

13857 PL-FF

DECISION



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

FILE: B-196111

DATE: May 29, 1980

MATTER OF: Canadian Commercial Corporation

DIGEST:

1. ^{Against} ~~Protest that procurement should not have been~~ ^{Being} set aside for small business is dismissed as untimely since it was filed more than 10 days after denial of protest by agency and opening of bids.
2. Although bid of small business firm in small business set-aside exceeded "courtesy" bid submitted by non-small business concern, determination that bid is reasonable is not legally objectionable since extent to which non-binding "courtesy" bid indicates price that would actually be available to Government is matter for contracting officer's judgment which GAO will not second-guess.
3. Protest by non-small business firm that partial award under total set-aside was made improperly on an "all or none" bid will not be considered since protester is ineligible for award and therefore not an interested party under GAO Bid Protest Procedures.

Canadian Commercial Corporation (CCC), the official representative of Ernst Leitz Limited (Leitz), protests the award of a contract to another firm under invitation for bids (IFB) DAAK10-79-B-0087, issued by the Army Armament Research and Development Command (Army), Dover, New Jersey. The procurement, for a quantity of M64 Sight Units and related items, was a total set-aside for small business concerns under the provisions of the Small Business Act, 15 U.S.C. § 631 (1976).

CCC contends that the procurement should not have been set aside, that the bid of the lowest small business firm was unreasonably high, and also that a partial award was made while the awardee's bid was on an "all or none basis".

~~010573~~
112401

The solicitation was issued on June 4, 1979, as a 100 percent set-aside for small business concerns. Thus, Leitz, a Canadian concern, was not eligible to compete in the procurement. See 13 C.F.R. § 121.3-2 (i).

In late June, CCC asked the Army to remove the set-aside so that Leitz could bid. CCC argued that Leitz is a registered Planned Producer in the Industrial Preparedness Program and that Defense Acquisition Regulation (DAR) § 1-706.1(j)(ii) prohibits small business set-asides when the item to be procured is on an established list under the Industrial Preparedness Program and a large business Planned Emergency Producer of the item desires to participate. While the Army denied the protest, CCC did not receive notice that its protest was denied until July 16, the day before bid opening.

Leitz submitted the low bid, but award was not made to it because it was ineligible for award. On September 7, 1979, at the request of CCC, the Army again notified CCC that Leitz's bid would not be considered because the procurement was restricted to small business firms.

On September 19, CCC filed another protest with the Army. At this time CCC alleged that award to Leitz would result in considerable cost savings and that the low small business bid was unreasonably high. CCC also renewed its request that the set-aside be lifted. On September 20, CCC protested to this Office on the same grounds.

On the question whether the procurement should have been set aside, the protest is untimely and must be dismissed. Although CCC protested this alleged impropriety in the solicitation to the Army prior to bid opening, it did not file a protest with our Office until September 20, almost two months after the Army notified CCC that its protest on this question was denied and bids were opened. Both the denial of the protest and the opening of bids in these circumstances are adverse agency actions. See International Harvester, B-196514, October 31, 1979, 79-2 CPD 313; Professional Computer Services--Reconsideration, B-197450.2, March 6, 1980, 80-1 CPD 179. Our

procedures require that for a protest to be timely, it must be filed here within 10 working days of the initial adverse agency action on the protest filed with the agency. 4 C.F.R. § 20.2(a) (1979). Since this was not done, the protest on this issue is untimely. See Mr. Scrub Car Wash, Inc., B-186586, July 9, 1976, 76-2 CPD 29 and Federal Signal Corporation, B-195525, August 9, 1979, 79-2 CPD 109.

CCC contends that the disparity in bid prices indicates that an award to the small business firm would be unreasonable. CCC, citing DAR § 1-706.3(a), contends the set-aside should thus be withdrawn in the public interest. We do not agree.

The small business which was awarded this contract submitted a basic bid for all items (including spare parts) of \$2,275,525.70. This was slightly more than half of the Government estimate of \$4,175,902, which was based on the cost of these items the preceding fiscal year. (In Fiscal Year 1978, the eight units were purchased for \$1,425 each from a small business concern: the awardee's unit price in this procurement was \$889.) At the same time, the awardee's basic bid for all items was \$540,930.69 above Leitz' bid of \$1,734,575.01.

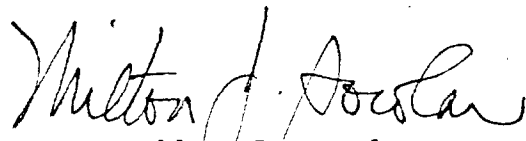
The purpose of the set-aside program is to award a fair proportion of Government contracts to small business firms even if it is necessary to pay higher prices than are otherwise obtainable. In this regard, we have held that the Government may pay a "reasonable premium price" to small business firms on restricted procurements in order to implement the Congressional policy reflected in the Small Business Act. Society Brand, Inc., 55 Comp. Gen. 372 (1975), 75-2 CPD 225. The question to be resolved here is whether the contracting officer acted reasonably in finding the small business bid price to be acceptable. J. H. Rutter Rex Manufacturing Co., Inc., 55 Comp. Gen. 902 at 906 (1976), 76-1 CPD 182.

Whether a particular price is reasonable depends upon the circumstances of each case. Triple "A" South, B-193721, May 9, 1979, 79-1 CPD 324. Usually those circumstances involve a comparison with the Government estimate or with a prior contract price. See, e.g., Otis Elevator Company, B-196076, February 1, 1980, 80-1 CPD 86; Triple "A" South, supra. A "courtesy" bid from a concern ineligible to bid on a small business set-aside, while nonresponsive, may also be considered as part of the comparison. Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD 21. However, the fact that a small business bid is higher than a "courtesy" bid or the Government estimate does not mean that it is unreasonable since there is a range over and above those amounts which may be regarded as reasonable. Osmose Preserving Company of America, Inc., B-192191, October 23, 1978, 78-2 CPD 294.

Here, the contracting officer received a small business bid that was only slightly more than half the Government estimate but also some 31 percent higher than a "courtesy" bid from a large business. The contracting officer, apparently relying on the Government estimate and the prior procurement history, concluded that the small business bid price was reasonable. Although both the "courtesy" bid and the small business bid suggest that the Government estimate was of questionable accuracy (possibly because it did not take into account the fact that much larger quantities were being procured than were previously purchased), we cannot conclude that the contracting officer's determination was unreasonable. First, while the estimate may have been faulty in that it didn't reflect the cost savings possible in this procurement, it did represent the actual unit cost to the Government in the previous year, and the much lower price offered by the small business firm certainly could be viewed as reasonable in light of both that experience and the potential for lower unit prices. Second, while "courtesy" bids may be considered in determining reasonableness of small business bids, the extent to which such non-binding "offers"--which may not be forthcoming in a follow-on unrestricted procurement--indicate a price that would actually be available to the Government is largely a matter for contracting officer's

judgment which we will not second-guess. Thus, for example, we have upheld a contracting officer's finding that a small business bid price 43 percent higher than a courtesy bid was reasonable in light of the Government estimate which was more than 30 percent above the small business bid. Osmose, supra. Consequently, under these circumstances, we do not believe the contracting officer's determination regarding price reasonableness is subject to legal objection.

Finally, CCC contends that the contracting officer improperly made a partial award to the successful contractor because that firm had bid on an "all or none" basis. (After bid opening but before award, the Army decided it did not need two spare parts items--Item 13, 20 lamps, and Item 49, 285 control dials--worth about \$7,000, and did not award those items.) Since CCC is ineligible for award of this contract, it is not an "interested party" with respect to this issue and we need not decide it on the merits. In any event, we think the contracting officer reasonably could have interpreted the "all or none" qualification to apply to each item individually: that the bidder would not accept, for example, a partial award of 50 control dials under Item 49. The Army's award of the full quantity of each item, except two where no award was made, is consistent with this view.



For the Comptroller General
of the United States