestricted solicitation. IASO protests award under the solicitation to any of the other bidders--Hinesville Officials Association, Savannah Umpires, Savannah Officials, or Hinesville Sports Officials.

IASO contends that: (1) absent our Office's "approval" the Army could not proceed with a resolicitation until IASO's protest under IFB -0019 had been resolved; (2) the other bidders are substantially owned or controlled by government employees and an award to any one of them would violate public policy, see DAR § 1-302.6; and (3) it constitutes unfair competition for nonprofit associations to compete with for-profit commercial concern. We find no merit to these contentions.

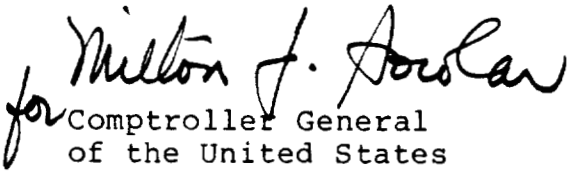
First, there is no prohibition against an agency resoliciting for a requirement even if there is pending a protest of the cancellation of a prior solicitation. An award under the resolicitation, of course, may not be made unless it is properly justified and approved at a level above that of the contracting officer. DAR § 2-407.8(b)(2) and (3). In the present case, the Army simply has extended the incumbent's contract on a month-to-month basis pending resolution of IASO's protest; no award under IFB -0100 has been made.

Second, DAR § 1-302.6 does provide that no agency knowingly shall enter into a contract with employees of the government or a business organization that is substantially owned or controlled by government employees except for the most compelling reasons, such as where the needs of the government cannot reasonably be otherwise supplied. IASO, however, has not presented any information to support its allegation that the other bidders are "substantially owned or controlled" by government employees. In contrast, the Army has provided lists from Hinesville Officials, Savannah Officials, and Savannah Umpires identifying the employment of each of their members; these lists indicate that only a minority of the members and officers of each association are government employees. The Army has not provided any information concerning Hinesville Sports Officials on the basis that it is an individually-owned small business concern and not a private association. The fact that Hinesville Sports Officials is a small business does not necessarily mean that it is not controlled by government

employees, but again IASO has not introduced any evidence to show that it is. Since the record does not include any evidence to support IASO's contention that its competitors are substantially owned or controlled by government employees, this allegation must be rejected.

Finally, there is no prohibition against nonprofit associations competing with commercial concerns for government contracts in the absence of any statutory or regulatory policy to that effect. E.I.L. Instruments, Inc., 54 Comp. Gen. 480 (1974), 74-2 CPD 339. An unrestricted procurement was utilized here to permit competition by all interested bidders and under this type of solicitation, an agency cannot reject a bid submitted by a nonprofit organization simply because of its status.

The protest is denied.



for Comptroller General
of the United States