



GAO

Accountability * Integrity * Reliability

United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: First Enterprise

File: B-292967

Date: January 7, 2004

Sam Z. Gdanski, Esq., for the protester.

Kenneth B. MacKenzie, Esq., and Phillipa L. Anderson, Esq., Department of Veterans Affairs, for the agency.

Louis A. Chiarella, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Determination to cancel invitation for bids after bid opening is unobjectionable where the bids exceeded the funding allocated for the construction project, irrespective of any dispute concerning the validity of the government estimate.

DECISION

First Enterprise protests the cancellation after bid opening of invitation for bids (IFB) No. 600-249-03RT, issued by the Department of Veterans Affairs (VA) for the construction of a prosthetic and eye clinic center as part of the VA Greater Los Angeles Healthcare System, Los Angeles, California. First Enterprise, the bidder in line for award under the IFB, maintains that the agency had no compelling reason to cancel and convert the IFB to a negotiated procurement.

We deny the protest.

The solicitation, issued on August 6, 2003 as a Small Business Administration (SBA) 8(a) set-aside, contemplated the award of a fixed-price contract.¹ The IFB required

¹ Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2000), authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. These subcontracts may be awarded on a competitive or noncompetitive basis. See Federal Acquisition Regulation (FAR) § 19.800.

bidders to submit prices for all the required work (the “main bid item”), as well as prices for five deductive bid alternates. The construction project had approved funding in the amount of \$3,510,190.

At bid opening on September 4, the VA received bids from First Enterprise, Ace Engineering, Inc., DJM Construction Co., Inc., and Stronghold Engineering. The bid prices for the required work, including the deductive alternate items, were as follows:

	First Enterprise	Ace	DJM	Stronghold
Main Bid Item	\$3,884,495	\$3,592,994	\$4,100,000	\$3,997,127
Alternate Item #1	\$3,814,845	\$3,562,994	\$4,070,000	\$3,967,127
Alternate Item #2	\$3,708,985	\$3,557,994	\$4,060,000	\$3,955,127
Alternate Item #3	\$3,760,985	\$3,514,394	\$4,010,000	\$3,915,127
Alternate Item #4	\$3,752,345	\$3,484,394	\$3,930,000	\$3,895,127
Alternate Item #5	\$3,680,895	\$3,464,394	\$3,900,000	\$3,885,127

Agency Report (AR), Tab D, Abstract of Offers, Sept. 4, 2003.

The contracting officer reviewed the bids and determined that Ace was the apparent low bidder. The agency subsequently undertook steps to make award of Alternate Item #5 to Ace at a price of \$3,464,394. On September 15, Ace notified the contracting officer of a mistake in its bid and asked to withdraw the bid. By letter dated September 24, the agency permitted Ace to withdraw its bid.

The VA then decided to reject all remaining bids and to cancel the IFB because, among other reasons, all remaining bids exceeded the amount of funding available. The contracting officer also decided to complete the acquisition by negotiation, consistent with FAR § 14.404-1(f). AR, Tab E, Determination and Findings, at 1-2.

On September 23 the VA amended the solicitation, informed the remaining bidders that all the prices received were in excess of the available funding, and converted the IFB to a request for proposals. While the construction project requirements remained the same, the amended solicitation also included a sixth alternate deductive item, in order to maximize the potential for a contract award.

Three offerors, including First Enterprise and DJM, submitted proposals by the September 25 closing date. The offerors’ prices and the independent government estimate (IGE) were as follows:

	First Enterprise	DJM	Offeror 3	IGE
Main Bid Item	\$3,762,558	\$4,008,000	\$3,949,100	\$3,596,111
Alternate Item #1	\$3,727,271	\$3,982,000	\$3,919,100	\$3,566,111
Alternate Item #2	\$3,711,506	\$3,969,000	\$3,907,100	\$3,556,111
Alternate Item #3	\$3,666,666	\$3,921,000	\$3,867,100	\$3,513,111
Alternate Item #4	\$3,656,466	\$3,837,000	\$3,847,100	\$3,494,111
Alternate Item #5	\$3,613,986	\$3,796,000	\$3,827,100	\$3,471,111
Alternate Item #6	\$3,111,216	\$2,989,000	\$3,627,100	\$3,121,111

AR, Tab G, Abstract of Offers, Sept. 25, 2003.

The contracting officer subsequently decided to award Alternate Item #6 to DJM at the price of \$2,989,000. This protest followed.

First Enterprise's protest centers around the VA's decision to cancel the IFB and convert it to a negotiated procurement. Specifically, the protester argues that after permitting Ace to withdraw its bid, the agency should have made award to First Enterprise, the next lowest bidder. First Enterprise essentially contends that the VA did not have a reasonable basis to cancel the IFB, particularly since bidders' prices had already been disclosed. The VA responds that, after permitting Ace to withdraw its bid, all remaining bids exceeded the available funding, and thus it did not have sufficient funding to make award to the next lowest bidder.

Cancellation of a solicitation after bids have been opened and prices have been exposed is only permitted where a compelling reason exists to cancel. FAR § 14.404-1(a)(1); Robert Hall Assocs., Inc., B-261849, Oct. 25, 1995, 95-2 CPD ¶ 189 at 1; Michelle F. Evans, B-259165, Mar. 6, 1995, 95-1 CPD ¶ 139 at 3. An agency's determination that funds are not available for contract obligation is a sufficient reason to cancel a solicitation, Robert Hall Assocs., Inc., *supra*, as agencies cannot award contracts which exceed available funds. 31 U.S.C. § 1341(a)(1)(A) (2000); FAR § 32.702; DynaLantic Corp., B-274944.5, Aug. 25, 1997, 97-2 CPD ¶ 75 at 6. Additionally, it is not our role to question the unavailability of funds. The management of an agency's funds generally depends on the agency's judgment concerning which projects and activities should receive increased or reduced funding and a contracting agency has the right to cancel a solicitation when, as a result of its allocation determinations, sufficient funds are not available. Michelle F. Evans, *supra*; Kato/Intermountain Elec., A Joint Venture, B-245807, B-245925, Jan. 30, 1992, 92-1 CPD ¶ 129.

At a hearing that our Office conducted in this protest, the VA explained that the budget and the available funding for the prosthetic and eye clinic center project here were as follows:

Construction Cost:	\$3,218,781
Construction Contingency:	\$ 241,409
Impact Cost: ²	\$ 50,000
Total Construction Cost:	\$3,510,190
Design Cost:	\$ 406,394
Total Project Cost:	\$3,916,584

Hearing Transcript at 10:32-33; AR, Tab K, Minor Project Application, at 1; Tab P, 2003 Minor Operating Plan Spending. Consequently, after the agency permitted Ace to withdraw its bid, all the remaining bids, including the \$3,680,895 bid of First Enterprise for Alternate Item #5, exceeded the maximum amount of funding available for the construction project. Given the lack of adequate available funding, the VA clearly acted properly in rejecting all remaining bids after the withdrawal of Ace's bid and canceling the IFB.

First Enterprise does not dispute that, after Ace's withdrawal, all remaining bids exceeded the \$3,510,190 in available funding for the construction project here.³ Instead, the protester argues that the agency improperly failed to assess the validity of the underlying government estimates and that such failure cannot be excused by an assertion of a lack of funding. First Enterprise contends that if the IGE was erroneous and the available funding was premised on the inaccurate estimates, the VA had an affirmative duty to seek an increase in funding in order to make award under the IFB. We disagree.

A contracting agency has the right to cancel a solicitation when sufficient funds are not available regardless of any disputes concerning the validity of the IGE, National Projects, Inc., B-283887, Jan. 19, 2000, 2000 CPD ¶ 16 at 4; J. Morris & Assocs., Inc., B-256840, July 27, 1994, 94-2 CPD ¶ 47 at 2 n.1, as agencies cannot create obligations that exceed available funds. Further, the VA is precluded by law from obligating or expending funds in excess of \$4 million total for any medical facility project without express Congressional approval. See 38 U.S.C. §§ 8101 et seq. (2000). Since the VA previously had obligated \$366,228 for the design aspect of the project here, the

² Impact costs represent the incidental expenses of project construction, such as moving and relocation costs.

³ First Enterprise requests, however, that our Office assess costs against the VA as a sanction because of the agency's failure to act promptly to establish the meaning of the various agency budget and funding documents in advance of the hearing we conducted. Our Regulations do not specifically authorize costs as a sanction for delays in furnishing, or clarifying, documents. See H. Watt & Scott Gen. Contractors, Inc.—Request for Declaration of Entitlement to Costs, B-257776.3, Apr. 6, 1995, 95-1 CPD ¶ 183 at 3. Moreover, we do not think that the facts would merit such a sanction in any event.

contracting officer could not have made contract award to First Enterprise after the withdrawal of Ace's bid, even if it had sought to obtain additional funds. Accordingly, the VA's decision to cancel the IFB after determining that all bids not withdrawn exceeded available funding was proper.

To the extent that First Enterprise also contends that DJM's price for Alternative Item #6 was unreasonably low and that the agency should have considered whether the price reflected a lack of understanding of the solicitation requirements, the protest is without merit.⁴ An allegation that DJM submitted an unrealistically low offer provides no basis for protest because there is no prohibition against an agency accepting a below-cost offer on a fixed-price contract. M-Cubed Info. Sys., Inc., B-284445, B-284445.2, Apr. 19, 2000, 2000 CPD ¶ 74 at 8. While an agency may elect to perform a realism analysis in the award of a fixed-price contract, in order to assess an offeror's risk or to measure an offeror's understanding of the solicitation's requirements, it need not do so unless required by the solicitation, AST Envtl., Inc., B-291567, Dec. 31, 2002, 2002 CPD ¶ 225 at 2, which is not the case here.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ The discussion of this issue in the initial protest was limited to conclusory statements offered without support, and at a minimum should have more clearly articulated the basis of the protester's complaint on this point. See Protest at 3. A more detailed discussion of the protester's argument on this point was not provided until the protester's comments on the agency report, filed more than 10 days after this basis for protest was or should have been known. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2003). We need not decide whether the issue was timely raised, however, since, even if the initial protest is interpreted as adequately raising it, this basis for protest is clearly without merit.