

DECISION

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

B-217399

FILE:**DATE:** September 20, 1985

Advance Machine Company

MATTER OF:**DIGEST:**

1. Protest against small business set-aside of multiple award Federal Supply Schedule procurement for pressure cleaners is denied where the record shows that the contracting officer reasonably expected receipt of sufficient offers from small business concerns at reasonable prices.
2. The dominance by a small business of sales of a category of items under prior Federal Supply Schedule (FSS) multiple award contracts does not, in itself, affect the propriety of a determination to set aside that item for small business concerns under next FSS procurement where sufficient competition by small business concerns is reasonably anticipated by the agency.
3. Small business size status is for determination by Small Business Administration and not by GAO.
4. Contention that a small business set-aside is improper because it will injure a large business' small business distributors is without merit.

Advance Machine Company, a large business, protests the total small business set-aside of two items on multiple award Federal Supply Schedule (FSS) contract solicitation No. 7PM-52513/V5/7FC issued by Region 7 of the General Services Administration (GSA) in Fort Worth, Texas. The items involved are special item numbers (SINs) 239-6, hot/cold water pressure cleaners, and 239-7, hot high-pressure cleaners, for use in maintenance and repair shops.

We deny the protest.

Advance alleges that the set-aside for SINS 239-6 and 239-7 is improper because of lack of adequate competition as shown by prior sales figures for those SINS. In particular, Advance states that sales figures for SIN 239-7 through December 26, 1984, in Region 7 under the GSA contract in effect for the period April 1, 1984 to March 11, 1985, show that one small business concern, Hotsy Corporation, has so dominated sales that the agency contracting officer could not have had a "reasonable expectation" that adequate competition will be obtained under the new solicitation. Also, Advance asserts that the determination to set aside SIN 239-7 is inconsistent with the current contract, for which the competition was unrestricted. Advance also objects to the set-aside on the basis that a similar large business in a different industry, but which uses equipment similar to its own, is permitted by GSA to compete on another procurement. Lastly, Advance states that the effect of the set-aside is to favor 17 small business manufacturers and discriminate against the 300 plus small businesses who serve as Advance's distributors.

Under the Federal Acquisition Regulation (FAR), a set-aside should be made when the contracting officer determines it to be in the interest of assuring that a fair proportion of government contracts is placed with small business concerns. 48 C.F.R. § 19.502-1 (1984). In order to make a total set-aside, the contracting officer must determine that there is a reasonable expectation that offers will be received from a least two responsible small business concerns and awards will be made at reasonable prices. FAR, 48 C.F.R. § 19.502-2.

A determination as to whether adequate competition may reasonably be expected is basically a business judgment within the broad discretion of the contracting officer. We will sustain the determination by the contracting officer absent a clear showing of abuse of discretion. Belfort Instrument Co., B-202892, July 15, 1981, 81-2 C.P.D. ¶ 38.

GSA reports that for the contract period April 1, 1984 to March 31, 1985, SIN 239-6 was set aside for small

business concerns and that 12 contracts were awarded to small business manufacturers at reasonable prices. GSA further advises that although SIN 239-7 was not set aside for small business concerns under the current contract, 9 of the 11 contracts awarded for that class of items were to small business manufacturers. Accordingly, GSA asserts that the contracting officer had a reasonable expectation that a sufficient number of small business firms would submit offers in response to the current solicitation. GSA indicates that more than a dozen offers from small businesses have been received for each of the two SINs--239-6 and 239-7--under the protested solicitation.

Special Item No. 239-6

Advance has pointed to the sales figures for SIN 239-6 in prior years in support of its allegation that adequate competition for that item does not exist. Advance states that in 1981 it received sales information from GSA Region 7 which showed that sales for SIN 239-6 totaled \$181,610 with five contractors above \$15,000 in sales, seven contractors below that figure, and two with no sales. In 1983 Advance apparently received sales figures which showed that the total sales for SIN 239-6 were in the amount of \$84,984, that the highest sales for SIN 239-6 by any concern was in the amount of \$14,549, and that five of the 16 contractors had not made any sales.

We fail to see how these figures militate against a set-aside here. The sales data indicate that in prior years there were not significant sales under the schedule contracts for SIN 239-6 for any one vendor; they do not show the GSA erred in anticipating adequate competition for this year's requirements. As stated above, during the current contract period 12 small businesses received contracts for SIN 239-6. Thus, we believe the record supports GSA's decision to set aside SIN 239-6.

Special Item No. 239-7

Advance contends that the sales statistics for SIN 239-7 under the current contracts do not support the requirement for "adequate competition" because Hotsy, a small business, dominated sales for that SIN, receiving approximately 80 percent of total sales dollars. Specifically, the sales data provided Advance by GSA shows that

of \$125,162 in sales under SIN 239-7, Hotsy's sales accounted for \$103,724, while three other concerns, including Advance, received sales for SIN 239-7 under the current contract in the amount of \$3,933, \$7,977 and \$9,528 (Advance's sales). Advance further states that GSA advised it that in 1983 total sales for SIN 239-7 were \$173,126, of which Hotsy's sales were \$171,779, and that sales for one other contractor were in the amount of \$1,347. Advance further states that 2 years ago it furnished similar evidence to GSA Region 7 regarding Hotsy's dominance of sales under SIN 239-7 which resulted in the contracting officer's decision to issue an unrestricted solicitation for SIN 239-7 for the contract which expired March 31, 1985. Advance contends that to set aside the new procurement for SIN 239-7 notwithstanding Hotsy's dominance in dollar amount of sales would be inconsistent with prior GSA policy as evidenced by the current contract under which SIN 239-7 was not set aside.

We do not believe that Hotsy's dominance of sales under SIN 239-7 is by itself sufficient to establish that the contracting officer abused his discretion in determining that adequate competition would be obtained.

From the record before us, it appears that the majority of orders for hot high-pressure cleaners are being placed with Hotsy. What is not apparent is why this is so. The protester, who bears the burden of proof, has provided no explanation for this situation: we do not know whether it is attributable to Hotsy's prices, the capabilities of its equipment, or both.

We have found the set-aside of FSS multiple award contracts for a broad category of instruments to be improper where only one small business concern could supply top-of-the-line models or their components and therefore had received the "lion's share," in dollar terms, of the sales of those instruments under a previous year's set-aside. DISA Electronics, 62 Comp. Gen. 271 (1983), 83-1 C.P.D. ¶ 306. In affirming that decision, we stated that it was:

"not intended to require GSA to conduct a detailed and costly review of each item solicited under every small business set-aside under the FSS to determine if competition

exists. This decision is applicable only to the situation where it can be readily determined prior to establishing a small business set-aside or, as here, after issuance of a solicitation, that only one small business supplier can produce the most sophisticated, top-of-the-line product."

The General Services Administration--Reconsideration, B-206798.2, May 23, 1983, 83-1 C.P.D. ¶ 545. In the absence of a showing by Advance that Hotsy's dominance of sales of the equipment included within SIN 239-7 is, as in DISA, supra, attributable to a unique capability on Hotsy's part to fulfill the government's needs, we cannot say that the contracting officer abused his discretion in establishing the set-aside. In this regard, the fact that the procurement was not set aside the prior year does not preclude a set-aside determination in a subsequent solicitation for the same product. Where the contracting officer has properly determined, in part based on the competition for the prior procurement for that item, that there is a reasonable expectation of adequate competition by small business concerns and that award will be made at reasonable prices, the set-aside is proper. See Otis Elevator Co., B-196540, May 6, 1980, 80-1 C.P.D. ¶ 327.

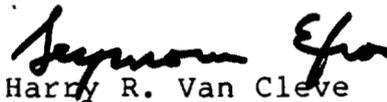
Advance next contends that some small businesses should not be eligible for award under the small business set-aside for SIN 239-7 since they have completely dominated not only sales under the recent GSA contract, but also the commercial marketplace in sales of hot water pressure cleaners--i.e., that they do not qualify as small business concerns. Under 15 U.S.C. § 637(b)(6) (1982), the Small Business Administration has conclusive authority to determine matters of small business size status for the purpose of federal procurements. Thus, our Office does not consider size status protests. Impulse Enterprise, B-215597, July 9, 1984, 84-2 C.P.D. ¶ 29. The protest is dismissed as to this issue.

Advance also has objected to the set-aside for SINS 239-6 and 239-7 on the basis that a similar large company in a different industry producing what the protester asserts is similar equipment (lawn and garden equipment) has been able to compete for another GSA procurement. The protester believes GSA is treating two similar industries inconsistently in setting aside for small business concerns

the procurement from one but not the other. The decision as to whether a particular procurement should be set aside is one within the discretion of the contracting activity. Interior Steel Equipment Co., B-212253, Nov. 14, 1983, 83-2 C.P.D. ¶ 556. Thus, the decision not to set aside a procurement for similar equipment would not affect the propriety of the instant set-aside.

Advance's final assertion is that the set-aside for SINS 239-6 and 239-7 is improper because it discriminates against its numerous small business distributors. We have held that such a claim is without legal merit. See Datametrics, Dresser Industries, Inc., et al., B-210520, et al., July 26, 1983, 83-2 C.P.D. ¶ 129 and Bell & Howell; Topper Mfg. Corp., 61 Comp. Gen. 595 (1982), 82-2 C.P.D. ¶ 224.

The protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel