

12/10/87



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: Cherokee Enterprises, Inc.

File: B-228330

Date: December 4, 1987

## DIGEST

Under program for small disadvantaged businesses established by Section 1207 of the Department of Defense Authorization Act of 1987, withdrawal of total set-aside is proper where lowest responsive bid exceeds estimated fair market price by more than 10 percent. Estimation of fair market price, as a way of determining reasonable price under normal competitive conditions, is within discretion of the procuring agency, and we will not disturb such a determination unless it is unsupported or there is a showing of fraud or bad faith on the part of the contracting official.

## DECISION

Cherokee Enterprises, Inc., the low responsive bidder, protests the cancellation of invitation for bids No. FO8650-87-B-0276, issued by the Department of the Air Force, for construction services for storm water drainage at the Capehart military family housing at Patrick Air Force Base, Florida. This solicitation was issued as a total set-aside for small disadvantaged businesses, pursuant to Defense Federal Acquisition Regulation Supplement, (DFARS) 48 C.F.R. §§ 219.501-70, 219.502-72 (1987). Because the lowest responsive bid was found to be more than 10 percent above the fair market price, as estimated by the government, the IFB was canceled pursuant to DFARS, 48 C.F.R. §§ 219.502-72(d), 219.506(a). Cherokee argues that the solicitation should not have been canceled for this reason and that award should be made to it as the lowest responsive bidder because the government's estimate of the fair market price was unreasonably low.

We deny the protest.

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This IFB was issued on August 10, 1987, as a total set-aside for small disadvantaged businesses. This special category of small business set-asides was authorized by section 1207 of the Department of Defense (DOD) Authorization Act of 1987, Pub. L. No. 99-661. Section 1207 establishes for DOD a goal of awards to such firms of 5 percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988, and 1989. Section 1207 also provides broad discretionary authority to the Secretary of Defense for achievement of that objective. Under this program, DOD contracts directly with the small disadvantaged businesses rather than subcontracting through the Small Business Administration (SBA) under the 8(a) program, established by section 8(a) of the Small Business Act. Both the DOD and SBA programs use an estimation of fair market price as a benchmark of a reasonable price under normal competitive conditions. See Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 19.806-1, 19.806-2 (1986). Under the SBA's program, any excess of the contract price over the estimated fair market price is eligible for funding by the SBA as a business development expense, with the contracting agency paying to SBA only the amount of the estimated fair market price. However, under DOD's program, since it is contracting directly with the small disadvantaged business, any excess of the contract price over the fair market price is paid by DOD.

In establishing the regulatory framework for its program, DOD placed a limit of 10 percent as the excess over the fair market price it would pay to contractors under the program. If the DOD contracting officer finds prior to award that the lowest responsive bid exceeds the fair market price by more than 10 percent, the set-aside must be withdrawn pursuant to DFARS, 48 C.F.R. §§ 219.502-72(d), 219.506(a). Fair market price, as under the SBA 8(a) program, is defined as a "price based on reasonable costs under normal competitive conditions and not on lowest possible costs." DFARS, 48 C.F.R. § 219.001. In estimating the fair market price, the DOD contracting officer is referred to the methodology used in the SBA's 8(a) program, which requires the contracting officer to use "price or cost analysis and consider commercial prices for similar products and services, available in-house cost estimates, data (including cost or pricing data) submitted by the SBA or its contractor, and data obtained from any other Government agency." See FAR, 48 C.F.R. § 19.806-2.

Four bids were received by the Air Force in response to the IFB. The low bid of \$371,000 was rejected because the bidder was not a small disadvantaged business. The remaining bids were \$400,000, \$448,643, and \$489,987, of which Cherokee's was the lowest.

The contracting officer had established a fair market price of \$320,000 by using an estimate prepared by an architect-engineer firm, selected for its expertise in storm water drainage systems design, which had prepared the drawings and specifications used in the IFB. In preparing the estimate, the firm first had made a quantity estimate for all work involved and then used historical cost data to obtain a line-item cost for each component of work. By adding overhead and profit to the sum of the line items, the firm obtained a total estimated cost of \$320,000. Given the disparity between the estimate and the lowest responsive bid of \$400,000, the contracting officer had the estimate rechecked by his own engineering personnel, by the architect-engineer firm which prepared the estimate, and by a developer/contractor in Orlando, Florida. According to the contracting officer, all agreed that the estimate was correct and reasonable. As a result, the IFB was canceled, pursuant to DFARS, 48 C.F.R. § 219.506, since all bids exceeded the fair market price by more than 10 percent.

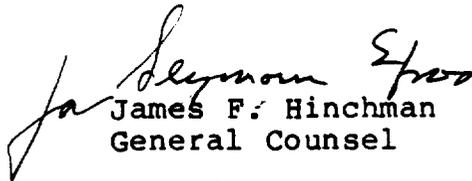
Cherokee protests that the fair market price established by the Air Force was unreasonably low. Since the line-item breakdown of the government estimate was not released to the protester and has only been provided for our in camera review, Cherokee expresses concern that the estimate may have excluded certain items of work which were included in the drawings and specifications for this procurement. Cherokee also argues that methods other than the government estimate should have been used to establish the fair market price. Cherokee states that in establishing the fair market price, the contracting officer should have used the historical costs of similar work performed at Patrick Air Force Base, Florida, during 1984 and 1985 as well as commercial prices published in current publications for similar work throughout the state of Florida.

We have consistently held that a determination of price reasonableness is within the discretion of the procuring agency, and that we will not disturb such a determination unless it is unsupported or there is a showing of fraud or bad faith on the part of the contracting official. See Washington Patrol Service, Inc., B-225610; B-225878; B-226411, Apr. 7, 1987, 87-1 C.P.D. ¶ 587. We have also applied this rule specifically to a determination of price reasonableness for small business set-asides. See Advanced Construction, Inc., B-218554, May 22, 1985, 85-1 C.P.D. ¶ 587. We stated that in making a determination of price reasonableness, a contracting officer may consider government estimates, the procurement history for the supplies and services in question, current market conditions, and any other relevant factors. Id.

We see no reason why a different rule should apply to the estimation of a fair market price under DOD's small disadvantaged business program since such estimation is a way of determining the reasonable price under normal competitive conditions. As long as the DOD contracting officer's determination is reasonable and in accordance with the methods outlined in FAR, 48 C.F.R. § 19.806-2(a), and there is no showing of fraud or bad faith, we will not question the determination.

These principles, when applied to the facts presented here, provide no basis for overturning the Air Force contracting officer's determination of a fair market price of \$320,000. We find the estimate of fair market price to be adequately supported and no evidence of fraud or bad faith has been presented. The estimate was originally prepared by the same firm which prepared the drawings and specifications and included a breakdown of all categories of work. Based on our in camera review of the quantity estimates and cost data for each category, we do not find the items of work mentioned by the protester to have been omitted from the estimate. After bid opening, when the disparity between the estimate and the lowest responsive bid was evident, the contracting officer had the government estimate rechecked with the result that it was found to be correct and reasonable. Since the determination of price reasonableness may properly be made by comparing offered prices with the government estimate, we find no reason to overturn the contracting officer's determination of the fair market price. See, e.g., Singleton Contracting Corp., B-204654, Oct. 9, 1981, 81-2 C.P.D. ¶ 297.

The protest is denied.

  
James F. Hinchman  
General Counsel