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**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Louis Bojan; Hood's Pest Control Center, Inc.

File: B-223744; B-224355

Date: September 18, 1986

DIGEST

1. Agency has discretion to cancel a sale of surplus real property where (1) the highest bid is less than the agency's appraisal of the fair market value of the property; (2) regulations permit resolicitation in these circumstances; and (3) the solicitation reserves the government's right to reject all offers.

2. Where invitation for sale of surplus real property specifically states that settlement will be within 90 days after acceptance of bids, any expenditures by bidders before the property is actually conveyed to them are at their own risk.

DECISION

Louis Bojan and Hood's Pest Control Center, Inc. protest the procedures followed by the General Services Administration (GSA) during a public auction of real property located near Bolling Air Force Base in Washington, D.C., GSA Control No. 4-D-DC-411-B. The protesters also object to the agency's subsequent cancellation of the sale.

We deny the protests.

GSA conducted the auction on May 7, 1986, pursuant to the Federal Property and Administrative Services Act of 1949, as amended, 41 U.S.C. § 484 (1982). The property being sold consisted of three contiguous lots totaling 7.15 acres. GSA offered these for sale individually or in combination, i.e., Parcels I and II, Parcels II and III, and Parcels I, II, and III.

Three bidders participated in the sale. The highest initial bids on the parcels at issue here were as follows:

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<u>Parcel</u>	<u>Bidder</u>	<u>Bid</u>
I	Smitty L. Durham	\$45,000
II	Louis Bojan	31,000
I & II	Hood's Pest Control	92,000

GSA determined that none of these was equal to the fair market value of the properties. By letters dated May 12, the agency therefore offered all of the bidders an opportunity to increase their bids by May 23.

The revised bids were still below the fair market value, and the agency continued to contact the bidders until it received final bids as follows:

<u>Parcel</u>	<u>Bidder</u>	<u>Bid</u>
I	Smitty L. Durham	\$ 71,000
II	Louis Bojan	48,000
I & II	Hood's Pest Control	100,000

GSA then determined that it would be in the best interest of the government to award Parcels I and II individually, since it would receive \$19,000 more than Hood's bid for the combined parcels. On June 4 and 9, respectively, GSA sent letters of acceptance to the two successful bidders. It rejected Hood's bid by letter dated June 13, and that firm's protest followed.

Hood contends that it submitted the highest initial bid for Parcels I and II combined and that GSA improperly afforded the other bidders an opportunity to increase their individual bids. Hood also contends that because the auctioneer stated that it was the highest bidder, it invested approximately \$25,000 pertaining to the development of the project before receiving the agency's request to modify its bid. It seeks award for the combined parcels.

Upon receipt of the protest, GSA agreed that, based upon the Federal Property Management Regulations (FPMR), 41 C.F.R. § 101-47.305-1(b) (1985), and decisions of our Office,^{1/} it had improperly allowed all bidders an

^{1/} GSA relied upon B-154749, Sept. 24, 1964, and B-152989, Apr. 6, 1964, as supplemented by a letter from our Office to the Administrator of GSA dated Feb. 24, 1965.

opportunity to increase their bids. The regulations state that where advertising does not result in a price commensurate with fair market value, "the highest bidder," at the discretion of the head of the disposal agency and upon a determination of responsiveness and responsibility, "may be afforded an opportunity to increase his price." Thus, GSA stated, it should have determined whether individual bids or a combined bid would provide the highest return for a particular parcel or parcels and offered only the highest bidder an opportunity to increase its bid. GSA determined that it therefore should not have given Durham or Bojan an opportunity to increase their individual bids since, at \$45,000 and \$31,000, respectively, their total was only \$76,000.

Because of this perceived error, by letters dated July 17, GSA advised all bidders that it was canceling the sale of Parcels I and II (Parcel III is not at issue here). The agency returned bid deposits and additional monies that it had collected and scheduled a reoffering by sealed bid for September 24.

Bojan then protested to our Office, contending that the policy of allowing only the highest bidder to increase its bid is unfair and prevents the government from receiving the best yield from its disposal properties. Bojan also states that in reliance on the GSA's letter of acceptance, it invested time and money in exploring site development. The firm seeks award at its final bid price for Parcel II.

While under the FPMR "the highest bidder" may be permitted to increase its offered price, it is within agency discretion whether to follow this procedure or to (1) reoffer the property on the basis of competitive bids, (2) dispose of it by negotiation, or (3) otherwise dispose of it under applicable regulations. See FPMR, 41 C.F.R. § 101-47.305-1(d).

Given the facts of this case, we cannot conclude that GSA abused its discretion in ultimately deciding to reject all bids for Parcels I and II. After filing of the protests, GSA recalculated the fair market value of the property in question, considering the probable development of the parcels for townhouses (which current zoning permits), as well as the value of existing improvements for interim use. GSA concluded that even if Hood alone had been offered an opportunity to increase its bid, the firm's \$100,000 offer was less than fair market value, and would have been rejected. Hood therefore was not prejudiced by the agency's affording other bidders an opportunity to increase their bids.

In its comments on the agency report, Hood questions the agency's statement that it would have rejected the \$100,000 bid as too low. The development of an estimate of the fair market value of surplus real property is, like the development of a cost estimate in a procurement, a matter of judgment which our Office will not question except where it can be clearly shown that the appraisal methods were improper or lacking in credibility. Fort Holabird and Casil Corp., 57 Comp. Gen. 823 (1978), 78-2 CPD ¶ 217. We have examined the GSA appraisal in light of Hood's criticism. While, in view of the pending resale, we are not at liberty to discuss this appraisal, we find no impropriety in the evaluation method used.

As for Bojan, since it was also within the agency's discretion to reoffer the property on the basis of competitive bids, there is no legal requirement that GSA instead make an award to it at its increased bid price for Parcel II. In this regard, the contracting officer has determined that the expense of the resale will be justified by the additional proceeds that it is expected to generate. Moreover, the IFB expressly reserved the government's right to reject any and all bids. Contracting officers have authority to reject all bids where it is in the public interest to do so, and failure of the highest bid to come up to the appraised fair market value of real property is a proper basis for such action. See 71-74 Corp., B-213424, Apr. 10, 1984, 84-1 CPD ¶ 407; 49 Comp. Gen. 685 (1970). With regard to the protesters' contentions that they invested time and money in anticipation of the development of the project, we note that paragraph VII of the "Special Terms" provides for settlement within 90 days of notice of acceptance of the bid. Until the properties actually had been conveyed to the protesters, in our opinion, any expenditures were at their own risk. Cf. Northpoint Investors, B-209816, May 13, 1983, 83-1 CPD ¶ 523 (contract does not come into existence when it is conditioned upon future actions by offeror and agency); Lawrence Hall d/b/a/ Halcyon Days, B-189697, Feb. 1, 1978, 78-1 CPD ¶ 91 (claimant may not be paid expenses incurred preparing for performance when contract has not been executed).

The protests are denied.

for *Signature* *Efco*
Harry R. Van Cleve
General Counsel