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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-201687

DATE: May 5, 1981

MATTER OF: American Dredging Company

[Protest of Coast Guard Decision to Designate Solicitation as Small Business Set-Aside]

DIGEST:

Decision to amend solicitation to set aside procurement exclusively for small businesses on bid opening day is upheld where agency has shown set-aside determination was reasonable.

American Dredging Company (American), [a large business, protests the decision of the United States Coast Guard, Department of Transportation (Coast Guard), to designate^{an} advertised solicitation] No. DTCG42-81-B-00003 [as a small business set-aside.] The procurement is for maintenance dredging services for Coast Guard training center piers at Cape May, New Jersey.

[The solicitation, when issued] on November 17, 1980, [was not a small business set-aside. However, based on information which the contracting officer states became available in the 4 days prior to and including the bid opening date] December 22, 1980, [the contracting officer determined there was adequate competition to restrict the solicitation to small businesses.] At approximately 9 a.m. [on bid opening day] (bid opening was scheduled for 2 p.m.), [an amendment restricting the procurement to small businesses was issued.]

[Four bidders present prior to bid opening acknowledged the amendment.] One was Sea Harvest, Inc. (Sea Harvest), the lowest bidder of the five small business concerns which submitted bids; another was American, a large business, and the low bidder overall. [Because] Sea Harvest's [bid] of \$478,761 [was lower than the Government estimate] of \$574,000, [and only 10 percent higher than American's bid] of \$432,000, [the contracting officer determined the bid price was reasonable. The contract was awarded to Sea Harvest; however, performance has been held in abeyance pending our resolution of American's protest.]

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American asserts that:

(1) The contracting officer's decision to set-aside was not independently made; instead, it was coerced on bid opening day by Coast Guard officials in Washington, D.C., largely as a consequence of a protest from a small business against the original unrestricted procurement;

(2) Even if contention (1) has no merit, the set-aside decision was based on an erroneous interpretation of the applicable regulations and, thus, the contracting officer acted on the mistaken belief he had no discretion as to setting the procurement aside when in fact he did;

(3) Even if the decision to set aside the procurement was reasonable, the contracting officer's decision to restrict the procurement to small businesses on bid opening day, thereby suddenly disqualifying certain firms, was an abuse of discretion;

(4) The Coast Guard has violated its duty under statute and regulations to facilitate review by GAO by delaying the filing of the protest report and awarding the contract prior to the resolution of the protest.

For these reasons, American requests the award of the contract.

Based on the following, the protest is denied.

In recognition of the Government's legitimate socio-economic interests fostered through its procurements, we have upheld the propriety of canceling a solicitation after bid opening so that the procurement could be set aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), as amended by Public Law No. 95-507, § 202, 92 Stat. 1761, see A.R.&S. Enterprises, Inc., B-194622, June 18, 1979, 79-1 CPD 433. We have also allowed the setting aside of procurements for small businesses by amendment well after the solicitation issuance date and close to or even after proposal receipt date. See 53 Comp. Gen. 307 (1973); Gill Marketing, Inc., B-194414.3, March 24, 1980, 80-1 CPD

213; Ampex Corporation, et al., B-183739, November 14, 1975, 75-2 CPD 304. Although these latter three cases involved negotiated procurements, the rationale of those cases is equally applicable here. [In light of the statutory mandate that a fair proportion of procurement contracts be placed with small businesses, plus the absence of any regulatory requirement that a set-aside be made at any particular time, see Federal Procurement Regulations § 1-706.5 (1964 ed. amend. 192), [a set-aside determination is permissible after solicitation issuance if there is a reasonable basis for the determination at the time it is made.]

Responding in the above cases to allegations similar to those raised by American, we decided the matter on the reasonableness of the set-aside determination based on facts and circumstances existing at the time of the determination. [Since the determination] required by FPR § 1-706.5, [that is, a reasonable expectation that bids or proposals will be received from a sufficient number of responsible small business concerns so that the award will be made at a reasonable price, is basically a business judgment, we will sustain the determination absent a clear showing of abuse of discretion.] Otis Elevator Company, B-196540, May 6, 1980, 80-1 CPD 327.

Under this standard of review, [there is no basis to disturb the award since, in our view, the record adequately supports the set-aside decision.]

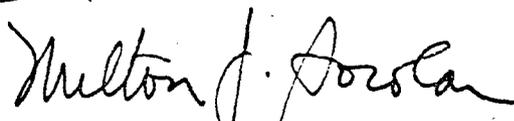
The contracting officer advises that the procurement was not restricted initially because prior maintenance dredging solicitations had resulted in few bids from small business firms. On December 18, 1980, a small business specialist from the Procurement Division, Coast Guard Headquarters (HQ) advised the contracting officer that Cottrell Engineering, Inc. (Cottrell), a small business, intended to file a protest against the failure to set-aside the solicitation. The contracting officer was apparently on sick leave Friday, December 19, 1980, and no action was taken concerning the procurement. On bid opening day, Monday, December 22, the contracting officer called HQ and was advised that a Cottrell protest had been filed. The contracting officer noted that one bid had already been received by a firm which had represented itself as a small business when it requested a bid package. Furthermore, at 8:30 a.m. on bid opening day, an employee of another firm known to the contracting officer to be a small business delivered a sealed bid to the bid box.

At that time, the contracting officer telephoned a Coast Guard attorney, Chief Counsel's Office, Washington, D.C. who advised that, based upon GAO decisions, two or more bids constituted adequate competition, and that designation of the procurement as a total small business set-aside was recommended. (This legal opinion was correct. See Fermont Division, et al., B-195431, June 23, 1980, 80-1 CPD 438.) The attorney also pointed out that the bidder's mailing list contained a number of apparent small businesses. The contracting officer states that, after some discussion, the decision was made to set-aside.

On the basis of this, and the receipt of five bids from small businesses, we do not find the contracting officer's decision to set-aside to have been unreasonable. See Otis Elevator Company, B-195831, November 8, 1979, 79-2 CPD 341. Moreover, although the protester has challenged the contracting officer's determination based on alleged coercion, lack of independent judgment, and mistaken view that a set-aside was mandatory, all of which have been refuted by the agency, [the protester has not rebutted the reasonableness of the contracting officer's expectation that a sufficient number of small businesses would bid, which eventually was proven by the competition. Although the contracting officer did not initiate the set-aside until the bid opening day, the record indicates that the action was taken in good faith and only after the contracting officer was convinced that adequate small business competition existed.]

Because of our conclusion, and the fact that the Coast Guard suspended performance of the contract pending our decision, [we will not consider American's contentions concerning the Coast Guard's delay in filing the protest report with this Office and making the award to Sea Harvest based on urgency.

The protest is denied.]


Acting Comptroller General
of the United States