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Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Tumpane Services Corporation and Phillips National, Inc.

**File:** B-242788.3; B-242788.4

**Date:** June 10, 1991

Ralph L. Kissick, Esq., Zuckert, Scoutt & Rasenberg, and James P. Tumpane, for Tumpane Services Corp., and Anthony J. D. Contri, Esq., Civerolo, Hansen & Wolf, P.A., and M.W. Phillips, for Phillips National, Inc., the protesters. Spencer Kurihara, for Society Painters, Inc.; Howard Perry, for State Janitorial Services, Inc.; and Timothy H. Power, Esq., for Geronimo Service Co., interested parties. Paul M. Fisher, Esq., Department of the Navy, for the agency. Anne B. Perry, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protests are denied where the issue of whether a small disadvantaged business set-aside conflicts with the Small Business Competitive Demonstration Program Act of 1988 recently was considered and resolved by our Office and no useful purpose would be served by revisiting the issue.
2. Agency's decision to set aside procurement for small disadvantaged business (SDB) concerns was proper where contracting officer determined that there was a reasonable expectation that offers would be obtained from at least two responsible SDB firms at prices which will not exceed the fair market price by more than 10 percent.

### DECISION

Tumpane Services Corporation and Phillips National, Inc. protest the decision by the Department of the Navy to set aside for small disadvantaged business (SDB) concerns invitation for bids (IFB) No. N62755-90-B-2914, for maintenance work on change-of-occupancy of military family housing at Bellows Air Force Station and Kaneohe Marine Corps Air Station, Oahu, Hawaii. Tumpane and Phillips principally

contend that the SDB set-aside conflicts with the requirements of the Small Business Competitiveness Demonstration Program Act of 1988 (the SBCDP Act), 15 U.S.C. § 644 note (1988).

We deny the protests.

The issue raised in these protests is identical to that which we resolved in Sletager, Inc., B-241149, Jan. 25, 1991, 91-1 CPD ¶ 74, which involved the Department of the Army's authority to issue a total SDB set-aside where the procurement was subject to the SBCDP Act. The protesters here rely on the same arguments which we considered in the previous decision, in which we held that the SBCDP Act provides, on a test basis, for the issuance of solicitations on an unrestricted basis in four designated industry groups where agency's small business participation goals have been met, but specifically exempts procurements set aside for SDB concerns pursuant to section 1207 of the Defense Authorization Act of 1987, 10 U.S.C. § 2301 note (1988).

Since this issue raised by Tumpane and Phillips is identical to the issue which we recently resolved in our prior decision, we deny this aspect of the protests, since no useful purpose would be served by revisiting the arguments.<sup>1/</sup>

Phillips also argues that the SDB set-aside is improper because the contacting officer had no basis to conclude that at least two responsible SDB concerns would submit offers at prices not exceeding the fair market price by 10 percent.

The regulations implementing the Department of Defense (DOD) SDB program, set forth in the Department of Defense Federal Acquisition Regulation Supplement (DFARS), part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The regulations also provide that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12-month period a responsive offer from at least one SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services, and (2) the contracting officer has reason to know (from the activity's relevant solicitation

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<sup>1/</sup> We have examined this issue and reached the same conclusion on more than one occasion. Alpha Bldg. Corp., B-242576, Apr. 23, 1991, 91-1 CPD ¶ \_\_\_\_; Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.

mailing list, response to presolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

We review a decision to conduct a procurement as an SDB set-aside to determine if the contracting officer has a reasonable basis to restrict competition. John Bowman, Inc., B-239543, Aug. 28, 1990, 90-2 CPD ¶ 165. Here, the contracting officer examined the abstract of offers for the previous change of occupancy contract, which showed that one SDB concern did submit a bid within 10 percent of the contract price. The contracting officer also reviewed the requests received for the solicitation package, which included four from SDB concerns. The contracting officer contacted these firms and was apprised that they intended to submit bids. Contract administrators evaluating the work of these SDB concerns on other contracts provided favorable evaluations. Based on this information, the contracting officer reasonably concluded that offers would be obtained from at least two responsible SDB concerns at prices not exceeding fair market price by more than 10 percent.

Tumpane also contends that the offers actually received from SDBs demonstrate that the set-aside was improper. Tumpane argues that the offers from SDBs must be rejected because, according to its calculations, they have not complied with the Davis-Bacon Act, 40 U.S.C. § 276(a) et seq., in computing their wage rates. Since Tumpane is not an SDB concern, however, it is not an interested party to challenge any award under this solicitation. 4 C.F.R. § 21.0(a) (1991); see, e.g., ARO Corp., B-231438, July 22, 1988, 88-2 CPD ¶ 74. Further, since the basis for setting a procurement aside for SDB's is the reasonable expectation that offers will be obtained from at least two responsible SDB's and that award will be made at a price not exceeding 10 percent of the fair market price, the number of responsible SDB firms that actually submit offers is not relevant to the propriety of the set-aside. See Vollrath Co., B-230029, Jan. 29, 1988, 88-1 CPD ¶ 99.

The protest is dismissed in part and denied in part.

  
James F. Hinchman  
General Counsel