

**DECISION**



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

FILE: B-195831

DATE: November 8, 1979

MATTER OF: Otis Elevator Company -CN809900

**DIGEST:**

*[Protest of Agency Determination to Set-Aside Procurement]*

1. Large business protest against erroneously large size standard in small business clause of solicitation is dismissed because protester is not eligible to compete in proper small business set aside and is not an interested party which would be affected by resolution of issue.
2. Protest against total small business set aside is denied because contracting officer did not abuse his discretion in determining that, pursuant to DAR § 1-706.5(a)(1), there was reasonable expectation that bids would be obtained from at least two responsible small business concerns at reasonable prices.

Otis Elevator Company (Otis) protests the Department of the Navy, Naval Facilities Engineering Command (Navy), determination to set-aside invitation for bids (IFB) No. N62470-79-B-2654, for elevator maintenance services at Navy and Marine Corps facilities in North Carolina, exclusively for small business participation. We find no legal basis to object to the Navy's decision to set-aside the procurement.

Otis contends that the set-aside determination constitutes an abuse of discretion because contrary to Defense Acquisition Regulation (DAR) § 1-706.5(a)(1), Defense Acquisition Circular (DAC) No. 76-19, July 27, 1979, the Navy had no reasonable expectation that it would receive sufficient bids from responsible small

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business firms and that award would be made at a reasonable price. Otis also maintains that the IFB contained an erroneously large small business size standard, which shows that the Navy lacked the requisite "reasonable expectation" when the IFB was issued on August 6, 1979. Otis concludes that the set-aside was made in violation of applicable procurement regulations, that it was unduly restrictive of competition, and that, therefore, the Navy should resolicit its elevator maintenance requirements on an unrestricted basis.

Otis, a large business concern, is ineligible to participate in this procurement and does not have a sufficient interest in it to protest the size standard deficiencies in the IFB which materially affect only small business concerns and will not change the firm's inability to compete for the set-aside. Atlas Guard Service, et al., B-193453(3), May 8, 1979, 79-1 CPD 318; Aydin Vector Division, B-192431, November 2, 1978, 78-2 CPD 316; 4 C.F.R. § 20.1(a) (1979). Although this ground of the protest is dismissed, the matter will be discussed to the extent Otis raises the deficiency to show that the Navy could not reasonably expect adequate competition when the set-aside was made.

The Navy concedes that the IFB's small business definition erroneously stated that average annual receipts of the bidder and its affiliates for the preceding 3 fiscal years could not exceed \$7.5 million. That figure, as Otis asserts, should have been \$2 million. 13 C.F.R. § 121.3-8(e) (1979). The Navy amended the IFB on August 31, 1979, to correct the size standard and extend the bid opening date from September 6 to September 11, 1979. We note that the amended size standard decreases the population of small business concerns eligible to compete for the procurement.

Contrary to Otis' characterization, DAR § 1-706.5 (a)(1) requires that acquisitions be set aside if the contracting officer determines there is reasonable expectation that 1) bids will be obtained from at least two responsible small business concerns and 2) award will be made at a reasonable price. In determining whether that expectation exists, past acquisition history of the

service is important, but it is not the only factor to be considered. However, the regulation does not enumerate other factors to be considered.

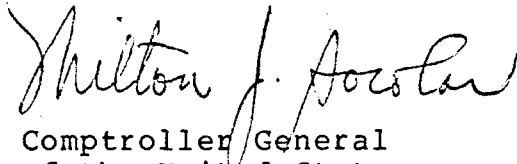
We have consistently recognized that the determinations prescribed by the regulation are basically business judgments requiring the exercise of broad discretion by the contracting officer. We will not substitute our judgment for that of the contracting officer and will sustain determinations concerning these matters absent a clear showing of abuse of discretion. See, e.g., Otis Elevator Company, B-194147, May 10, 1979, 79-1 CPD 331; DeWitt Transfer and Storage Company, B-182635, March 26, 1975, 75-1 CPD 180.

The Navy states that its previous maintenance procurement was a total small business set-aside, that two bids were received, and that the awards were made at reasonable prices. Otis responds that the Navy offered no evidence that it relied on prior procurement history in making the determination, merely cited a single procurement without identifying its nature or date, and did not indicate any other factors were considered. However, we have acquiesced in a set-aside determination based on procurement history that two competitive small business bids were received under the agency's most recent procurement. KDI Electro-Tec Corporation, B-185714, June 8, 1976, 76-1 CPD 364; Allied Maintenance Corporation, B-188522, October 4, 1977, 77-2 CPD 259. We believe that because the Navy had previously successfully acquired elevator maintenance services on the basis of a set-aside, the agency was required to acquire its current maintenance requirements by a repetitive set-aside, in the absence of a determination that there was not a reasonable expectation of competition and reasonable prices. DAR § 1-706.1(f), DAC No. 76-19, July 27, 1979.

Three bids were received in response to the instant IFB, and the Navy has withheld award pending resolution of the protest. Although Otis emphasizes the fact that one of the bids is more than five times the amount of the Government estimate, the remaining bids are 16 and 22 percent, respectively, below the Government estimate.

Otis nevertheless contends that the bid opening results are irrelevant to the propriety of the contracting officer's set-aside determination. We consider the Navy's procurement history concerning the number and price reasonableness of small business bids, as well as the fact that three bids, at least two of which appear to be reasonably priced, were received in response to the amended IFB, an indication that the contracting officer's expectation of adequate competition was reasonable. Atlas Guard Service, et al., supra; Simpson Electric Company, B-190320, February 15, 1978, 78-1 CPD 129; Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350.

Our review of the record does not indicate that the contracting officer abused his discretion in restricting the procurement to small business. We therefore find no legal basis to object to the Navy's set-aside determination and Otis' protest against the determination is denied.

  
For the Comptroller General  
of the United States