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DECISION

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

FILE: B-202698

DATE: September 21, 1981

MATTER OF: Saratoga Industries

DIGEST:

Contracting officer's withdrawal of small business set-aside without notifying Small Business Administration (SBA) liaison representative, thereby denying SBA of its right to appeal withdrawal to head of procuring agency, was contrary to regulation as well as to purpose and intent of Small Business Act. GAO recommends that matter be referred immediately to SBA representative for possible appeal of withdrawal to agency head.

Saratoga Industries protests any award to Rodale Electronics Corporation under request for proposals (RFP) No. N00383-80-R-2825, issued by the Navy Aviation Supply Office (Navy), Philadelphia, Pennsylvania.

The RFP, originally issued as a total small business set-aside, solicited offers to provide quantities of "module switches." Saratoga argues that the Navy improperly determined its price to be unreasonable and then failed to notify the Small Business Administration (SBA) representative of the decision to withdraw the set-aside and negotiate on an unrestricted basis. Saratoga believes that the solicitation should remain a total small business set-aside and, in addition, that it should then be awarded the contract as the only qualified small business offeror.

We conclude that the Navy was required to notify the SBA representative of its decision to withdraw the set-aside.

The RFP was issued on July 3, 1980, and on September 2, 1980, after evaluating the two offers received, the contracting officer sent a letter to

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Saratoga notifying that firm of his intention to award the contract to Rodale. Saratoga immediately challenged Rodale's small business status. This matter was then referred to the New York Regional Office of the SBA. On November 19, 1980, the SBA ruled that, since Rodale had failed to provide information regarding its relationship with Carl Marks and Company, Inc., it would assume that this information would demonstrate that Rodale did not meet the procurement's size standard (750 employees or less). SBA determined, therefore, that Rodale was "other than small business for the procurement in question" and for "all future government procurements with a similar size standard." We understand that Rodale did not appeal this decision to SBA's Size Appeals Board.

As a result of the SBA determination, Saratoga's proposal was the only one left for consideration. The contracting officer then compared Saratoga's price with Rodale's price, as well as with the purchase history of the item. From this analysis, the contracting officer concluded that Saratoga's proposal was unreasonable as to price. He then issued amendment No. 0001 on February 26, 1981, which withdrew the set-aside, established a new closing date of March 19, 1981, and solicited best and final offers from both Saratoga and Rodale. Saratoga first protested this action to the contracting agency and then on April 1, 1981, filed a protest with our Office.

In the meantime, Rodale furnished SBA's New York Regional Office with information concerning its relationship with Carl Marks and Company, Inc. Based on this information, the SBA determined that, for future procurements, Rodale could certify itself as a small business under a size standard of 750 employees or less.

As to the present procurement, the record indicates that both offerors submitted a best and final offer. The Navy, however, has made no award pending the outcome of this protest.

The Navy admits that the contracting officer inadvertently failed to notify the SBA representative of the decision to withdraw the set-aside. In the Navy's opinion, however, Saratoga was not prejudiced by this omission because Saratoga itself "apparently" notified the SBA representative almost immediately after it learned of the withdrawal. The Navy argues that this constituted actual notice of the withdrawal and enabled the SBA representative to take whatever action deemed appropriate.

In reply, Saratoga states:

"The contracting officer seeks to condone [this omission] on the theory that the SBA knew the facts and impliedly consented. Such assumption is completely contrary to the facts. Ms. Ginsberg [of the SBA] will verify that the SBA files show no action whatsoever in the subject case."

There is nothing in the record to show that the SBA has formally consented to the withdrawal of the set-aside here. Moreover, contrary to the Navy's view, we do not consider that SBA's consent to the withdrawal may be inferred in the circumstances especially in view of Saratoga's above reply. Consequently, we believe that the Navy is now required to give the SBA representative written notice of the withdrawal.

The Small Business Act, 15 U.S.C. § 631 et seq. (1976), as amended, reflects a national policy of furthering the interests of small business concerns and in awarding a fair proportion of Government contracts to such concerns. The SBA is charged with promoting policies and taking actions to assure that small businesses received a fair share of Government procurements. To carry out this responsibility, the SBA assigns representatives to procurement activities. These representatives are expected to screen agency decisions not to set aside procurements for small business and to process appeals to the agency head if SBA does not concur with negative decisions. See generally DAR § 1-706.3 (DAC#76-25, October 31, 1980).

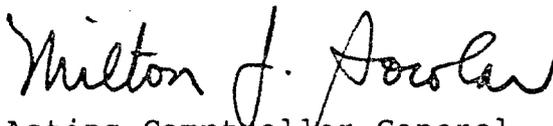
Thus, DAR § 1-706.3(a), above, provides that the contracting officer will give written notice of the withdrawal of a small business set-aside to the SBA representative. This allows the SBA representative to appeal the withdrawal if the representative believes it is unjustified.

As indicated above, the Navy did not inform the SBA representative of the decision to withdraw the set-aside. In this circumstance, the SBA is denied its right of appeal contrary to the intent and purpose of the Small Business Act and the implementing regulations. See Comprehensive Health Services, Inc., 58 Comp. Gen. 658 (1979), 79-2 CPD 37. Failure to give proper notice is not a mere procedural oversight as the Navy implies.

We recommend, therefore, that the contracting officer immediately refer the case to the SBA representative so that the representative may consider whether an appeal is appropriate here. If, as a result of any SBA appeal, the set-aside is reinstated, award should be made to Saratoga, if otherwise proper, since, under the facts of record, it is clear that Rodale may not be considered to be a small business for this procurement.

By separate letter of today, we are notifying the Secretary of the Navy of our recommendation.

The protest is sustained.



Acting Comptroller General
of the United States