

*Skimlow PL II*



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

Matter of: J. Carver Enterprises

File: B-227359

Date: September 3, 1987

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## DIGEST

Protest against cancellation of item in solicitation after opening of bids is denied, where agency relied upon historical costs for determination that bids were unreasonably high, and protester has not met burden necessary to show bad faith or that the determination was unreasonable.

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## DECISION

J. Carver Enterprises protests cancellation of one item under invitation for bids (IFB) No. R6-1-87-43, issued by the Forest Service, United States Department of Agriculture. The procurement was for the use of workers and equipment to thin, buck, <sup>1/</sup> and pile trees in five work areas, Items 1-5, located in the Fort Rock Ranger District, Deschutes National Forest, Oregon. The IFB provided that separate awards could be made for each item.

At bid opening on May 11, 1987, Carver was the low bidder for Item 5. On May 18, Carver was informed that Item 5 of the solicitation would be canceled, pursuant to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1 (1986), because the Forest Service had found all bids unreasonably high based on an estimate for Item 5 of \$63 per acre, or \$22,365. Carver then filed its protest with this office.

We deny the protest.

Item 5 involved the bucking and piling of timber on 355 acres of forest. Prior to issuance of the solicitation, Forest Service personnel completed a "Cost Estimate Worksheet For Service Contracts" for Item 5 based on a

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<sup>1/</sup>"Buck" means to cut already-felled trees into convenient, standardized lengths to be transported and/or processed.

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technical assessment of the forest area involved. The Forest Service estimated the machine rate of production at nine acres per day, arriving at a preliminary cost estimate of \$84 per acre or \$29,820.

Once this preliminary estimate was calculated, the staff concluded that this estimate exceeded the amount that the government should expect to spend for the work. This was based on recent procurement history (i.e., prices on recent contracts for similar work). As a result, the Forest Service adjusted this original estimate downward to \$63 per acre or \$22,365.

When the bids were opened, the prices for Item 5 ranged from a high of \$194 per acre or \$68,870, to Carver's low bid of \$129 per acre or \$45,795. Because even Carver's bid greatly exceeded the estimated cost for the item, the Forest Service concluded that all otherwise acceptable bids were at unreasonable prices and decided to cancel this item of the solicitation.

The primary issue presented by Carver is whether the contracting officer properly found Carver's bid price for Item 5 to be unreasonable. With regard to its challenge to the government's cost estimate and to the reasonableness of the contracting officer's determination, Carver presents three related arguments. First, Carver alleges that the machine rate of production that the Forest Service used in its cost estimate is unrealistic. Second, Carver contends that, here, the recent procurement history is irrelevant to determining a reasonable cost. And third, Carver asserts that its offer includes an accurate representation of its costs and allows only a reasonable profit. The protester also raises an issue with regard to the good faith of the contracting officer.

As a general rule, cancellation of an advertised solicitation after bid opening is improper "unless there is a compelling reason." FAR, 48 C.F.R. § 14.404-1(a)(1); see also, e.g., International Alliance of Sports Officials, 63 Comp. Gen. 162 (1984), 84-1 CPD ¶ 63. However, FAR, 48 C.F.R. § 14.404-1(c)(6), states that one compelling reason justifying cancellation is that "[a]ll otherwise acceptable bids received are at unreasonable prices." Furthermore, before awarding any contract, a contracting officer must determine that the price at which the contract would be awarded is reasonable. FAR, 48 C.F.R. § 14.407-2. In this regard, the discretion of the contracting officer is extremely broad, Eclipse Systems, Inc., B-216002, Mar. 4, 1985, 85-1 CPD ¶ 267, and all or, as here, part of a

solicitation may be canceled. Surgical Instrument Company of America, B-211368, Nov. 18, 1983, 83-2 CPD ¶ 583; see also Schindler Haughton Elevator Corp., B-200965, Apr. 23, 1981, 81-1 CPD ¶ 315.

Our Office will not question a contracting officer's determination in this regard unless it is unsupported or there is a showing of bad faith or fraud on the part of the contracting officer. Washington Patrol Service, Inc., B-225610, et al., Apr. 7, 1987, 87-1 CPD ¶ 384. In this respect, a determination of price unreasonableness may be based upon such factors as government estimates, past procurement history, current market conditions, or any other relevant factors. Loral Packaging Inc., B-221341, Apr. 8, 1986, 86-1 CPD ¶ 347.

These principles, when applied to the facts presented here, do not provide an adequate basis for our questioning the contracting officer's determination that Carver's price was unreasonable.

In 1986 and early 1987, the Forest Service issued three solicitations for thinning, bucking and piling trees. Awards under these solicitations for various items were made at prices ranging between \$37 per acre to \$69 per acre for thinning, and, except for one bid item, awards were made at prices between \$40 and \$85 for bucking and machine piling. Based on these facts alone, we have no basis to question the contracting officer's determination that Carver's bid of \$129 per acre for bucking and piling was unreasonable. In this regard, Carver challenges the use of prior procurement history because it "is based on a period of time that was a distorted [depressed] economy." Nevertheless, past procurement history is a legitimate factor for use in preparing a cost estimate, Loral Packaging, Inc., supra, and recent history may logically be the most relevant. See Omega Container, Inc., B-206858.2, Nov. 26, 1982, 82-2 CPD ¶ 475. We think the weight to be given past procurement history, even reflecting a recessionary period, should be left to the sound discretion of the contracting officer. Accordingly, we conclude that the past procurement history reasonably supports the contracting officer's determination. Consequently, we need not consider Carter's other reason for challenging the government's cost estimate.

We also interpret Carver's statement in its protest that Forest Service personnel have "deliberately misstate[d] the actual known costs of similar work for the purpose of stifling competition," among others, to constitute an allegation of bad faith on the part of the contracting officer.

We note that there must be irrefutable proof that an agency has a malicious and specific intent to injure a protester before we may presume bad faith. Kalvar v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976).

In this protest Carver has offered little more than its bald assertion that the Forest Service has exercised bad faith. It may appear that Forest Service personnel have been unsympathetic to the financial difficulties facing the timber industry in the region. However, this lacks the requisite maliciousness and specificity necessary to rise to the level of bad faith. Therefore, we also find this basis for Carver's protest to be without merit.

The protest is denied.

Finally, with regard to Carver's request for bid protest costs, where a claimant has not shown that an agency abused its discretion and we find that cancellation of the solicitation is proper, award of bid protest costs is not appropriate. John C. Kohler Co., B-218133, Apr. 22, 1985, 85-1 CPD ¶ 460.

*for* *Seaman Spru*  
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