



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Atkinson Dredging Company, Inc.

File: B-250965; B-250967

Date: February 17, 1993

Howard W. Roth, III, Esq., and Michael L. Sterling, Esq., Vandeventer, Black, Meredith & Martin, for the protester. Lester Edelman, Esq., Department of the Army, for the agency.

Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's cancellation of solicitation after bid opening on the basis that all bids received are unreasonable in price is proper where the protester's low bid exceeded the government estimate by a significant amount, and even if the government estimate is adjusted upward to the amount that the protester argues is correct, its bid remains 14.3 percent higher than the estimate.

DECISION

Atkinson Dredging Company, Inc. protests the cancellation of invitation for bids (IFB) No. DACW65-92-B-0027, issued as a total small business set-aside by the United States Army Corps of Engineers, Norfolk Division, and the agency's subsequent unrestricted resolicitation of the requirement under IFB No. DACW65-92-B-0078. The Army canceled the original solicitation because it determined that both bids received were unreasonably high as compared to the government estimate. Atkinson contends, among other things, that the government estimate was unreasonably low.

We deny the protests.

The Army issued the original solicitation on June 12, 1992, for maintenance dredging of portions of the Norfolk Harbor Channel in Norfolk, Virginia. The IFB sought bids for two line items: (1) mobilization/demobilization; and (2) dredging. The government estimate of the cost to perform the requirements under the IFB was \$1,030,840. At the July 29 bid opening, the Army received two bids;

Atkinson's \$1,438,740 bid was low.¹ A comparison of Atkinson's bid and the government estimate, broken down by line item, revealed the following:

	<u>ATKINSON</u>		<u>GOV'T ESTIMATE</u>	
<u>Line Item</u>	<u>Cost Per Cubic Yd.</u>	<u>Amount</u>	<u>Cost Per Cubic Yd.</u>	<u>Amount</u>
1. Mobilization & Demobilization		\$ 711,000		\$ 328,840
2. Dredging (234,000 cu. yd.)	\$3.11	<u>727,740</u>	\$3.00	<u>702,000</u>
TOTAL		\$1,438,740		\$1,030,840

The contracting officer reviewed the bids in relation to the government estimate and concluded that both bids were unreasonable as to price; specifically, Atkinson's low bid was 39.5 percent higher than the government estimate. The contracting officer, who is also the Small and Disadvantaged Business Utilization Specialist (SADBUS), asked the deputy chief of the engineering division to review the government estimate. He did so and advised the contracting officer that the estimate was accurate. Accordingly, on July 30 the contracting officer, acting as both the contracting officer and the SADBUS, decided to cancel the solicitation and resolicit on an unrestricted basis, subject to a review of the government estimate by the agency's East Coast Dredging Team. By letter dated July 31, the contracting officer notified the bidders that the bids had been rejected and the solicitation canceled. On August 3, Atkinson filed an agency-level protest, alleging that the government estimate upon which the price reasonableness determination was made was erroneous.

On August 17, the requirement was resolicited on an unrestricted basis. On August 20, Atkinson filed an agency-level protest in which it argued that the agency had not followed proper procedures to cancel the small business set-aside and that the agency should have set aside the new solicitation for small businesses; the protester also repeated its contention that the government estimate was erroneous. In the meantime, the agency's East Coast Dredging Team had reviewed the project requirements and the government estimate and, on September 9, found all aspects of the estimate to be fair and reasonable.² In

¹The other bidder submitted a bid of \$1,028,000 for line item one and \$786,240 for line item two (at \$3.36 per cubic yard), for a total bid of \$1,814,246.

²It did recommend a change in the scope of work for increased dredge material due to shoaling on any resolicitation.

mid-September, the contracting officer consulted with the Small Business Administration's (SBA) Procurement Center Representative (PCR) for the region; she attests that he was satisfied with her determination to cancel the solicitation and resolicit. The protester then filed this protest in our Office on October 16.³

Atkinson first protests the agency's determination to cancel the solicitation on the basis of its conclusion that both bids received were unreasonably priced in comparison with the government estimate; the protester asserts that the government estimate was unreasonably low.

Once bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the IFB. Federal Acquisition Regulation (FAR) § 14.404-1(a)(1). Such a compelling reason to cancel the IFB exists when it is determined that all otherwise acceptable bids are at unreasonable prices. FAR § 14.404-1(c)(6).

An agency's determination of price reasonableness involves the exercise of discretion on the part of the contracting officer, which our Office will not question unless it is unreasonable. U.S. Constructors, Inc.; Eletech, Inc., B-248329; B-248605, Aug. 19, 1992, 92-2 CPD ¶ 112. The FAR provides that the contracting officer is responsible for selecting and using whatever price analysis techniques will ensure a fair and reasonable price. See FAR §§ 14.407-2, 15.805-2. One of those techniques is a comparison of the prices received with the independent government estimate. FAR § 15.805-2(e); Sylvan Serv. Corp., B-222482, July 22, 1986, 86-2 CPD ¶ 89. A determination regarding price reasonableness may be based on the government estimate alone. Adrian Supply Co., B-240871; B-240872, Dec. 21, 1990, 90-2 CPD ¶ 515; Pipe, Inc., B-236461, Dec. 7, 1989, 89-2 CPD ¶ 526.

Atkinson argues that the costs shown in the government estimate do not accurately reflect the costs involved in pipe handling and the crossing of the channel. Our review of the record shows that the government estimate may be understated; Atkinson has pointed to a number of apparent errors and the Army has not refuted these points. Nevertheless, even if the government estimate is adjusted upward to the amount urged by the protester to account for these apparent errors (\$1,203,057), the protester's bid is still

³On the extended bid opening date of October 20, four bids were received; Atkinson was the fourth low bidder behind three large business firms.

14.3 percent higher than the government estimate.⁴ In view of this difference, we see no basis to object to the contracting officer's determination of price unreasonableness. See Building Maintenance Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233 (low responsive bid exceeded the government estimate by 7.2 percent).

Atkinson contends that accepting a second round of bids under the amended IFB resulted in an improper auction. This argument is without merit. There is nothing objectionable in an agency's recompeting a requirement after properly canceling a solicitation even though prices have been exposed. Resolicitation does not create an impermissible auction where, as here, the original post-bid opening cancellation of an IFB was otherwise proper. Duracell, Inc.; Altus Corp., B-229538 et al., Feb. 12, 1988, 88-1 CPD ¶ 145.

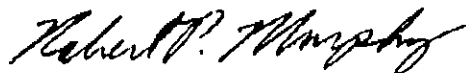
Finally, Atkinson argues that the new solicitation should have been set aside for small businesses. In this regard, FAR § 19.502-2(a) provides that acquisitions of services, such as dredging, shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns at fair market prices. Since the decision to set aside a particular procurement for small business concerns is a business judgment within the discretion of the contracting officer, our Office will not question such a determination absent a showing that it was unreasonable. FKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32.

Atkinson contends that the contracting officer had a reasonable expectation that offers would be obtained from at least two responsible small business concerns at a fair market price because Atkinson's bid on the original solicitation was reasonably priced. Since, as discussed above, the contracting officer reasonably determined that both bids from small business concerns on the original solicitation were unreasonably priced, she properly could conclude that there was not a reasonable expectation that bids would be received from two responsible small business concerns at a

⁴Atkinson points out that its proposed corrections to the government estimate bring its bid to within 25 percent of that estimate, as required by Engineering Federal Acquisition Regulation Supplement (EFARS) § 36.205. That section states that no contract may be awarded if the price exceeds the government estimate prepared in conformity with EFARS § 36.203(100) by more than 25 percent; it does not state that award must be made to bids within the 25 percent range.

fair market price; consequently, her subsequent decision, which was supported by the SBA PCR, to issue the new solicitation on an unrestricted basis was also reasonable.⁵ See RNJ Interstate Corp., B-241946, Feb. 26, 1991, 91-1 CPD ¶ 219. Given that the set-aside was properly withdrawn, Atkinson's argument that the agency failed to make a reasonable effort to award this requirement to small business concerns is without merit. While the agency is required to place a fair proportion of government contracts with small businesses and to meet certain goals for such awards for dredging, see Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C. § 644 note (1988 and Supp. III 1991); Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 201(c), 106 Stat. 986, 994, the agency is not required to make award at an unreasonably high price. See FAR §§ 14.404-1(a)(1), 19.506(a).

The protests are denied.



for James F. Hinchman
General Counsel

⁵Atkinson contends that the Army improperly withdrew the solicitation without providing notice to the SBA in violation of FAR § 19.506. That regulation requires a procuring agency to notify the SBA PCR, where one has been assigned, whenever it proposes to withdraw a small business set-aside. Here, the record shows that the contracting officer did not notify the SBA PCR of her July decision to cancel the solicitation and resolicit on an unrestricted basis until September. However, the contracting officer attests that when the SBA PCR was notified of the contracting officer's decision, he was satisfied with it. Accordingly, we find that the contracting officer's failure to comply with the FAR requirement for advance notice to the SBA PCR did not prejudice the protester.