



Comptroller General
of the United States

113157

Washington, D.C. 20548

Decision

Matter of: Atkinson Dredging Company, Inc.--
Reconsideration

File: B-250965.2; B-250967.2

Date: July 19, 1993

Howard W. Roth, III, Esq., and Michael L. Sterling, Esq., Vandevanter, 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

Prior decision denying protest challenging agency's decision to cancel solicitation on the basis that all bids received were unreasonable as to price is affirmed where protester's contention--that the applicable statute requires agency to make award if the low-priced responsive bid is within 25 percent of a reasonable government estimate--is contrary to the plain language of the statute. The fact that the Claims Court in one decision ordered relief consistent with the protester's position does not compel a conclusion that the statute is properly so interpreted, given the inconsistency between the remedy ordered by the court and the statutory language, and the lack of any stated rationale for the court's action.

DECISION

Atkinson Dredging Company, Inc. requests reconsideration of our decision, Atkinson Dredging Co., Inc., B-250965; B-250967, Feb. 17, 1993, 93-1 CPD ¶ 153, in which we denied its protest of 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.

We affirm our prior decision.

The Corps canceled the original solicitation because it determined that both bids received were unreasonably high as compared to the government estimate. Specifically, the contracting officer found that Atkinson's low bid of \$1,438,740 was 39.5 percent higher than the government estimate. In its protest, Atkinson primarily contended that the original solicitation was improperly canceled because the government estimate was unreasonably low.

In our decision, we stated that the government estimate may have been understated because Atkinson pointed to a number of apparent errors that the Corps did not refute. We concluded, however, that even if the government estimate were adjusted upward to the amount urged by the protester to account for all of the errors it alleged, the protester's bid would still be 14.3 percent higher than the government estimate. Since a contracting officer may reject a bid as unreasonably priced when the bid exceeds the government estimate by as little as 7.2 percent, see, e.g., Building Maintenance Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233, we found no basis to object to the contracting officer's price unreasonableness determination here.

In its request for reconsideration, Atkinson asserts that since its bid was within 25 percent of the adjusted government estimate, it is entitled to award under the applicable statute, 33 U.S.C. § 624 (1988), which states:

"No works of river and harbor improvement shall be done by private contract . . . [where] the contract price is more than 25 per centum in excess of what [the Chief of Engineers] determines to be a fair and reasonable estimated cost of a well-equipped contractor doing the work."

The protester asserts that under this provision the Corps must award a dredging contract to the low, responsive bidder whose price is within 25 percent of a fair and reasonable government estimate.

While this provision clearly prohibits the Corps from awarding a dredging contract to a bidder whose price exceeds a fair and reasonable government estimate by more than 25 percent, it does not mandate that the Corps award a dredging contract to a bidder whose price is within 25 percent of that government estimate. Similarly, the applicable regulation, Engineering Federal Acquisition Regulation Supplement (EFARS) § 36.205, 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.¹

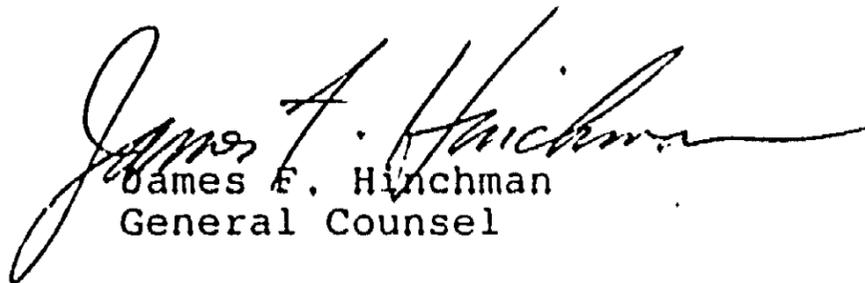
Atkinson cites Bean Dredging Corp. v. United States, 19 Cl. Ct. 561 (1990), for the proposition that where a bid is within 25 percent of a reasonable government estimate, the contractor must be awarded the contract. In Bean, the Corps canceled a dredging solicitation where the low bid exceeded the government estimate by more than 25 percent. The low bidder, Bean, requested injunctive relief from the Claims Court, arguing that the government estimate was unreasonably low. The court concluded that the government estimate was unreasonably low. When the court adjusted the government estimate upward to account for the errors, Bean's low bid was within 25 percent of the estimate. The court then permanently enjoined the agency from awarding a contract to anyone but Bean.

While the court conducted an exhaustive examination of the government estimate and the challenges to it, it seems to have assumed that the low bidder was entitled to the award once its bid came within 25 percent of the estimate. There is no analysis supporting the court's conclusion, nor is there a citation to any other decision reaching that result. In our view, the court's interpretation--which would infringe upon the agency's ability to exercise its discretion in the determination of price reasonableness, see Federal Acquisition Regulation § 14.407-2--is not consistent with the plain language of the statute, which limits only the agency's ability to award contracts where all the bids

¹Atkinson argues that the Corps, in reliance on 33 U.S.C. § 624, has consistently awarded dredging contracts where the low bid is within 25 percent of the government estimate. However, each procurement is a separate transaction and agency action under one procurement does not affect the propriety of the agency's action under a different procurement. See Barnes Elec. Co., Inc., B-228651, Oct. 2, 1987, 87-2 CPD ¶ 331.

received exceed the government estimate. See Cottrell Eng'g Corp., B-242973, May 21, 1991, 91-1 CPD ¶ 498.² We therefore decline to follow it. See J.A. Walker Co., Inc.; James A. Walker, d/b/a J.A. Walker Co., B-236518, Nov. 17, 1989, 89-2 CPD ¶ 474.

The prior decision is affirmed.


James F. Hinchman
General Counsel

²The protester cites Cottrell in support of its contention that 33 U.S.C. § 624 requires that award be made where the bids do not exceed the 25 percent limitation; in fact, the case holds that the contracting officer properly canceled a solicitation where all the bids received were more than 25 percent above the government estimate.