

DECISION



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

Draws

29174

FILE: B-214153

DATE: August 24, 1984

MATTER OF: Flagg Integrated Systems Technology

DIGEST:

1. Cancellation of small business set-aside and resolicitation on an unrestricted basis was not improper where contracting officer reasonably determined that the only firm eligible under the original solicitation submitted a price which was unreasonable and unfair.
2. In considering price reasonableness for a small business set-aside, the contracting officer may look at procurement history, government estimates, current market conditions, and any other relevant factors that have been revealed by the bidding, including the price submitted by an otherwise ineligible large business.
3. Under applicable regulations, a small business set-aside may be withdrawn when it is determined that award under it would be detrimental to the public interest.
4. GAO will not consider a protest when it was not filed within 10 days of initial adverse agency action on protest filed with agency. If improprieties that were obvious on the face of the solicitation are alleged, protest must be filed before the closing date for receipt of initial proposals.
5. GAO generally will not review protest questioning the capability of a first-time offeror of equipment, since this is in effect a challenge to the procuring agency's affirmative determination of responsibility.

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Flagg Integrated Systems Technology protests the cancellation of a request for proposals issued by the Naval Regional Contracting Center of Long Beach, California, for electric harness assemblies to be used in support of the HARM missile. We deny the protest in part and dismiss it in part.

In response to solicitation No. N00123-83-R-0807, a 100 percent small business set-aside, the Navy received offers from one small business, Flagg, and two large businesses, La Barge Electronics and Joslyn Defense Systems, Inc. Because Joslyn's price was 12 percent below that of Flagg, the Navy adjudged the latter unreasonable and unfair. After unsuccessfully attempting to negotiate a price reduction with the protester, the Navy canceled the set-aside, resolicited on an unrestricted basis, and awarded an \$82,477 contract to Joslyn.

Flagg contends that its offer of \$101,925 was neither unreasonable nor unfair. In support of this contention, the protester notes, first, that the Navy had twice before purchased similar harnesses at higher prices, second, that the government estimate exceeded Flagg's price, and finally, that the other large business quote submitted in response to the original solicitation was higher than its own.

A determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such a determination unless it is clearly unreasonable or there is a showing of possible fraud or bad faith on the part of the contracting official. Warren/Dielectric Communications, B-212609, Jan. 26, 1984, 84-1 CPD ¶ 121. In making the determination, a contracting officer may indeed consider government estimates and the procurement history for the supplies or services in question. However, he may also consider current market conditions or any other relevant factors, including those which have been revealed by the bidding. See International Alliance of Sports Officials, 63 Comp. Gen. 162 (1984), 84-1 CPD ¶ 63. This includes consideration of the price submitted by an otherwise ineligible large business. Browning-Ferris Industries, B-209234, March 29, 1983, 83-1 CPD ¶ 323.

Here, the courtesy bid indicated that the Navy probably would be able to procure the needed equipment at a price 12 percent less than that of the only eligible offeror under the set-aside. We have found a small business concern's price that was 7.2 percent higher than one used for comparison purposes to be unreasonable. Saratoga Industries--Reconsideration, B-202698.2, Jan. 2, 1982, 82-1 CPD ¶ 47. Therefore, we cannot find that the Navy abused its discretion in determining Flagg's price unreasonable and unfair.

We have consistently held that a determination of price unreasonableness provides a basis for cancellation. Having concluded this, we find the cancellation proper. See International Alliance of Sports Officials, 63 Comp. Gen. 162, supra; Universal Analytics, B-200938, July 7, 1981, 81-2 CPD ¶ 11. In addition, under Federal Procurement Regulations, 41 C.F.R. § 1-1.706-3(b) (1983), a small business set-aside may be withdrawn when it is determined that award under the set-aside would be detrimental to the public interest. Science and Management Resources, Inc., B-212628, Jan. 20, 1984, 84-1 CPD ¶ 88. The contracting officer made such a determination here.

Flagg further alleges that the cancellation was improper because the Small Business Association (SBA) was not notified of it. This allegation is rebutted by an affidavit executed by an SBA representative and included in the record, stating that she discussed the cancellation with the Navy on or about December 12, 1983, the day before it occurred.

The protester next alleges that in awarding the contract to Joslyn, the Navy did not consider extra costs associated with qualifying a new vendor. Flagg contends that these costs will catapult Joslyn's price above that of its own. The record shows, however, that in accord with the evaluation scheme announced in the solicitation, the Navy allowed for first article testing by adding \$8,400 to Joslyn's price. Even with this adjustment, Joslyn was still lower than Flagg's price with a waiver of first article testing.

We therefore deny the protest on the above bases.

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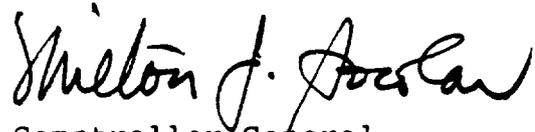
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The protester next contends that the 3-day period between the cancellation of the original solicitation and deadline for submission of revised proposals was not enough time for Flagg to contact its suppliers for new quotes. Flagg notified the Navy of its problem on December 15 and requested a 30-day extension; however, the Navy accepted offers under the new solicitation on December 16.

We find this basis of protest untimely. Even if we consider Flagg's December 15 letter a protest to the Navy, the acceptance of other offers was an initial adverse agency action. Under our Bid Protest Procedures, a protester must file a further protest with our Office within 10 working days of when it knows or should know of such action. 4 C.F.R. § 21.2(a) (1984). If the letter was not a protest, Flagg did not comply with the requirement that alleged improprieties obvious on the face of a solicitation must be protested before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2 (b)(1). Flagg did not file with our Office until January 7, 1984. We therefore will not consider this basis of protest.

Finally, Flagg questions the capability of Joslyn as a first-time offeror of this equipment. This is in effect a challenge to the Navy's affirmative determination that Flagg is responsible, a decision we will not review except in circumstances not present here. Lake Shore, Inc., B-213877, Dec. 27, 1983, 84-1 CPD ¶ 14.

The protest is denied in part and dismissed in part.



Acting Comptroller General
of the United States