

*Weiskopf*

19022

**DECISION**



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

FILE: B-201319 DATE: August 4, 1981  
MATTER OF: Midland Transportation, Co.

**DIGEST:**

1. Protest of solicitation's cancellation is timely where filed within 10 days after protester knew or should have known basis of protest -- usually that solicitation was canceled.
2. Procurement of several items, some of which are set aside in their entirety for small business and others which are not, is not "partial small business set-aside" which is term of art describing situation where severable portion of quantity of same item or class of items is set aside exclusively for small business and other portion is not.
3. Agency properly canceled solicitation after bid opening after it discovered solicitation was confusing and ambiguous because improper set-aside provisions were erroneously included in solicitation.
4. Resolicitation of canceled solicitation is independent procurement which must meet statutory mandate for free and full competition and thus resolicitation cannot be limited to bidders under canceled solicitation.

Midland Transportation Company, protests the cancellation of the Air Force invitation for bids No. F25600-80-B-0072, and the issuance of IFB No. F25600-81-B-0001 resoliciting the same requirements, which were for packing and crating services. Midland, a small business, was the low bidder on certain items which were totally set aside for small business under the original IFB. The Air Force canceled the IFB after bid opening upon discovering that it erroneously contained the standard notice of a partial small business set-aside as opposed to a total set-aside. We deny the protest.

*[Protest of IFB cancellation]*  
~~014780~~ **116002**

Initially, there is a timeliness question. The Air Force alleges that the protest is untimely because it was not filed prior to the bid opening date for the resolicitation. However, to be timely filed a protest of a solicitation's cancellation must be filed within 10 working days after the protester knew or should have known the basis of its protest -- usually that the solicitation was canceled. John R. Wood Trucking Inc., B-200688, November 12, 1980, 80-2 CPD 359; 4 C.F.R. § 21.2(b)(2)(1981). In this case the notice of cancellation was sent to Midland with the second IFB and Midland filed its protest within 10 days after it received the documents. Thus, the protest is timely.

The canceled IFB sought offers for a requirements contract to supply packing, crating, unpacking and storage services for Department of Defense personnel's property being shipped within each of five geographic areas. Award was to be made by geographic area for the services listed in three schedules, two of which contained several items. Schedule I described outbound services, Schedule II inbound services and Schedule III storage services. A few of the areas within Schedule I and II were set aside for small business. The IFB required bidders to bid on all services within an area of performance under a given schedule, and, as originally issued, totally set aside certain areas of performance for the services required by Schedules I and II.

The contracting officer believed the original IFB erroneously contained a notice of a total small business set-aside because not all areas of performance in Schedules I and II were set-aside. Therefore, the contracting officer amended the IFB to include the standard "Notice of Partial Small Business Set Aside" clause, Defense Acquisition Regulation (DAR) § 7-2003.3(a)(1976 ed.), which provides for the negotiation of the set-aside portion after bid opening and after the award price of the non-set-aside portion has been determined. The notice also includes the following:

"To be eligible to participate in the set-aside portion of this procurement, a small business concern must submit a responsive offer on the non-set-aside portion."

Apparently the small business bidders seeking a contract on the set-aside areas ignored or did not understand the notice's language that the set-aside portions would be negotiated after bid opening because these bidders submitted prices for the set-aside areas. At least one small business bidder interpreted the requirement that a small business concern seeking a set-aside award must bid on the non-set-aside portion to mean that it must bid on all the services (on all three schedules) in the area where it wishes to perform. In the two areas where Midland was the low bidder on the set-aside services it did not bid on the non-set-aside services, whereas other small business bidders did bid on all the services to be performed in those areas. One of these bidders protested to the Air Force that, in effect, Midland was nonresponsive to the IFB for failure to bid on the non-set-aside portion of the services to be performed in the areas on which it bid. The Air Force considered the protester's interpretation of the IFB to be reasonable, but determined that the provision requiring small business bidders to bid on the non-set-aside portion did not reflect its minimum needs. Moreover, the Air Force concluded that limiting an award to bidders who bid on all the services in one area as opposed to only the set-aside services would cost the Government approximately \$100,000. Therefore, the Air Force canceled the solicitation and recompeted the requirement using an IFB with the appropriate set-aside provisions.

A partial small business set-aside entails setting aside a portion of a quantity of identical items or a class of items exclusively for small business, and may only be utilized when, among other things, "the procurement is severable into two or more economic production runs or reasonable lots." DAR § 1-706.6(a)(ii)(1976 ed.). Here, the Air Force did not intend to sever the procurement of any item, but intended to set-aside each item contained in a schedule for a certain area in its entirety.

In our view, inclusion of the notice of the partial set-aside notice in the original solicitation rendered the IFB confusing and ambiguous. Under the circumstances, the Air Force properly canceled the solicitation instead of making award to Midland because the notice of partial

set-aside confused bidders as to the basis for award, and may have prevented potential bidders from competing. Since the partial set-aside clause required small business bidders seeking set-aside awards to also bid on the non-set-aside portions, some small businesses which might have been willing to bid on the set-aside services but not on other services may have been prevented from bidding.

When solicitations contain ambiguous or erroneous specifications adversely affecting competition, the proper course of action is the rejection of all bids, cancellation of the solicitation, and issuance of a revised solicitation without the improper provision. See J and J Maintenance, Incorporated, B-196239, February 29, 1980, 80-1 CPD 165. The reason for this is to effect the statutory mandate that, "the specifications and invitations for bids shall permit such free and full competition as is consistent with the procurement of the property and services needed by the agency concerned." 10 U.S.C. § 2305(a)(1976). Since the partial set-aside notice adversely affected competition, the Air Force correctly canceled the IFB and reissued a corrected one upon discovering the defect after bid opening.

Moreover, it is well established that award of a contract pursuant to the advertising statutes must be made on the same terms offered to all bidders. Com-Tran of Michigan, Inc., B-200845, November 28, 1980, 80-2 CPD 407. Since at least one bidder interpreted, and we believe reasonably so, the IFB as advising small business bidders that to be eligible for award on set-aside services they must also submit a responsive offer on the non-set-aside services, the Air Force could not make a set-aside award to a bidder who did not comply with this requirement even if that such an award would be less costly to the Government. See Com-Tran of Michigan, supra.

The protester requests that, if we do not direct the Air Force to award it a contract under the canceled solicitation, we recommend that the second solicitation be limited to the group of bidders under the canceled solicitation. However, the second solicitation is a

separate procurement action which also must comply with the statutory mandate for free and full competition to the maximum practicable extent. Limiting the competition upon resolicitation would therefore not be proper.

The protest is denied.

*Milton J. Jordan*  
Acting Comptroller General  
of the United States