



Comptroller General  
of the United States

Washington, D.C. 20548

*P. Williams*

## Decision

**Matter of:** Lewis & Smith Construction Company

**File:** B-265763

**Date:** December 7, 1995

### DECISION

Lewis & Smith Construction Company, a small disadvantaged business (SDB) protests the failure to set-aside for exclusive SDB participation request for proposals (RFP) No. F04700-95-0032, issued by the Department of the Air Force to design and construct military family housing at Edwards Air Force Base in California.<sup>1</sup> Lewis & Smith also objects to the cancellation of RFP No. F04700-95-R-0001 (RFP-0001) which had been issued as a total SDB on the grounds that the cancellation lacked a reasonable basis and was motivated by the agency's desire to avoid making award to Lewis & Smith.

We dismiss the protest.

Subsequent to the receipt and evaluation of the second round of best and final offers (BAFO) submitted in response to RFP-0001, the agency concluded that its minimum requirements for Phase I of the design-build project, could not be met within the available fiscal year funding. As a result, the contracting officer determined that cancellation of RFP-0001 would be in the best interests of the government and notified each competitive range offeror of the cancellation. This notice was sent by telefacsimile and regular mail on June 21, 1995.

Lewis & Smith's allegations regarding the propriety of the cancellation of RFP-0001 are untimely. Our Bid Protest Regulations contain strict rules requiring timely submission of protests. Under these rules, protests not based on solicitation improprieties must be filed within 10 days after the basis of protest is known, or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1995); The Jonathan Corp., B-247053.7, May 15, 1992, 92-1 CPD ¶ 446. As shown by the record, Lewis & Smith was well aware that the Phase I solicitation had been canceled due to insufficient funds when it received the telefax notification on June 21. If the protester believed that the agency canceled the solicitation after the second round of BAFOs were evaluated in order to circumvent making award to the firm, Lewis &

<sup>1</sup>The scope of work for RFP-0032 includes the demolition, design, and replacement of 34 housing units (Phase I) and the demolition, design, and replacement of an additional 127 units (Phase II and III).

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Smith was required to protest within 10 working days from June 21, the day it received the notice of cancellation. Since Lewis & Smith's August 16 protest was filed more than 10 working days after it received the cancellation notice, its protest on this basis is untimely, and will not be considered. Id.

We also dismiss Lewis & Smith's allegation that the agency was required by applicable regulations to issue RFP-0032 as a total SDB set-aside. In a policy directive dated October 23, 1995, the Under Secretary of Defense has suspended the military's SDB set-aside program and the applicable regulations based on a recent Supreme Court decision, Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995). As a result of this directive, contracting officers cannot set aside acquisitions for SDBs; thus, we will not consider this ground of protest because to do so would serve no useful purpose.

Accordingly, the protest is dismissed.

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