

Benejam



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Greenway Enterprises, Inc.

File: B-238943.2

Date: May 4, 1990

Palmer A. Hoovestal, Esq., for the protester.
Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Contracting agency has a compelling reason to cancel a solicitation after bid opening where it determines that sufficient funds are not available to make award.

DECISION

Greenway Enterprises, Inc., protests the cancellation of invitation for bids (IFB) No. 102-IFB-90-0008, issued by the Public Health Service (PHS), Department of Health and Human Services, for construction services to remodel an alcohol and drug abuse treatment facility in Browning, Montana.

We dismiss the protest.

Three bids were received by February 22, 1990, the due date for submission of bids under the IFB. Greenway was the apparent low bidder at \$384,054. The government estimate was \$306,000, but funds were available for the project only in the amount of \$286,000. On April 12, the contracting officer decided to cancel the IFB because sufficient funds were not available to make award. On April 17, the agency issued a new IFB with a reduced scope of work which, the agency expects, will allow award to be made within the amount of available funds.

Before the original IFB was canceled, Greenway filed a protest with our Office objecting to the anticipated rejection of its bid by PHS as unreasonably high. When the agency subsequently informed us that the IFB was canceled due to lack of funding, we dismissed Greenway's protest as

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academic, noting that the issue presented in the protest--whether the agency properly could reject Greenway's bid as unreasonably high--had no practical consequences in light of the cancellation.

Greenway now objects to the cancellation of the IFB, arguing that it improperly resulted in exposure of its bid price and that resolicitation will result in an improper auction, particularly in light of the fact that this is the second time the agency has canceled an IFB for the services at issue.

A contracting agency must have a compelling reason to cancel an IFB after bid opening. See Federal Acquisition Regulation § 14.404-1(a)(1). The fact that sufficient funds are not available to make award under the IFB, as in this case, is a compelling reason to cancel, irrespective of disputes concerning the validity of the government estimate or the reasonableness of the low responsive bid price. Weststar Inc., B-235652, Aug. 7, 1989, 89-2 CPD ¶ 112.

Here, the protester does not dispute the agency's determination that there is insufficient funding for the project. Rather, Greenway argues that because its price has been exposed, it should be awarded a contract under the canceled IFB, or the agency should be directed to proceed with negotiations to make an award under the canceled IFB. Since the IFB was properly canceled, and, in any event, there are insufficient funds to make award at Greenway's bid price, there is no basis to recommend that the award be made to Greenway under the canceled IFB.

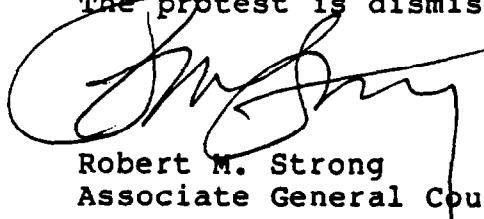
Further, the FAR allows an agency to convert a sealed bidding procurement to a negotiated procurement, as Greenway suggests the agency do here, only where the cancellation is pursuant to FAR § 14.404-1(c)(6) (all otherwise acceptable bids received are at unreasonable prices, or only one bid is received and the contracting officer cannot determine the reasonableness of the price, or no responsive bid has been received from a responsible bidder) and FAR § 14.404-1(c)(7) (bids were not independently arrived at, were collusive, or were submitted in bad faith). See FAR § 14.404-1(e). Here, in contrast, the cancellation was based on a finding pursuant to FAR § 14.404-1(c)(9) that cancellation clearly would be in the public interest due to lack of sufficient funds to make award under the IFB.

Greenway also suggests that, rather than resoliciting competitively, the agency should arrange for the award of a contract to Greenway under section 8(a) of the Small

Business Act, 15 U.S.C. § 637(a) (1988).^{1/} Our Office does not review contracting agency decisions regarding whether or not to conduct procurements under the section 8(a) program absent a showing of possible fraud or bad faith by government officials or that specific regulations have been violated. This is so because such decisions are by statute within the discretion of the agencies to make, and thus no firm has a right to require the government to satisfy a particular procurement need through the 8(a) program or to award through the program to that firm. See Sam Gonzales--Reconsideration, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306. Since the required showing has not been made here, we have no basis to consider whether the procurement should be set aside for award to Greenway under the 8(a) program.

Finally, Greenway requests reimbursement of its bid preparation and protest costs. Since the IFB was properly canceled and the protest thus is without merit, we have no basis to find that Greenway is entitled to recover its costs. See Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988); Kos Kam-Pelasgus, Joint Venture, B-225841, Apr. 1, 1987, 87-1 CPD ¶ 370.

The protest is dismissed.



Robert M. Strong
Associate General Counsel

^{1/} Under the 8(a) program, the Small Business Administration enters into contracts with contracting agencies and arranges for performance by awarding subcontracts to socially and economically disadvantaged small business concerns.