

DECISION



13204 *Wendy Pro I*
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-194414.3

DATE: March 24, 1980

MATTER OF: Gill Marketing Co., Inc.

DLG-04209

DIGEST:

AGC00017

AGC00002

1. Decision to amend solicitation to set aside procurement exclusively for small business after proposals have been submitted will be upheld if there is reasonable basis for such action; a "compelling," as opposed to "reasonable" basis, is not required.
2. Agency decision to set aside procurement after date for submission of initial proposals is not legally objectionable where agency had reasonable expectation of offers from five small businesses with experience in providing items similar to required item and there is no showing that such experience was not reasonably related to firm's capability to supply required item.
3. Small Business Administration's concurrence is not a prerequisite to contracting agency setting aside procurement for small business.

Gill Marketing Company (Gill) protests the setting aside, after the date set for submission of initial proposals, of item 302-37(b), "Automatic Rack Conveyor Dishwashing Machine" and accessories, of solicitation No. FPGG-Z-36350-N-3-27-29, issued by the General Services Administration (GSA) for the multiple award Federal Supply Schedule (FSS), FSC Group 73, Part III, Food Service, Handling, Refrigeration, Storage and Cleaning Equipment.

Small BUSINESS

[Protest Against ~~Setting~~ Aside]

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The solicitation was issued on March 7, 1979, with proposals due on March 27, 1979. After offers were submitted on that date, GSA determined that the circumstances warranted setting aside the automatic rack conveyor dishwashers and accessories portion of the acquisition, and issued an amendment on April 10, 1979, setting aside item 302-37(b), and a subsequent amendment extending the deadline for receipt of proposals to June 29, 1979.

Gill, which is itself a small business, but which had offered dishwashers manufactured by a large business, Hobart Corporation (Hobart), protests on the following grounds:

- (1) There was no compelling reason for the Government to issue the amendments and the amendments were unduly restrictive of competition.
- (2) The set-aside violates the Small Business Act, 15 U.S.C. § 644(a) (Supp. I 1977), because GSA did not assure that a sufficient number of small businesses could compete to fill the Government's needs at reasonable prices, and the Small Business Administration (SBA) refused to concur in the set-aside.
- (3) No basis exists in law for a small business set-aside on a FSS where the needs of the user agencies and the quality of small business equipment have not been evaluated.

We find the protest to be without merit.

First, there is no requirement that an agency have a "compelling" reason for issuing an amendment to a request for proposal (RFP). The compelling reason standard is used when an agency seeks to cancel an invitation for bids after bid opening; because of the obvious detrimental effect on the competitive bid system of a cancellation and resolicitation after exposure of bid prices, there must be a cogent and compelling reason for such a cancellation.

Federal Procurement Regulations (FPR) § 1-2.404.1; Massman Constr. Co. v. United States, 60 F. Supp. 635 (Ct. Cl. 1945), cert. denied 325 U.S. 866. In this case, however, as in all negotiated procurements, there is no public bid opening and no exposure of pricing. There is also no "cancellation" of a solicitation here; there are only RFP amendments which restrict one small portion of the total requirements to small business competitors only. While the restrictive nature of the amendments obviously does have the effect of canceling the procurement for large businesses with respect to the type of dishwashing equipment covered by the amendment, we are not aware of any case nor any sound rationale which would lead us to conclude that the agency must have a "compelling" reason to do what it did here. Rather, our cases indicate that the standard to be applied in these negotiated procurements is the "reasonableness" standard--that is, does the agency have a reasonable basis for amending or canceling an RFP after receipt of proposals. See, e.g., Semiconductor Equipment Corporation, B-187159, February 18, 1977, 77-1 CPD 120; Host International, Inc., B-187529, May 17, 1977, 77-1 CPD 346.

We recognize, of course, that wherever a solicitation is amended or canceled after the closing date, there will likely be some adverse effect on one or more offerors. See Foss Alaska Line, 57 Comp. Gen. 784, 797 (1978), 78-2 CPD 192. It is in part for that reason that agencies are expected to make good faith efforts to ascertain their actual needs and to issue solicitations accurately reflecting those needs. Certainly, good procurement policy dictates that set-aside determinations should be made prior to issuance of a solicitation, 53 Comp. Gen. 307, 308, (1973), and in general cancellation or revision of a solicitation well into the procurement process, to reflect needs that could or should have been determined earlier, is not looked upon with favor. See, e.g., Honeywell Information Systems, Inc., B-193177.2, December 6, 1979, 79-2 CPD 392.

Nonetheless, despite their potential adverse effect, solicitation amendments revising the Government's stated requirements or changing the basis for evaluation and award are appropriate when the Government's needs reasonably so require. See, e.g., Bell Aerospace Company, 55

Comp. Gen. 244 (1975), 75-2 CPD 168; 51 Comp. Gen. 411 (1972); Jones & Guerrero Co., Incorporated, B-192328, October 23, 1978, 78-2 CPD 296. So are cancellations. Honeywell Information Systems, supra.

In this connection, in recognition of the Government's legitimate socioeconomic interests fostered through its procurements, we have upheld the propriety of canceling a solicitation after bid opening so that the procurement could be set aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), as amended by Public Law No. 95-507, § 202, 92 Stat. 1761, see A.R.&S. Enterprises, Inc., B-194622, June 18, 1979, 79-1 CPD 433, as well as the setting aside of procurements for small business well after the solicitation issuance dates. See 53 Comp. Gen. 307, supra; Ampex Corporation, et al., B-183739, November 14, 1975, 75-2 CPD 304. Although in the latter two cited cases the procurements were converted to small business set-asides prior to the closing dates for receipt of proposals, we believe the rationale of those cases--that in light of the statutory mandate that a fair proportion of procurement contracts be placed with small businesses, plus the absence of any regulatory requirement that a set-aside be made at any particular time, see FPR 1-706.5, a set-aside determination is permissible after solicitation issuance if there is a reasonable basis for the determination at the time it is made--is equally applicable here. Therefore, what must be determined is whether GSA had a reasonable basis to set aside item 302-37(b). If it did, the issuance of the amendments was neither improper nor, in light of the contemplation of the Small Business Act that in appropriate circumstances a procurement may be limited to small business concerns, unduly restrictive of competition.

The record shows that several different items covered by the RFP were initially set aside for small business. Included in the set-aside were two categories of equipment under special item 302-37, Dishwashers and Accessories. GSA then received a protest from the Insinger Machine Company (Insinger); Insinger asserted that all six categories of item 302-37 should have been set aside because there were sufficient small business manufacturing sources "available to compete." In response, the contracting officer, after investigating the matter to determine whether further set-asides would be appropriate, concluded that item 302-37(b) could be set aside.

The contracting officer's original decision not to set aside item 302-37(b) was based on FSS sales data from May 1, 1978 through November of that year, during which time there were five small business contractors on the Schedule who received only 38 percent of item 302-37(b) sales, or \$247,084. From this, the contracting officer concluded that small businesses lacked the capacity to supply the \$1,562,706 worth of item 302-37(b) equipment which GSA anticipated user agencies would require during the upcoming contract period. In conducting the later investigation, however, the contracting officer received data indicating that the annual dishwasher sales volume capability of the five small business offerors which had responded to the solicitation was more than \$16 million. The contracting officer also learned that the Defense General Supply Center (DGSC), Richmond, Virginia, a major purchaser of dishwashers from the Schedule, had in fiscal year 1979 purchased most of its dishwashing equipment from small businesses. On the basis of this information, the contracting officer set aside the procurement for small business.

Gill's objection to the set-aside determination is that it was not based on any showing that small businesses could supply all the Government's needs for the particular type of dishwasher represented by item 302-37(b). Gill states that the contracting officer learned only that small businesses had the capacity to supply dishwashers and accessories generally, and that the only data available with respect to the automatic rack conveyor dishwashing machines indicated that small businesses had handled only 38 percent of user agencies' needs in the prior procurement.

We find that the contracting officer had a reasonable basis for her action. We have previously held that contracting officers, in determining whether there is a reasonable expectation of obtaining adequate competition from small businesses, may reasonably rely on information showing that small business firms have experience in producing items which are the same or similar to those required by the solicitation. See Ampex Corp., et al., supra. Gill has not shown that experience in producing

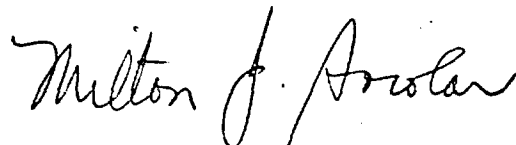
various types of dishwasher equipment bears no reasonable relationship to the ability of firms with that experience to produce the rack conveyor type of machine represented by item 302-37(b). Consequently, we believe the protester has not shown that the contracting officer abused her discretion in setting aside item 302-37(b).

While Gill has also raised various objections with respect to the sufficiency of the document which contained the determination to set aside the procurement, we find they are of no consequence since, as indicated, the contracting officer had a reasonable basis for setting aside the procurement at the time she did so. See J. H. Rutter Rex Manufacturing Corporation, Inc., 55 Comp. Gen. 902, 906 (1976), 76-1 CPD 182.

Furthermore, contrary to Gill's contention, the Small Business Act does not prohibit contracting officers from setting aside procurements without the concurrence of SBA. Atlas Guard Service; McCracken Security Agency, B-193453(3), May 8, 1979, 79-1 CPD 318. The Act requires only that small business concerns receive the award of a contract where the SBA and the contracting agency have both determined that the procurement meets certain statutory prerequisites. The statute contains no requirement that the contracting agency must obtain SBA concurrence before setting aside a procurement. In any event, we have been advised by SBA that it encouraged GSA officials to set aside the procurement of item 302-37(b).

Gill's last basis for protest is that GSA failed to evaluate the needs of user agencies and the quality of equipment available from small business before setting aside the procurement. GSA, however, is not required to perform an in-depth evaluation of each individual user agency's needs and the quality of equipment available from potential small business suppliers to assure that a set-aside will satisfy the particular needs of using agencies. See U. S. Divers Company, B-192867, February 26, 1979, 79-1 CPD 132.

The protest is denied.



For The Comptroller General
of the United States