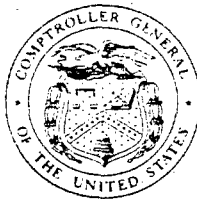


DECISION



PL-1
Mr. Fitzmaurice
14110
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of DOE Contract Award]

FILE: B-197745

DATE: June 20, 1980

MATTER OF: Industrial Contractors, Inc.

DIGEST:

1. Subcontracting with large business under construction contract set aside for small business is not objectionable.
2. Enforcement of general provision in contract requiring prime contractor to subcontract with small business concerns to maximum extent possible is not responsibility of GAO.
3. Objection concerning solicitation's failure to contain provision limiting amount of work that small business contractor can subcontract to large business firms does not afford basis for questioning solicitation or ensuing contract.

Industrial Contractors, Inc. (ICI), protests the award of a contract to Southern Machinery Erectors, Inc. (Southern), under invitation for bids No. DE-AC05-800R20321, a total small business set-aside, issued by the Department of Energy (DOE), Oak Ridge Operations, Oak Ridge, Tennessee.

The invitation solicited bids for the construction of process control modifications at the Oak Ridge Gaseous Diffusion Plant. Southern was the low bidder with ICI second low. When ICI learned that Southern intended to subcontract part of the project to a large business, it filed this protest, arguing that such action was not proper under a total small business set-aside.

However, we find no basis to disturb DOE's contract with Southern.

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According to DOE, the contract work is to be performed by Southern and four subcontractors. The amount of work to be done by each is as follows:

<u>Firm</u>	<u>Type of Work</u>	<u>Percentage of Work</u>
Cleveland Consolidated, Inc.	Mechanical	41%
Cleveland Electrical Contractors, Inc.	Electrical	24%
Regal Instruments, Inc.	Instrumentation	22%
Southern Machinery Erectors, Inc.	Architectural	11%
Western Kentucky Painting, Inc.	Painting	02%

Pursuant to DOE's request, Southern asked its subcontractors whether they were small businesses. Southern reports that its mechanical and electrical subcontractors stated they were not small businesses, but that its instrumentation and painting subcontractors stated they were small businesses.

ICI argues that the amount of work actually being performed by a large business (65 percent) in this instance raises serious doubts whether the congressional intent behind total small business set-asides is being followed.

ICI also argues that Southern has not complied with clause 29 of the General Provisions of the contract. This clause requires the successful contractor to subcontract with small business concerns to the maximum extent possible consistent with the efficient performance of the contract. In ICI's opinion, the present record shows that Southern has violated the clause.

Finally, ICI contends that DOE should explain why it did not include a clause in the invitation requiring that a certain percentage of the work be performed by the small business prime contractor; moreover, ICI requests that GAO direct DOE to promulgate regulations which would require the use of such a clause in future procurements. ICI believes that DOE could prevent any abuse of the small business set-aside program by including such a clause.

Subparagraph (b) of the clause entitled "Notice of Total Small Business Set-Aside," as set forth in the invitation, contains the following definition of a small business:

"The term 'small business concern' means a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is bidding on Government contracts, and can further qualify under the criteria set forth in the regulations of the Small Business Administration (13 CFR 121.3-8). In addition to meeting these criteria, a manufacturer or a regular dealer submitting bids or proposals in his own name must agree to furnish in the performance of the contract end items manufactured or produced in the United States, its territories and possessions, Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia, by small business concerns: Provided, That this additional requirement does not apply in connection with construction or service contract." (Emphasis added.)

An identical paragraph was considered in our decision in Nanakuli Paving & Rock Co., B-181873, January 28, 1975, 75-1 CPD 58, in which we held that, in light of the exemption provided, large business firms may subcontract under a construction contract which has been awarded under a total small business set-aside. See also United Paint Manufacturing, Inc., B-181163, June 25, 1974, 74-1 CPD 343.

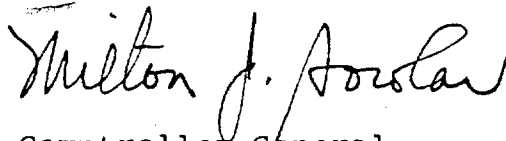
Southern's contract is also for construction work. Therefore, Southern was free to subcontract with large business concerns.

ICI has also questioned whether Southern has complied with clause 29 of the General Provisions of the contract which requires a prime contractor to subcontract with small business concerns as much as possible. In reply to this question, DOE notes that the clause does not establish any "goals, targets or quotas" for subcontracting with small business concerns. Further, DOE argues that Southern "has, in fact, subcontracted a significant part (24%) of the effort not to be performed in-house, to other small business concerns." This "significant" effort, coupled with Southern's contribution (11 percent of the work), leads DOE to conclude that "small businesses are making a major contribution to this contracting effort, notwithstanding * * * that large businesses are participating as well."

[We note that while DOE has concluded that small businesses are making a major contribution to this contracting effort, it seems DOE has not determined whether the "as much as possible" subcontracting standard has been met in this case. Be that as it may, clause 29 specifically requires the "Contractor [to agree] to cooperate in any studies or surveys that may be conducted by the Small Business Administration or the contracting agency which may be necessary to determine the extent of the Contractor's compliance with this clause." Under the clause, therefore, it is the responsibility of the listed agencies, not GAO, to enforce the policy provisions involved during performance of the contract. Thus, we cannot question Southern's compliance with the clause.]

Concerning ICI's inquiry about the lack of a solicitation provision which would have required that a certain percentage of the work be performed by the small business prime contractor, we have received no reply from DOE. Although DOE might well consider the advisability of doing as ICI recommends, the Department's failure to do so does not afford a basis for questioning the solicitation or the Southern contract.

Protest denied.



Acting Comptroller General
of the United States