

**DECISION**



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

11/92 Proc I

**FILE:** B-192370

**DATE:** August 22, 1979

**MATTER OF:** Fire Apparatus Service

**DIGEST:**

1. Where [protest against issuance of IFB] was denied by contracting officer prior to bid opening and doubt exists as to the date of denial (adverse agency action), doubt is resolved in favor of protester and protest filed in GAO 7 days after bid opening is considered timely.
2. Although items were available on Federal Supply Schedule (FSS), contracting officer was not precluded from issuing IFB for item, since FSS was not mandatory and determination whether to proceed with solicitation in order to obtain more favorable price is basically business judgment.
3. Product manufactured by large business concern would not be in compliance with DAR (ASPR) and IFB requirements that items in small business set-aside be "manufactured or produced" by small business concerns.
4. Where contracting officer determined that only bid available for acceptance under small business set-aside IFB was at unreasonable price, it was proper to withdraw set-aside and make subsequent purchase from large business concern at lower price on Federal Supply Schedule.

*DL 602468*  
*ALG 02612*  
Fire Apparatus Service (FAS) protested the issuance of Loring Air Force Base, Maine, invitation for bids (IFB) F17600-78-BA011, a small business set-aside for the procurement of 1,600 photoelectric smoke detectors with supplementary thermal switches, and the subsequent cancellation after bids were opened.

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Essentially, FAS contends that the Air Force should have procured these items from the Federal Supply Schedule in the first place; but that once the agency proceeded to solicit bids under a small business set-aside, it should have made award rather than rejecting FAS's bid, canceling the IFB, and then procuring the items from a large business listed on the Federal Supply Schedule.

A threshold question is whether the FAS protest against the issuance of the IFB is timely. Upon receipt of the IFB, a representative of FAS called the contracting officer and asked whether he was aware that the smoke detector was on the Federal Supply Schedule (FSS). The representative told the contracting officer that the manufacturer's price was lower than the price that a distributor like FAS would pay for the item. The representative protested the issuance of the IFB and suggested that it be canceled since no one other than the manufacturer could supply the item for lower than that price. The representative was told that the IFB would not be canceled and FAS submitted a bid.

The protest was filed in our Office 7 calendar days after bids were opened. The fact that the contracting officer indicated prior to bid opening that the IFB would not be withdrawn is sufficient to constitute an adverse agency action. Technical Services Corporation, et al., B-190945, B-190970, B-190992, August 25, 1978, 78-2 CPD 145; National Flooring Company, B-188019, February 24, 1977, 77-1 CPD 138. Under the Bid Protest Procedures, 4 C.F.R. § 20.2(a), FAS had 10 working days from the time of the adverse action within which to file a protest with our Office. There is no evidence as to the date when the conversation between the FAS representative and the contracting officer occurred. If the conversation occurred a few working days before the bid opening, the protest filed after bid opening was timely. Since doubt exists as to the date of the conversation, it is resolved in favor of FAS and we will consider the protest to be timely. Ampex Corporation, B-190529, March 16, 1978, 78-1 CPD 212.

FAS alleges it was improper for the contracting officer to procure under the solicitation after he was notified that the smoke detector was available on an FSS. However, the FSS for smoke detectors is not mandatory upon the Department of Defense. The contracting officer has reported that given the extremely competitive nature of the smoke detector market, it was anticipated that a price more favorable than that available through nonmandatory schedules could be obtained. A determination whether to proceed with a solicitation in order to obtain a more favorable price than that found on a nonmandatory supply schedule is basically a business judgment by the contracting officer. Our Office will not interfere with such a judgment absent a clear showing of abuse of discretion. Cf. Falcon Rule Company, et al., B-187024, November 16, 1976, 76-2 CPD 418.

FAS's second contention is that its bid should not have been rejected. The basis for the rejection was that FAS was a "nonmanufacturing industry" which anticipated supplying a product manufactured by large business. However, FAS states that it is a manufacturer employing three persons and that therefore the award should have been made to it. Although FAS may be a manufacturer of certain items, it was not going to furnish smoke detectors of its own manufacture. In that regard, both DAR (ASPR) § 1-701.1c (1976 ed.) and the terms of the IFB, section "C," paragraph 23(b), required items "manufactured or produced" by small business concerns. A product manufactured by a large business concern would not be in compliance with these requirements.

Finally, FAS protests that the item was obtained from a large manufacturer even though the IFB stated a 100-percent small business set-aside. However, the contracting officer determined that the only bid available for acceptance under the small business set-aside IFB was at an unreasonable price. DAR (ASPR) § 1-706.3(a) (1976 ed.) provides for the withdrawal of small business set-asides where unreasonable prices have been received. Therefore, it was proper for the contracting officer to withdraw the set-aside and make a subsequent purchase from a large business concern at a lower price on the FSS.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States