GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Overstreet Electric Company, Inc.

File: B-284691

Date: May 12, 2000

Timothy A. Sullivan, Esq., Starfield & Payne, for the protester.
Robert W. Pessolano, Esq., Department of the Army, for the agency.
Katherine I. Riback, Esq., and James Spangenberg, 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 32 percent and the protester has not shown that the government estimate was materially understated.

DECISION

Overstreet Electric Company, Inc. protests the cancellation of invitation for bids (IFB) No. DACW27-00-B-0002, issued by the United States Army Corps of Engineers. The Army canceled the IFB because it determined that the bids received were unreasonably high as compared to the government estimate. Overstreet contends that the government estimate was unreasonably low.

We deny the protest.

The Army issued the IFB on December 6, 1999 for the rehabilitation of the Little Calumet River pump stations. At the January 5, 2000 bid opening, the Army received three bids. The three bids and the government estimate, without profit, were as follows:

Overstreet	$4,638,400
Bidder A	$4,773,545
Bidder B	$4,827,770
Government Estimate	$2,915,265

Agency Report at 2.

After bid opening, the agency reviewed the government estimate and revised it to $3,510,910. Id. Overstreet's bid exceeds the revised government estimate by 32.1 percent, Bidder A's bid exceeds the revised government estimate by 36 percent, and Bidder B's bid exceeds the revised government estimate by 37.5 percent. The contracting officer determined that all bids received were at unreasonably high prices as compared to the government estimate, pursuant to Federal Acquisition Regulation (FAR) §§ 14.404-1(c)(6), 14.404-1(e)(1), 14.404-1(f), cancelled the IFB and proposed to complete the acquisition by negotiation. Agency Report, Tab 10, Contracting Agency Findings and Determination; Tab 11, RFP amend. No. 3. This protest of the cancellation followed.

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. FAR § 14.404-1(a)(1). 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).

Overstreet argues that the revised government estimate was unreasonably low because it failed to include or understated various necessary elements of costs of this project in a manner inconsistent with applicable Corps regulations regarding the development of government estimates. As a result of these alleged cost understatements and omissions, Overstreet argues that the government estimate should be upwardly revised to a range of $3.9 million to $4.3 million. Overstreet further argues that since its bid was within 25 percent of a proper government estimate (i.e., $3.9 million to $4.3 million), it is entitled to award under 33 U.S.C. § 624 (1994), 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.

Citing Bean Dredging Corp. v. U. S., 19 Cl. Ct. 561 (1990), the protester asserts that under this statute if its price is within 25 percent of a fair and reasonable government estimate, the agency is mandated to award it, the low responsive bidder, the contract. Protester's Comments, Mar. 31, 2000, at 8-10.

In Atkinson Dredging Co., Inc.--Recon. B-250965.2, B-250967.2, July 19, 1993, 93-2 CPD ¶ 31 at 3-4, we found that, while 33 U.S.C. § 624 clearly prohibits the Corps from awarding a dredging contract to a bidder whose bid 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 where the agency does not believe the bid

price is fair and reasonable. We expressly discussed the court's holding in Bean and found that if the court held that the Corps could not reject bids within 25 percent of the government estimate as unreasonably high where 33 U.S.C. § 624 is applicable, this was not consistent with the plain language of the statute, which only limits the agency's ability to award contracts where all the bids received are not within 25 percent of the government estimate, and would infringe upon the agency's ability to reasonably exercise its discretion under FAR § 14.404-1(c)(6) in determining price reasonableness.

Overstreet responds that Atkinson did not consider the legislative history behind 33 U.S.C. § 624, which states:

> Section 2 clarifies the procedure for determining whether a contract bid on the civil works program of the Corps of Engineers is fair and reasonable. This section affects all civil works functions of the Corps of Engineers. In making such an estimate, the corps is to take into account labor and material costs, depreciation of plant, supervisory and over-head expenses, workmen's compensation, general liability insurance. State and local taxes, interest on capital, and such other expenses and charges as the Secretary determines to be appropriate. With the exception of State and local income taxes, these costs are presently included in corps estimates. To qualify, the lowest bid must be no more than 25 percent above this cost base.

Senate Report No. 95-722, at 3 (1978), reprinted in, 1978 U.S.C.C.A.N. 652, 654. This legislative history in no way contradicts the plain meaning of the statute, which only requires the rejection of bids if they exceed the government estimate by more than 25 percent and does not in any way limit an agency's ability to determine that a price is unreasonable, even if it is within 25 percent of the government estimate.

As noted, Overstreet contends that the government estimate should be within $3.9 million to $4.3 million. However, even though it was requested to do so, the protester has failed to include calculations that demonstrate how it arrived at these figures. Thus, we give little weight to this contention. Even if the government estimate is adjusted upward to $3.9 million or $4.3 million as asserted by the protester, Overstreet's bid is still 18 percent to 8.6 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 at 7.2 percent, we see no basis to object to the contracting officer's determination of price unreasonableness. See Atkinson Dredging Co. Inc.--Recon., supra, at 2; Building Maintenance Specialists, Inc., B-186441, Sept. 10, 1976, 76-2 CPD ¶ 233 at 4.

In any event, from our review of the protester's specific allegations challenging the revised government estimate and the agency's detailed responses, we cannot find the revised government estimate to be materially understated or developed in a manner inconsistent with applicable regulations. For example, the protester argued that the

subcontractor's overhead and profit are a cost to the prime contractor and were incorrectly omitted from the government estimate. Protester's Comments at 6. The agency agrees that the cost of the subcontractor's overhead and profit is part of the total cost to the prime contractor for the work performed, but notes that the subcontractors' quotes in the government estimate already contain the subcontractors' overhead and profit, as well as the direct cost features, and, therefore, accurately represents the total direct cost to the prime contractor for this subcontracted work. Agency's Supplemental Report at 4. We find the agency's explanation of this and the other challenged aspects of the government estimate to be reasonable and consistent with its regulations concerning the development of government estimates.

The protest is denied.

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of the United States