

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

FILE: B-186526

DATE: September 7, 1976

MATTER OF: Wyle Laboratories

98076

DIGEST:

1. Whether procedural rules adopted by Small Business Administration (SBA) were properly applied to SBA size determination is for determination by SBA, not this Office, since, by law, conclusive authority over size determination is in SBA. Alleged failure to apply correct rules should have been appealed to SBA Size Appeals Board rather than protested to GAO.
2. Total small business set-aside is appropriate where contracting officer did not abuse discretion in determining that reasonable expectation of adequate competition and reasonable price existed, notwithstanding that only one bid was received.

Wyle Laboratories (Wyle) protests any award under IFB 9-BB53-29-6-69B, issued by the National Aeronautics and Space Administration (NASA) Johnson Space Center for 11 acoustic noise generators.

Essentially, Wyle protests the setting aside of this procurement solely for small business concerns and questions the size status of the successful bidder. While the protester initially raised other objections generally related to alleged infringement of its patent, these objections have been withdrawn.

Wyle contends that the small business set-aside was improper under NASA PR § 1-706.5. This regulation provides:

"(a) * * * the entire amount of an individual procurement or class of procurements * * * shall be set-aside for exclusive small business participation * * * where there is reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that award will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists * * *. While the past procurement history of the item or similar items is important, it is not the only controlling factor which should be considered in determining whether a reasonable expectation exists."

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It is the protester's view that NASA, in determining to set-aside this procurement, failed to consider the past procurement history for this item and did not have a reasonable expectation of obtaining bids from a sufficient number of responsible small business concerns so that award would be made at a reasonable price. It appears from the report furnished our Office by NASA, that the firms initially solicited were taken from the Johnson Space Center commodity source list, under the categories "noise generators" and "acoustics." The category "noise generators" listed 20 firms, of which 13 were classified as small businesses. There were 26 small businesses included under the designation "acoustics." A total of 11 firms were identified as potential bidders and were provided the solicitation. Additionally, we are advised that the Small Business Specialist assigned to this procurement had contacted several of the small businesses solicited, and had received indications that they would be interested in bidding.

In this connection, the protester states that it conducted a phone survey of the firms on NASA's procurement source list and with the exception of the only bidder none had the capability to provide the required item. Notwithstanding the results of the protester's survey, we find no basis for concluding that NASA's reliance on its commodity source lists was unreasonable because the quoted regulation provides that past procurement history is not the only controlling factor for consideration. Moreover, we are aware of no legal basis for requiring procuring activities to perform in-depth surveys prior to initiating a small business set-aside. The fact that only one bid was received is not dispositive of the issue presented. A total small business set-aside is appropriate where, as here, the contracting officer does not abuse his discretion in determining that there was a reasonable expectation of adequate competition to insure reasonable prices. While this solicitation specified Wyle's Airstream Model WAS 3000, or equal, this fact does not justify a refusal to make a small business set-aside. NASA PR § 1.706-1(d)(vi). We have noted that a set-aside determination is to be judged on the basis of the facts and circumstances which existed at the time of the decision, not in view of facts that subsequently come to light. DeWitt Transfer and Storage Co., B-186235, March 26, 1975, 75-1 CPD 180. In any event, NASA advises us that the only bid received is actually lower in price than the protester's published catalogue price for the brand name item and we therefore find no basis for questioning the reasonableness of the award price.

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Wyle also argues that the SBA's determination regarding the successful bidder was improper for several reasons. It contends that an erroneous Standard Industrial Classification (SIC) Code was used to establish the applicable size criterion; that the determination was processed by the wrong SBA regional office; and that the determination was based on evidence which post-dates issuance of the solicitation. Generally, absent a prima facie showing of fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith, the size status of a bidder is not for consideration by this Office, because conclusive authority over such questions is vested by statute in the SBA. Zac Smith and Company, Inc. B-183843, November 4, 1975, 75-2 CPD 198; Case, Inc., B-185422, January 29, 1976, 76-1 CPD 63. The appropriate procedures for filing a size protest and any subsequent appeals are provided in the rules adopted by the SBA, to govern its proceedings in such cases. See 13 CFR § 121.3 (1976). We understand that this matter was not appealed to the SBA Size Appeals Board as provided in the cited regulation. We think this should have been appealed to that Board rather than protested to this Office.

Accordingly, Wyle's protest is denied.


Acting Comptroller General
of the United States