

DECISION

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

60188

FILE: B-184808

DATE: November 19, 1975

MATTER OF: Interad, Limited

97710

DIGEST:

1. Prior GAO decision in which it was recommended that agency resolicit requirement using improved descriptive literature clause was not intended to restrict agency's discretion in determining whether resolicitation should be set aside for small business concerns.
2. Agency's determination not to set aside procurement for small business because all bids on prior canceled solicitation were technically nonresponsive to agency's requirements for radio receivers of extreme complexity, does not constitute an abuse of the agency's discretion.

Invitation for bids (IFB) No. 76-4 was issued by the Federal Communications Commission (FCC) for the purchase of ten VHF/UHF radio receivers with an option to purchase up to eight additional units. The solicitation was virtually identical to IFB 75-8, a preceding total small business set-aside, which was canceled because no responsive bids were received. The cancellation was protested by Interad, Limited (Interad), and in our decision B-182717, June 16, 1975, 75-1 CPD 363, affirmed upon reconsideration, B-182717, September 26, 1975, 75-2 CPD 195, the protest was denied.

In the above decisions this Office concurred in the propriety of the cancellation, found the descriptive literature clause to be defective, concluded that the FCC had insufficient information to assess whether Interad's product would satisfy the FCC's needs, and recommended that the procurement be resolicited under an IFB complying with the descriptive literature provisions of the Federal Procurement Regulations (FPR).

Interad contends that the contracting officer's decision not to set aside this reprocurement for small business concerns is contrary to our decisions, in B-182717, surpa, and cannot be supported under the standards set forth in the Federal Procurement Regulations (FPR).

The contracting officer's decision to withdraw the small business set-aside pursuant to FPR § 1-1.706-3(b) (1964 ed. amend. 101) was supported by the following memorandum:

"A. Federal Procurement Regulations, 1-1.706-5(a) reads as follows:

'The entire amount of an individual procurement or class of procurements shall be set aside for exclusive small business participation where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such reasonable expectation exists:* * *'

"An almost identical requirement for this type receiver was generated a year ago (IFB 75-8) and was subsequently advertised as a total small business set-aside. Four small business firms responded to the solicitation and each one was rejected as being technically unacceptable. The solicitation was consequently canceled. In all probability, no more than the four same firms would bid the requirement this year should the solicitation be made a total small business set-aside. Since the receivers being purchased are one-of-a-kind, state-of-the-art, and extremely complex in nature, it is highly unlikely a sufficient number of responsible small business firms would be able to produce a satisfactory product at a reasonable price.

"B. Federal Procurement Regulations, 1-1.706-5(a) goes on to say:

'Total set-aside shall not be made unless such a reasonable expectation exists; however, in the absence of such expectation, a partial set-aside shall be considered pursuant to 1-1.706-6.'

"Since these receivers must interface fully with the Commission's existing emission measurement systems, as well as with those measurement systems now being developed under ongoing programs, it is technically impractical to sever the procurement into two or more production runs. In addition, since the vast majority of the cost will be incurred by the Contractor in producing the first unit, it would be highly uneconomical to divide the requirement among several firms.

"C. These receivers will be used as the primary monitoring instrument for the Federal Communications Commission's Field Operation Bureau's monitoring

stations whose fundamental mission is to monitor and measure radio emissions. The receivers are critically needed by the field stations especially in view of the fact that a procurement could not be made last year due to the cancellation of the Invitation for Bids and a protest that resulted. The widest possible competition is therefore required to ensure that a responsive, responsible contractor is found.

"For the reasons outlined in paragraphs A, B, and C above, I have determined that resoliciting the requirement as either a total or a partial small business set-aside would be detrimental to the public interest."

Interad first contends that our decision in B-182717, as affirmed, supra, directed the FCC to resolicit IFB 75-8 under precisely the same terms, except that the descriptive literature provision must comply with FPR § 1-2.202-5 (1964 ed. amend. 13). We do not agree. Whether or not a procurement should be a small business set-aside is a matter within the agency's discretion. Our decision in B-182717, supra, was in no way an attempt to circumscribe the FCC's discretion in that regard, and was solely concerned with the propriety of the rejection of Interad's bid.

Interad also contends that the contracting officer's decision does not meet the standard prescribed by FPR 1-1.706-3(b) for withdrawal of set-asides. In this connection, Interad states that the contracting officer erroneously relied upon the criterion relating to the initiation of set-asides instead of that for withdrawal of set asides. Under either criterion, Interad concludes, the contracting officer's decision is deficient.

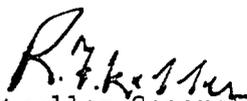
FPR § 1-1.706-5(a) (1964 ed. amend. 101) provides that the initial decision to set aside a procurement exclusively for small business concerns is dependent upon whether "there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices." Under FPR § 1-1.706-3(b) (1964 ed. amend. 101), in the absence of a Small Business Administration resident or liaison representative for the agency, the contracting officer is permitted to withdraw an existing unilateral set-aside determination "where he considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price)."

It is clear that the contracting officer's decision to withdraw the set-aside as detrimental to the public interest rested in large measure upon his concern regarding the effectiveness of

the competition that would be received from small business concerns. Therefore, we believe the record supports his determination whether viewed as a withdrawal of a set aside under FPR § 1-1.706-3(b) or as a refusal to initiate a set-aside under FPR § 1-1.706-5(a). Furthermore, we think there is some overlapping of the criteria under both provisions, and that some of the considerations which might lead a contracting officer not to initiate a small business set-aside could also appropriately result in the withdrawal of an existing set-aside.

We note that all bids received under IFB 75-8, including Interad's, were technically nonresponsive to the FCC's needs, notwithstanding the IFB's defective descriptive literature requirements. We cannot say that the contracting officer, knowing of the receiver's complexity and knowing that all four bids on the prior solicitation were technically nonresponsive, did not have a rational, inductive basis for finding that small business bidders might be nonresponsive in the subsequent solicitation. Having found that it was "highly unlikely a sufficient number of responsible small business firms would be able to produce a satisfactory product at a reasonable price" because of the previous four firms' demonstrated inability to respond to the IFB's technical requirements, the contracting officer chose not to set aside IFB 76-4 for small businesses. We believe that such an action was within the discretion of the contracting officer and find no abuse in its exercise.

Accordingly, the protest is denied.


Deputy Comptroller General,
of the United States