

DECISION



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

[Protest of Procurement Set Aside By GSA] 10, 071

FILE: B-193453(3)

DATE: May 8, 1979

MATTER OF: Atlas Guard Service, McCracken
Security Agency

DLG 01523
DLG 01524

DIGEST:

- 1. *↓* Protests alleging procurement should not have been set aside for small business concerns are denied since decision whether procurement should be set aside is within authority and discretion of contracting agency and GAO will not substitute its judgment in absence of clear showing of abuse of discretion.
- 2. Preference in procurement regulation for unilateral small business set-aside determination by contracting officer rather than joint determination by contracting officer and SBA does not prohibit contracting officers from setting aside procurements for small business before, after or without advice of SBA.
- 3. *↓* No legal basis exists to support protester's objection to small business set-aside on basis that national policy to encourage minority employment should prevail over policy of requiring procurement of fair proportion of Government supplies and services from small business.
- 4. *↓* Where large business protester is ineligible for award under proper small business set-aside, GAO will not consider its objections to alleged deficiencies in solicitation and procurement process since protester is not interested party which would be affected by resolution of issue.

Atlas Guard Services (Atlas) protests the action by the General Services Administration (GSA) of setting

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aside 11 procurements for guard services for small business participation. McCracken Security Agency, Inc. (McCracken) also protests 5 of the same procurements and its reasons are similar to those argued by Atlas. Our decision is to deny the protests.

Atlas, a large business and the incumbent contractor on some of the projects, contends that the set-asides are unfair, discriminatory and possibly violate regulations for initiating set-asides, regulations for modifying unrestricted procurements and national policy encouraging employment of minority persons.

GSA points out that its regulations require, to the maximum extent feasible, all service contracts over \$2,500 be set aside for exclusive participation of small business concerns. If, however, the contracting officer believes that responsive offers at reasonable prices will not be received from small business concerns, he may open the competition to large as well as small business concerns and submit his reasons to the Small Business Administration (SBA) for review. If the contracting officer receives no response within 5 working days, he may proceed with the procurement on an unrestricted basis.

Of the 11 procurements involved here, the contracting officer initially issued 7 invitations for bids (IFBs) restricted to small business concerns. The contracting officer submitted to SBA his reasons for not restricting competition for the other 4 procurements. As he received no response within 5 working days, he issued the IFBs on an unrestricted basis. He later received SBA advice that 3 of the procurements should be set aside. He agreed and on his own initiative decided that the remaining procurement on which he had received no SBA advice should also be set aside. Therefore, he amended all 4 IFBs to restrict the competition to small business concerns.

The second protester
McCracken contended that the GSA procuring officials failed to perform their required duties when they concurred, without objection and without requiring supporting documentation, in the SBA recommendations that

IFBs Nos. 03C8117501, 03C8093901, 03C8113301 and 03C8117001 be changed from unrestricted procurements to small business set-asides. McCracken attributes this concurrence to a desire to avoid the burden of appealing the SBA recommendations. McCracken points out that while the GSA officials gave their reasons in writing on GSA form 2689 for the initial determinations not to set the procurements aside for small business, SBA gave no reasons for its disagreements and provided no written list of small business concerns which were capable of performing the required services. This, McCracken asserts, was a violation of the GSA Procurement Regulations (GSPR) § 5B-1.706-52(c).

GSA states that while there was no supporting documentation provided by SBA, there was adequate justification and that GSA's actions were in accord with Federal Procurement Regulations (FPR) § 1-1.706.2 (a)(1). This regulation provides that when the SBA recommends a procurement be set aside for small business, the contracting officer shall promptly either "(i) concur in the recommendation, or (ii) disapprove the recommendation, stating in writing his reasons for disapproval." It does not require the SBA recommendation or the contracting officer's concurrence to be in writing. Moreover, GSPR § 5B-1.706-52(c) provides that if the SBA identifies additional prospective sources, such information "shall be furnished to the contracting officer with the conclusions reached by the reviewing official." It does not require the information or conclusions to be in writing. Thus, it is our view the lack of documentation provides no support for conclusions that adequate justification for the set-asides did not exist or that there was an abuse of discretion. Further, we are not persuaded by McCracken's contention that these procurements are too important and sophisticated for small business concerns. In any event, that determination is within the authority and discretion of the procuring agency. As stated in Par-Metal Products, Inc., B-190016, September 26, 1977, 77-2 CPD 227, we will not substitute our judgment for that of the contracting agency unless there has been a clear showing of abuse of that discretion.

The contracting agency has the authority and discretion to decide whether a procurement should be set aside for small business concerns. Par-Metal Products, Inc., supra; Dumont Oscilloscope Laboratories, Inc., B-185267, April 16, 1976, 76-1 CPD 259. The law does not prohibit contracting officers from setting aside procurements for small business before, after or without the advice of SBA. See Small Business Act, 15 U.S.C. § 631 et seq. (1976). In fact, regulations state a preference for unilateral set-aside determinations rather than determinations jointly made by the contracting officer and SBA. Insofar as practicable, unilateral determinations by a contracting officer, shall be used as the basis for set-asides to small business concerns. FPR § 1-1-706-1(d) The regulation permits unilateral determinations when the contracting officer has a reasonable expectation that bids will be obtained from a sufficient number of small business concerns to insure reasonable prices.

We have been informed by GSA that from 2 to 8 responsive bids from small businesses were received in response to each of 9 solicitations and no bids are yet due on one. With respect to the remaining solicitation, the only bid received was deemed to be unreasonable and an unrestricted resolicitation is in process. We think this indicates that the contracting officer's expectation of adequate competition was reasonable. Berlitz School of Languages, B-184246, November 28, 1975, 75-2 CPD 350.

We find no legal basis to support Atlas' position ^{expound the protester's} that the national policy to encourage minority employment should prevail over that requiring procurement of a fair proportion of Government supplies and services from small business concerns. The minority employment program applies to large and small firms and the small business set-aside program is for the benefit of small firms including those owned and controlled by socially and economically disadvantaged individuals. However, no distinction is made between those with and those without a preponderance of minority employees.

In our view, Atlas' allegations of unfairness and discrimination primarily concern the set-aside policy

as established by ^{legislation} ~~the~~ Small Business Act, supra. This is not a matter within the jurisdiction of the agencies or GAO.

McCracken contends that competition was unduly restrictive because the IFBs erroneously contained a provision requiring bidders to indicate whether they perform detective work covered by the Anti-Pinkerton Act, 5 U.S.C. § 3108 (1976). See 57 Comp. Gen. 524 (1978). GSA points out that removing the provision (which it has done for one solicitation) would not benefit McCracken since the set asides are proper and as a large business, it would not be eligible for award in any event. McCracken also raises other objections and arguments but in each case it has not shown that, as a large business prohibited from competing under these small business set-asides, its interests have been prejudiced.

~~In our opinion McCracken does not~~ ^{The second protester did} have a sufficient interest to raise these issues because removal of the outdated anti-Pinkerton restriction and correction of the alleged deficiencies either would affect materially only small business concerns or would not change the ability of large business concerns to compete for the set-aside. Aydin Vector Division, B-192431, November 2, 1978, 78-2 CPD 316. We believe its basic objections for which it may be recognized as an interested party concern the decisions to set aside the solicitations solely for small business concerns. As pointed out above, we can find no legal basis to object to the set-aside decisions.

→ The protest ~~is~~ denied in part and dismissed as to those issues for which the protesters are not interested parties.

R. F. K. Miller
Deputy Comptroller General
of the United States