

DECISION

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

McConnell
24623

FILE: B-206798

DATE: March 25, 1983

MATTER OF: DISA Electronics

DIGEST:

A determination to set aside for small businesses Federal Supply Service (FSS) multiple award contracts for a category of broadly-described instruments, solely on the basis that an adequate number of small businesses will submit offers, is improper, where the evidence available to the contracting officer at the time the determination is made suggests that only one small business firm can supply a portion of the models and that firm has received the large majority in dollar terms of FSS sales of those particular instruments under a previous FSS set-aside.

DISA Electronics, a large business, protests the General Services Administration's (GSA) determination to set aside for small businesses 100 percent of the multiple award contracts for velocimeters (an instrument that measures the velocity of gas and liquid flows) on Federal Supply Schedule (FSS) solicitation No. FCGS-H-36399-N-3-19-82. DISA alleges that the set-aside is improper because there is actually only one small business capable of supplying the most sophisticated models of velocimeters.

We sustain the protest.

The particular FSS under which GSA sought these contracts is nonmandatory upon Government agencies except GSA; that is, agencies are not required to purchase the items listed on that schedule from that schedule. See 41 C.F.R. § 101-26.401-5(a)(1981). GSA set aside these contracts for velocimeters and velocimeter components in 1981 on the basis of results of the previous year's competition, in which five small businesses and DISA bid on and received contracts to supply velocimeters. During 1981, GSA awarded FSS contracts to three small businesses. In 1982, GSA continued the set-aside, during which the

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agency again awarded contracts to three small businesses. For the 1983 FSS, the schedule with which we are concerned here, GSA received offers from four small businesses.

DISA contends that GSA's set-aside determination did not comply with applicable regulations, which require that those determinations be based on "a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible concerns * * * so that awards will be made at reasonable prices." Federal Procurement Regulations (FPR) § 1-1.706-5(a) (1964 ed.). Since only one small business, TSI Incorporated, produces the most technically sophisticated and expensive velocimeters, DISA argues, the contracting officer had an obligation to look beyond the number of small businesses participating and establish whether competition existed among them. The effect of the set-aside, the firm asserts, is to give TSI a noncompetitive sole-source contract to supply the top-of-the-line models. This in turn, DISA continues, encourages TSI to charge unreasonable prices for those models. DISA buttresses these assertions by noting that TSI's reported Government sales of velocimeters during the first year of the set-aside amounted to 88 percent of the total sales of velocimeters reported by the three small businesses then on the FSS. Those statistics, the firm believes, indicate that the purchase of the sophisticated models, which only TSI can supply, probably accounts for 75 percent of all FSS sales of velocimeters. Thus, DISA concludes that the set-aside was improper.

GSA asserts that its set-aside determination was reasonable. In this regard, GSA notes that its initial set-aside determination in 1981 was based on the fact that the five small business contractors on the schedule in 1980 accounted for 85 percent of the dollars for velocimeter sales reported by those FSS contractors during that year. For the first two years of the set-aside, GSA states, three small businesses received contracts, which was sufficient small business participation to ensure competition and justify the set-aside. Under the present solicitation, GSA continues, four small businesses sought contracts and those small businesses together offered a full range of velocimeters. Since the purpose of the FSS is to make available to using agencies a wide range of functionally similar products, GSA argues, a set-aside is proper where that purpose may still be accomplished and there is sufficient participation from small businesses.

A contracting officer's determination to set aside a particular procurement exclusively for small businesses is basically a business judgment that this Office will sustain absent a clear showing of abuse of discretion. U.S. Divers Company, B-192867, February 26, 1979, 79-1 CPD 132. In making his determination, a contracting officer may rely in most instances on information indicating that small businesses have experience in producing items that are the same or similar to those requested by the solicitation. Gill Marketing Co., Inc., B-194414.3, March 24, 1980, 80-1 CPD 213. Generally, there is no legal requirement that a contracting officer, when setting aside items on the FSS, perform an in-depth evaluation of the quality of equipment available from small businesses or of each individual agency's needs. Id.

The central question DISA raises is whether a set-aside of FSS multiple award contracts for velocimeters was improper where only one small business firm could supply top-of-the-line models or their component parts and that firm had received, in dollar terms, the "lion's share" of the velocimeter sales under a previous year's set-aside. We conclude that, under those circumstances, the contracting officer was required to consider those factors, as well as the number of small businesses that would submit offers, in determining that the total set-aside was appropriate.

The solicitation in question requested offers in the form of catalog and published price lists along with discounts from the published prices for a variety of instrumentation and accessories. The item in question here--designated FSC class 6655, Special Item 66-273--was described, as were other items in the solicitation, only by the broad item description, "velocimeters and directly related accessories," instead of by detailed specifications. Thus, the solicitation did not differentiate between the degrees of sophistication of instruments falling within the broad category of instruments known as "velocimeters."

We have recognized this as a legitimate means of soliciting FSS multiple award contracts since the purpose of the broad item description is only to identify as closely as practicable a wide range of comparable

items in order to inform using agencies generally of the related items contractors are able to supply. Thus, considering this basic purpose of these solicitations, it follows, under most circumstances, that the contracting officer's determination respecting the availability of adequate small business competition may be based on the broad item description, rather than on any particular item that falls within the broader category.

Where, however, only one small firm is able to supply a portion of the models of the item broadly described under previous set-asides, we believe that the total set-aside of the broad category of items does not promote effectively the set-aside's purpose of encouraging a variety of small businesses to participate in Government procurements. There is no disagreement here that there are an adequate number of small businesses able to supply the broad category of instruments described as "velocimeters." In addition, we do not dispute that the contracting officer had a reasonable basis for his initial set-aside determination in 1981, after five small businesses had received 85 percent of the velocimeter sales during the previous, non-set-aside year. However, where the apparent absence of competition for a substantial portion of the item is brought to the attention of the agency, we believe that the contracting officer must obtain the data necessary to support any further set-aside. Since the record here does not indicate that the contracting officer considered the previous years' sales information, we conclude that the set-aside of the broad category of instruments described as "velocimeters," based merely on the number of small businesses expected to submit offers, was improper.

Therefore, we are recommending in a letter to the Administrator of GSA that, for the 1984 FSS, GSA obtain data specifying the types of velocimeters or velocimeter components purchased by the Government under previous FSS set-asides and, if that data reveals that there is in fact no reasonable expectation of competition for particular types of velocimeters, that the 1984 FSS contracts for those particular velocimeters not be set aside.

The protest is sustained.

for 
Comptroller General
of the United States