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DECISION



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

[Request for Reconsideration]

FILE: B-195747.2

DATE: August 19, 1980

DL904543

MATTER OF: Hein-Werner Corporation - Reconsideration

DIGEST:

Prior decision holding contracting officer acted reasonably in setting procurement aside for small businesses on grounds that 11 small businesses were on original mailing list which was ultimately expanded to 28, and bids from several small businesses were received in two recent prior procurements, is affirmed where protester has not established either error of fact or law.

Hein-Werner Corporation (Hein-Werner) requests reconsideration of our decision, Hein-Werner Corporation, B-195747, May 2, 1980, 80-1 CPD 317, denying that firm's protest of the Department of the Army's determination to set aside a purchase of ten-ton hydraulic dolly jacks for small businesses. For the reasons given below we affirm our prior decision. ARC 00020

In denying the protest we held that the contracting officer reasonably determined that bids from a sufficient number of responsible small business concerns would be received because the record indicated that the contracting officer had 11 small business firms on the original mailing list, the IFB was ultimately sent to 28 firms, and bids from several small businesses had been received under the two most recent procurements for these items. We also stated that even if there was only one small business capable of manufacturing the jacks in question, the set-aside would have been proper under Defense Acquisition Regulation (DAR) § 1-706.5(a) (1976 ed.) since Hein-Werner had not shown that none of the other small

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businesses solicited could perform the contract as a distributor. We further held that nothing in the regulation required the contracting officer to withdraw the set-aside after learning of Hein-Werner's allegations prior to the opening of bids. In other words, having once properly decided to set aside the procurement the contracting officer could reasonably decide to open bids to determine whether adequate competition existed.

Hein-Werner takes exception to our conclusion that the contracting officer's decision was reasonable. That firm asserts we agreed "that only a regular manufacturer of hydraulic service jacks could have been expected to actually produce the extremely complex equipment required by the contract." Hein-Werner further contends the contracting officer was aware that only Weaver Jack (the awardee) "was capable of successfully manufacturing such equipment at the time the award was to be made." Hein-Werner argues that rather than reach the obvious conclusion that the procurement was improperly set aside for small businesses, we decided, without "factual support", that the contracting officer could have expected to "receive competitive bids not only from Weaver Jack but from small businesses which were distributors rather than manufacturers." Hein-Werner maintains that since any distributor would have to purchase jacks from Weaver Jack, the contracting officer "plainly could not assume that he would receive competitive bids * * *." On the contrary, the protester argues, "it should have been clear to him that it was a virtual certainty that Weaver Jack would submit the lowest bid, untempered by the constraint of true competition."

Hein-Werner has misconstrued the basis of our decision. We did not, as asserted by Hein-Werner, agree "that only a regular manufacturer of hydraulic service jacks could have been expected to actually produce the extremely complex equipment required by the contract" nor did the record indicate that the contracting officer was aware that only Weaver Jack "was capable of successfully manufacturing such equipment at the time the award was to be made." Rather, [the record indicated that the contracting officer had 11 bidders on his original mailing list, the IFB was ultimately sent to 28 firms, and bids from several small businesses had been received under the two most recent procurements.] Under those circumstances we believe, that

[the contracting officer's decision was reasonable.] See Fermont Division, Dynamics Corporation of America; Onan Corporation, B-195431, June 23, 1980, 59 Comp. Gen. _____, 80-1 CPD 438, and cases cited therein. Furthermore, although Hein-Werner brought its views to the contracting officer's attention, it is our view that the contracting officer acted reasonably when he decided to resolve any doubt regarding the existence of small business competition by proceeding with bid opening.

Finally, our statements regarding the existence of at least one small business manufacturer and at least one small business which could act as a distributor were meant to point out that there was no requirement under the DAR provision applicable at the time this procurement was set aside that there be more than one responsible small business manufacturer in order for the procurement to be properly set aside. Thus, we indicated that even if we were to assume that Hein-Werner's allegations were correct on that score, it did not necessarily follow that a set-aside would be improper. We also noted that the regulation has been changed so that two small business concerns offering the products of different small business concerns are now required before a procurement may be set aside. We did not, as Hein-Werner asserts, base our conclusion on this point, but rather on the facts which are recited above and were also set forth in our original decision.

Accordingly, as Hein-Werner has not established that our prior decision was in error, it is affirmed.

Milton J. Fowler

For The Comptroller General
of the United States