

P. Jordan  
145791



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Kato/Intermountain Electric, A Joint Venture

**File:** B-245807; B-245925

**Date:** January 30, 1992

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.

Lester Edelman, Esq., and Beth Kelly, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Agency properly determined to cancel solicitation after bid opening where all bids exceeded amount agency was willing to allocate for the project.
2. Protest against determination to reissue a canceled small disadvantaged business set-aside solicitation on an unrestricted basis is dismissed as academic where subsequent solicitation also was canceled.

### DECISION

Kato/Intermountain Electric, a Joint Venture (Kato) protests the cancellation after bid opening of invitation for bids (IFB) No. DACA67-90-B-0028, issued by the Army Corps of Engineers as a small disadvantaged business (SDB) set-aside for construction of a temporary lodging facility at Fairchild Air Force Base, Washington. Kato, the low bidder, contends that the contracting officer's decision to reject all bids as unreasonably high, after determining that the bids exceeded the government estimate, was unreasonable because the agency's estimate was flawed and, thus, could not properly form the basis for canceling the IFB after bid opening. Further, Kato contends that the agency decision to reissue the IFB on an unrestricted basis is improper.

We deny the protest in part and dismiss it in part.

The IFB was originally issued on May 22, 1990, and requested prices for two base line items: construction of a lodging facility and associated work to a line 5 feet from the building, and site work and utilities beyond the 5-foot

line. The bid schedule also provided for two line items covering extension of vestibules and furnishing and installing appliances and equipment. Due to a Department of Defense moratorium on military construction, bid opening was delayed until July 23, 1991.

Three SDBs submitted bids, with Kato the apparent low bidder at \$1,856,000 for the base items and \$99,000 for the optional items, for a total of \$1,955,000. The government estimate for the project totaled \$1,557,353 (\$1,455,472 for the base and \$101,881 for the options). The funds programmed for the project totaled \$1.5 million.

After bid opening, the contracting officer determined that all three bids were unreasonably high since Kato's bid exceeded the government estimate by 25.5 percent and the second and third bidders exceeded it by 32.3 and 47.4 percent, respectively. The contracting officer also found that the bids "significantly exceeded" the funds programmed for the work. As a result, the contracting officer rejected all three bids, canceled the IFB, and notified the bidders of the decision by letter of August 1, 1991. In conjunction with the Small and Disadvantaged Business Utilization Specialist, the contracting officer also determined that there was no reasonable expectation that award could be made at a price not exceeding 10 percent of the fair market value (here, the government estimate). When a replacement IFB (No. DACA67-91-B-0101) was issued on an unrestricted basis, Kato protested first to the agency and then to our Office. Subsequently, when bids were opened on the new IFB, the contracting officer again canceled because all bids exceeded the government estimate and the \$1.5 million programmed for the project.

Kato first argues that rejection of the bids and cancellation of the IFB lacked a reasonable basis because its bid was reasonable and the government estimate was too low, especially with regard to the quality control supervisor, as-built drawings, profit rate, and mechanical work. The agency responds that it reviewed its estimate before bid opening and again after the agency-level protest was filed, and maintains that it is accurate and reasonable. It defends the decision to cancel and resolicit on the basis that all bids exceeded the government estimate and programmed funds.

While Kato challenges the validity of the government estimate, it is unquestioned that the bids received exceeded the \$1.5 million programmed for this project. In deciding how most effectively to utilize available funds, the determination of the government's minimum needs and the best method of accommodating them are primarily the responsibilities of the procuring activity. See IVAC Corp., 67 Comp. Gen. 531 (1988), 88-2 CPD ¶ 75. Here, the agency programmed \$1.5 million to construct the lodging facility and canceled the first IFB when all bids exceeded that amount. Prior to issuing the second IFB, the agency revised the scope of work and reviewed its estimate in an effort to procure the project within the \$1.5 million programmed. When all bids again exceeded this amount, the second IFB was canceled. Thus, it is plain that the agency has determined that its minimum needs can best be met within the \$1.5 million amount it has consistently programmed for the project. While an agency may seek an increase in funds to cover unforeseen cost variations (see 10 U.S.C. § 2853 (Supp. II 1990)), there is no requirement that it do so.

The management of an agency's funds generally depends on the agency's judgment concerning which projects and activities shall receive increased or reduced funding and a contracting agency has the concomitant right to cancel a solicitation when, as a result of its allocation determinations, sufficient funds are not available. NDT-1, Inc.--Recon., B-220570.2, Apr. 15, 1986, 86-1 CPD ¶ 364; Genco Tool and Eng'g. Co., 61 Comp. Gen. 281 (1982), 82-1 CPD ¶ 175. The agency's right to cancel a solicitation when sufficient funds are not available is not affected by disputes concerning the validity of the government estimate or the reasonableness of the low responsive bid price. Ignacio Sanchez Constr., B-238492, May 11, 1990, 90-1 CPD ¶ 467; Weststar, Inc., B-235652, Aug. 7, 1989, 89-2 CPD ¶ 112; see Federal Acquisition Regulation (FAR) § 14.404-1(c)(10) (cancellation clearly in public's interest). Since it is undisputed that the bids exceed the amount which the agency was willing to allocate for this project, the agency

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<sup>1</sup>Kato observes that the contracting officer's memorandum regarding the rejection of bids cites FAR § 14.404-1(c)(6) which concerns rejection of bids for unreasonable prices, instead of FAR § 14.404-1(c)(10) concerning public interest. Since the contracting officer found the prices to be unreasonable because they exceeded both the estimate and available funds, we do not find the failure to cite both FAR provisions to be significant.

properly canceled the IFB. Ignacio Sanchez Constr., supra.<sup>2</sup>

Kato argues that the agency should complete the acquisition through negotiation. Under FAR § 14.404-1(e)(1), where an IFB has been canceled for reasons specified in subparagraph (c)(6), the acquisition may be completed through negotiation. There is no requirement, however, that an agency utilize this approach in any particular case. Ford Constr. Co., Inc., 64 Comp. Gen. 810 (1985), 85-2 CPD ¶ 264; FAR §§ 14.404-1(e) and 15.103. Further, where, as here, the IFB actually was canceled pursuant to subparagraph (c)(10), the FAR does not provide for the contracting officer to convert the procurement to a negotiated one. See Greenway Enters., Inc., B-238943.2, May 4, 1990, 90-1 CPD ¶ 454.

Kato also argues that the new solicitation should have been set aside for SDBs. Since the contracting officer also canceled this second IFB, Kato's protest on this ground is academic. See Morey Mach., Inc.--Recon., B-233793.2, Aug. 3, 1989, 89-2 CPD ¶ 102.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel

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<sup>2</sup>In a related argument, Kato takes issue with and claims bad faith on the part of the agency in that the estimate of \$1,557,353 exceeded the \$1.5 million appropriated for the project. While the total estimate for base and optional items exceeds the programmed amount, the estimate for the required base items of \$1,455,472 is less than the amount programmed. Thus, we find no evidence of bad faith in preparing the estimate.