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DECISION

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

FILE: B-199159 DATE: July 15, 1981

MATTER OF: Fermont Division, Dynamics Corporation of America

DIGEST:

1. Contracting officer, prior to making small business set-aside, is not required to make determinations tantamount to affirmative determinations of responsibility on small businesses expected to submit bids, but is only obligated to make informed business judgment that there is reasonable expectation of receiving bids from at least two small businesses capable of producing items required.

2. Statutory provisions that "fair proportion" of Government contracts be awarded to small business concerns refer to proportion of total Government awards for all goods and services. Therefore, agency may properly set aside significant proportion of Government contracts for particular category of items or even make class set aside for particular items without violating statutory provisions.

3. Allegation that set-aside resulted in protester being constructively debarred without notice and hearing in violation of procurement regulations and its constitutional right to due process is without merit. There is no requirement in regulations that large business be provided notice or hearing prior to set-aside and large business does not have constitutional right to such notice or hearing.

4. Once determination is made that small business set-aside is proper, large business protester is not interested party to raise other objections regarding procurement.

[Protest of Army Decision to Set Aside Purchase of Generator Sets For Small Businesses]

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Fermont Division, Dynamics Corporation of America protests the Department of the Army's decision to set aside the purchase of 15KW and 30KW generator sets for small businesses. Fermont alleges the Army failed to properly determine that reasonable bids would be received from at least two responsible small businesses. Fermont also asserts the small business set-aside policies of the Department of Defense (DOD) have resulted in a Government-created co-monopoly of the generator field by two small businesses and in the constructive debarment of Fermont. Fermont further complains about option provisions contained in the solicitation. For the following reasons Fermont's protest is denied in part and dismissed in part.

On April 30, 1980, the Army issued IFB DAAJ09-80-B-5060 for 15KW and 30KW generator sets. The IFB was totally set aside for small businesses after the contracting officer determined a sufficient number of small businesses with known production capabilities and capacities to perform the contract would submit bids. Bids from six small businesses were opened on July 1. Award was made to the low bidder, Libby Welding Company, Inc., during the pendency of the protest.

Fermont maintains that the contracting officer failed to properly determine that reasonable bids would be received from at least two responsible small businesses as required by Defense Acquisition Regulation (DAR) § 1-706.5(a)(1) (DAC 76-19, July 27, 1979) in force at the time the acquisition was made. Although Fermont does not argue that an agency must conduct a complete pre-award survey of two or more small businesses prior to any decision to set aside a requirement, it does maintain that in a procurement of this magnitude more than the "cursory review" performed by the contracting officer is required.

In a recent case quite similar to this, Fermont Division, Dynamics Corporation of America; Onan Corporation, 59 Comp. Gen. 533 (1980), 80-1 CPD 438, we held that while contracting officers are not required to make responsibility determinations on prospective small business bidders before determining to set aside procurements, DAR § 1-706.5(a)(1) imposes an obligation on the contracting officer to make an informed business judgment that there is a "reasonable expectation" of bids from a sufficient number of responsible small businesses so that award can be made at reasonable prices. We further held that the contracting officer may exercise broad discretion in making the determination.

Here, the record indicates that the contracting officer found that there were "two viable small firms capable of producing the 15KW and 30KW" generator sets. This finding was based on the fact that Libby was awarded a contract in 1972 for a total quantity of 1092 15KW and 1265 30KW generator sets and that Libby also competed for a contract awarded to another small business, John R. Hollingsworth Company, in 1976 for a total quantity of 616 15KW and 1518 30KW generator sets. The contracting officer also noted that both firms had been visited by an agency industrial specialist who indicated that both had ample space to handle a contract of this magnitude. We believe that the review of prior similar procurements involving the two principal small businesses expected to bid was sufficient to support the set-aside determination. See KDI Electro-Tec Corporation, B-185784, June 8, 1976, 76-1 CPD 364. Although clearly not determinative, it is also relevant to note that bids from six small businesses were actually received.

Fermont also contends that the set-aside was improper because the contracting officer failed to consider the effect of an IFB amendment which converted the procurement from a three-year multi-year procurement to a firm buy with multiple options and which increased the delivery requirements. In this regard, the protester refers to the provision in the amendment requiring offerors to have the capacity to produce at least 150 sets per month. Fermont argues that this amendment represented a radical change in the Army's requirements and therefore required a new set-aside determination. The record, however, indicates that the agency did indeed consider the impact of these changes. In a "Revised Contract Acquisition Plan" dated June 6, the Army determined that the delivery schedules for both data and hardware allowed a "sufficient time to separately acquire provisioning parts to permit hardware fielding as items are produced." The plan also indicated only those firms "who have a capability to produce the generators will be solicited" and reiterated the earlier finding that a sufficient number of small businesses capable of producing the items in accordance with the IFB existed. Although the agency did not issue another formal set-aside determination, it did assess the impact of this change in the procurement method on the set-aside. In these circumstances we see nothing improper in the agency's handling of the matter.

Fermont further objects to the set-aside on the grounds that the small business set-aside policies of DOD contained in DAR § 1-706.5 have resulted in a Government-created co-monopoly of the generator field by two small businesses. Fermont asserts that since 1976, 21 contracts for generator sets have been awarded and that, of the 17 contracts awarded competitively, more than half have been made under small business set-asides. Fermont further asserts that Libby and Hollingsworth have been the only firms to receive awards on the set-asides.

Fermont argues that the Congressional preference set forth in the Small Business Act, 15 U.S.C. § 631 (1976), and in 10 U.S.C. § 2301 (1976), that small businesses receive a "fair proportion" of Government contracts, does not require that two small businesses be given a monopoly on supplying generators and consequently that the set-aside violates the general requirement for unrestricted competition contained in 10 U.S.C. § 2304. In this connection, Fermont points to section 221(j), Public Law 95-507, 92 Stat. 1757, October 24, 1978, which provides that all procurements which have an anticipated value of less than $10,000 and which are subject to small purchase procedures shall be reserved exclusively for small businesses unless the contracting officer is unable to obtain competitive offers. The protester argues that if Congress intended a small business set-aside to result whenever two small businesses might bid, it would have so provided when it enacted Public Law 95-507.

In connection with a similar issue raised by Fermont in Fermont Division, Dynamics Corporation of America; Onan Corporation, supra, we held that the Army's decision to set aside a procurement for like items under essentially the same circumstances did not result in small business receiving more than a "fair proportion" of Government contract awards. We indicated that the statutory provisions requiring that a "fair proportion" of Government contracts be awarded to small businesses refer to a proportion of total Government contract awards for all goods and services and thus agencies may properly set aside a significant proportion of Government contracts for a particular category of items, or even make a class set-aside of all contracts for particular items, without violating the statutory provisions.

The fact that Congress amended the Small Business Act to provide that small purchases should be reserved for small businesses does not, in our opinion, establish that the set-aside procedures contained in DAR § 1-706.5, which require a set-aside whenever the contracting officer reasonably believes bids can be expected from at least two responsible small business concerns, go beyond the legal authority set forth in the Small Business Act or in 10 U.S.C. § 2301. The amendment merely states that in one special procurement category everything should be reserved for small business. We fail to see the logic in the protester's position that this somehow negates the validity of the DAR's long-standing implementation of the Small Business Act.

Fermont also asserts, citing Art-Metal U.S.A. v. Solomon, 473 F. Supp. 1 (D.D.C. 1978), that the set-aside policies of DOD have resulted in it being constructively debarred without a hearing in violation of DAR § 1-600 et seq. and in violation of its constitutional right to due process. We do not agree. The specific notice and hearing requirements of DAR § 1-600 et seq. apply only to those situations where the Government takes action to preclude a bidder from receiving any Government contracts and not to a decision to set aside a given procurement. See DAR § 1-600. The Art-Metal case is clearly distinguishable in that it concerns an agency's actions pending a possible debarment action. Large businesses do not have a constitutional right to notice or a hearing prior to the decision to set aside a procurement for small businesses. Duke City Lumber Co. v. Butz, 382 F. Supp. 362, 375 (D.D.C. 1974).

Finally, Fermont argues that the option quantities contained in the solicitation involve a violation of the provisions of DAR § 1-1500 et seq. However, since we have determined that the procurement was properly set aside for small business, we do not believe Fermont, which as a large business is ineligible for this procurement, has a sufficient economic interest to raise this issue. All American Engineering Company, B-197974, June 23, 1980, 80-1 CPD 440.

The protest is denied in part and dismissed in part.

Milton J. Socolar

Acting Comptroller General
of the United States