

White



**Comptroller General  
of the United States**

Washington, D.C. 20548

**Decision**

**Matter of:** Ignacio Sanchez Construction

**File:** B-238492

**Date:** May 11, 1990

Ignacio Sanchez, for the protester.  
Vasio Gianulias, Esq., Department of the Navy, for the agency.  
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

1. Notwithstanding the validity of the government estimate or the contracting agency's determination that all bid prices were unreasonably high, agency's cancellation of solicitation after bid opening is proper where sufficient funds are not available to make award to the low responsive bidder.
2. Small Business Administration (SBA) regulations prohibiting acceptance of contract into section 8(a) program where competitive solicitation for the requirement has already been issued as a small business set-aside, or where SBA finds that doing so would adversely affect other small businesses, do not prohibit setting aside contract under the 8(a) program where: (1) solicitation originally was issued as a small disadvantaged business set-aside, not a regular small business set-aside, and later was converted to an unrestricted procurement; and (2) SBA has made no finding that acceptance of the contract into the 8(a) program would adversely affect other small businesses.

**DECISION**

Ignacio Sanchez Construction protests the cancellation after bid opening of invitation for bids (IFB) No. N62470-86-B-6154, issued by the Naval Facilities Engineering Command, Department of the Navy, for improvements to family housing at the Naval Security Group Activity, Sabana Seca, Puerto Rico. Sanchez contends that the contracting officer's decision to reject all bids as unreasonably high, after

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determining that the bids exceeded the government estimate, was unreasonable because the Navy's estimate was flawed, and thus could not properly form the basis for canceling the IFB after bids had been opened. Further, Sanchez argues that the Navy is violating applicable regulations in now setting aside this contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988).

We deny the protest.

Sanchez, the low bidder at the November 21, 1989, bid opening, offered \$4,975,599 on the base bid, and \$606,300 for the additive item. The government estimate for the base bid was \$3,782,830, plus \$406,446 for the additive item. The available funds committed to the project totaled \$3,920,000. After bid opening, the contracting officer determined that both bids received--the apparent low bid submitted by Sanchez, and the second low bid submitted by Francisco Levy Hijo, Inc.--were unreasonably high as they exceeded the government estimate by 32 percent and 47 percent, respectively, and also exceeded the funds available for the work. As a result, the contracting officer rejected both bids, canceled the IFB, and notified the bidders of the decision by letter dated January 19, 1990. This protest followed.

In response to Sanchez's argument that rejection of the bids and cancellation of the IFB lacked a reasonable basis, the Navy argues that its decisions were proper because both bids exceeded the government estimate and available funds. As part of its response to the protest, the Navy provided to the protester certain portions of the estimate. After reviewing the excerpts from the government estimate, Sanchez contends, and the Navy concedes, that the estimate contains a substantial arithmetic error and fails to include costs for certain work required by the IFB. The Navy agrees that these errors cumulatively increase the government estimate for the base bid by \$525,754, to a total base price of \$4,308,584, approximately 15.5 percent below Sanchez's base bid. Sanchez also argues that the Navy used an incorrect performance period in preparing its estimate.<sup>1/</sup>

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<sup>1/</sup> Sanchez asserts that the government estimate is based on a shorter contract duration than the IFB anticipates. The IFB, as originally issued, erroneously established the period of contract duration as 540 days from the date of award, while the statement of work anticipated renovation of 141 homes at the rate of 5 homes per month, for a total of 846 days. Amendment No. 0001 to the IFB extended the period

(continued...)

Notwithstanding Sanchez's challenge to the validity of the government estimate, the agency here has determined that the bids received exceed available funds. A contracting agency has a right to cancel a solicitation when sufficient funds are not available, 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. Since Sanchez does not dispute the Navy's determination that there is insufficient funding, we find that the agency properly canceled the IFB. Kos Kam-Pelasgus, Joint Venture, B-225841, Apr. 1, 1987, 87-1 CPD ¶ 370.

Sanchez further contends that the Navy is barred from now placing this procurement in the 8(a) program by the regulations at 13 C.F.R. §§ 124.301(b)(8)(i), (iv) (1989), which, in relevant part, prohibit inclusion of procurements in the 8(a) program if a "solicitation has already been issued for the procurement as a small business set-aside," or where the Small Business Administration (SBA) makes "a written determination that acceptance of the procurement for an 8(a) award would have an adverse impact on . . . [an] individual small business, whether or not the affected small business is in the section 8(a) program." These regulations, however, do not apply to this case.

The first regulation cited by Sanchez blocks shifting of procurements already issued as small business set-asides into the 8(a) program.<sup>2/</sup> 13 C.F.R. § 124.301(b)(8)(i). Here, the IFB was originally issued as a total small disadvantaged business set-aside, not as a regular small

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<sup>1/</sup>(...continued)

of performance from 540 days to 900 days. Sanchez argues that this extension requires a corresponding increase in the government estimate to account for an additional 360 days of contractor overhead. The Navy, on the other hand, explains that it prepared its estimate calculating the overhead and profit as a percentage of direct costs. Thus, under the Navy's method of calculating the cost for this work, the longer performance period now anticipated by the IFB does not change the profit and overhead calculations in the government estimate.

<sup>2/</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), authorizes the SBA and contracting agencies to enter into contracts for performance of agency requirements by socially and economically disadvantaged small businesses, via subcontracts with SBA.

business set-aside. Further, amendment No. 0005 to the solicitation converted the requirement to an unrestricted procurement. Thus, the cited regulation does not apply to the IFB either as issued, or as amended.

The second regulatory bar cited by Sanchez, 13 C.F.R. § 124.301(b)(8)(iv)--which provides that a procurement may not be included in the 8(a) program if the SBA has made a written determination that an individual small business would be adversely impacted--is also inapplicable. The Navy has yet to approach the SEA regarding this procurement, although the Navy states it has decided it will seek to have this requirement placed in the 8(a) program after it revises the specifications. Thus, the SBA has not received a request from the agency that this procurement be included in the 8(a) program, and to our knowledge, there has been no written finding that inclusion of this procurement in the 8(a) program will harm any other small business. Unless and until the SBA makes such a finding, the regulation has no application here.

For the reasons set forth above, we find that the contracting officer acted properly in rejecting the bids received and canceling the IFB, and that there has been no violation of applicable regulations governing admission of procurements to the SBA's section 8(a) program.

The protest is denied.

*Ronald Berger*  
fn James F. Hinchman  
General Counsel