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**DECISION**



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

**FILE:** B-202399, .2, .3

**DATE:** December 15, 1981

**MATTER OF:** National Steel and Shipbuilding Company;  
Atkinson Marine Corporation; Triple "A"  
South

**DIGEST:**

1. Determination to set aside procurement for ship repair services for small business after solicitation is originally issued on an unrestricted basis is not legally objectionable if a reasonable basis for the determination exists at the time it is made.
2. GAO has no reason to object to determination to set aside procurement for ship repair services after solicitation was issued on an unrestricted basis because delay in reaching final determination was caused by good faith dispute between contracting officer and Small Business Administration official. Dispute was resolved through appeals process set forth in regulation and final determination that offers would be received from at least two responsible small businesses does not appear unreasonable.
3. Protests questioning the size standard for ship repair firms is not subject to review by GAO since by law it is a matter for decision by the Small Business Administration.
4. Protest allegation concerning propriety of using negotiation raised after closing date for receipt of initial proposals is untimely as allegation concerns an alleged impropriety evident on the face of the solicitation. Likewise, contention regarding existence of written determination and findings needed to support negotiation is untimely as it was raised almost two months after closing date for receipt of initial proposals.

5. Claim for proposal preparation costs is denied where GAO has not found agency actions were improper.

National Steel and Shipbuilding Company (NASSCO), Atkinson Marine Corporation (Atkinson) and Triple "A" South (Triple "A") protest the restriction to small business concerns of request for proposals (RFP) No. N00024-81-R-1003, issued by the Naval Sea Systems Command, for repair and modernization of three PF 1052 Class vessels.

Although the RFP as originally issued on January 13, 1981, sought proposals from all firms in the San Diego, California area for this effort, the agency issued an amendment six days prior to the March 2 date set for receipt of initial proposals limiting participation to small business firms in that area. The large business protesters<sup>1</sup> object to the decision to set aside the procurement after the original solicitation was issued on an unrestricted basis. They further protest the applicable Small Business Administration (SBA) size standard, claiming that it results in a disproportionate number of awards to one firm in the San Diego area. The protests are denied because the record shows that the set-aside decision, although poorly timed, is legally supportable and the setting of size standards is for the SBA, not this Office.

#### Background

This procurement for ship repair services was conducted pursuant to the Navy's home port policy which restricts the performance of major long term ship repairs to an area surrounding the ship's home port, in this case San Diego. Thus, notwithstanding any restriction on the size of businesses which are allowed to submit offers, the firm must be located in the San Diego area to be eligible for award. The record shows that the contracting officer initially intended to solicit proposals on an unrestricted basis, but that in November 1980 the Navy's Small and Disadvantaged

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<sup>1</sup> Although all three protesters' objections to the restriction of this procurement to small business are slightly different we have combined the essence of their arguments into a single position.

Business Utilization Specialist recommended that the work be set aside exclusively for small business firms. The contracting officer rejected this recommendation in mid-December 1980 because, in his opinion, there was not a reasonable expectation that offers would be submitted by at least two responsible small business concerns and that reasonable prices could be obtained, as required by Defense Acquisition Regulation (DAR) § 1-706.5(a)(1). In this regard, the contracting officer anticipated that only two small business concerns, Southwest Marine Corporation and Arcwel Corporation, would submit proposals. The contracting officer did not believe that Arcwel had the experience or resources necessary to compete with Southwest Marine.

The matter was then referred to the SBA Procurement Center Representative in accordance with the appeal procedure set forth at DAR § 1-706.3(b) for resolving internal disputes regarding whether to set aside a particular procurement for small businesses. The SBA representative, by letter of January 9, 1981, appealed the contracting officer's rejection of the set-aside recommendation to the Commander, Naval Sea Systems Command, asserting that the work should be set aside because two responsible small business concerns were expected to submit offers. Due to operational commitments restricting the availability of the ships for repair work, the contracting officer determined on that same date to proceed with the procurement under the authority of DAR § 1-706.3(f), and on January 13 issued the solicitation on an unrestricted basis despite the unresolved set-aside issue. On February 24, the agency's Deputy Commander for Contracts accepted the SBA representative's recommendation to set aside the procurement and so advised the contracting officer, who, in turn, informed the offerors of this decision and extended the date for submission of initial proposals to March 23.

#### Protests

The three protesting firms contend that the Navy's decision to set this procurement aside for small business firms, with only six days remaining before the original date set for receipt of initial proposals,

was arbitrary. They point out that they had essentially completed their proposal preparation effort by that date and had lost other opportunities for business in the process.

They argue that the set-aside decision cannot be justified in any event because one small business firm, Southwest Marine, dominates the small business ship repair industry in the San Diego area, which is the only area for consideration due to the Navy's home port policy. The data submitted shows that Southwest Marine received nearly 80 percent of the dollar volume of the Navy ship repair work set aside for small business firms in the San Diego Area during the past three years.

As a result, the protesters contend that the criteria of DAR § 1-706.5(a)(1) have not been satisfied since there was no basis for anticipating that offers would have been submitted by at least two responsible small business firms. In support of this conclusion, they cite a recent small business restricted procurement for comparable ship repair work where the Navy found that Arcwel was not in the competitive range, leaving only Southwest Marine for consideration. They conclude that in these circumstances a small business set-aside amounts to a sole-source award to Southwest Marine.

The protesters also question SBA's small business size standard applicable to ship repair and shipbuilding work. They assert that although the 1000-employee standard may be reasonable for defining small ship building enterprises, ship repair firms do not employ nearly as many workers. In their view, a much lower standard should be established for ship repair work and SBA's failure to make this distinction results in an unwarranted preference for ship repair firms which are large enough to compete in the open market without the protection accorded small business firms.

One firm, Triple "A", also contends that the ship repair work should have been procured through formal advertising rather than through competitive negotiations, since repair work of this type has been obtained routinely by advertising in the past. This firm also questions whether the decision to negotiate was properly supported by a written determination and findings.

Finally, the three protesting firms contend that they are entitled to proposal preparation costs in light of the Navy's decision to set aside this procurement for small business participation subsequent to issuing the solicitation on an unrestricted basis. NASSCO advises that it contacted Navy procurement personnel early in the process through an intermediary, the Shipbuilders Council of America, and was assured that the procurement would not be restricted to small business firms.

#### Untimely Issues

The two additional issues raised by Triple "A" are untimely and will not be considered. The fact that this procurement was not formally advertised was evident from the face of the solicitation and our Bid Protest Procedures require that protests based on alleged solicitation improprieties be filed prior to the closing date for receipt of initial proposals, 4 C.F.R. § 21.2(b)(1) (1981). Triple "A" first raised this allegation in its submission filed on May 14; the amended closing date for receipt of initial proposals was March 23.

Triple "A" also contended that either a written determination and findings did not exist or that if it did exist it must be erroneous. This allegation is also untimely because it too was first raised on May 14, almost two months after the amended closing date for receipt of proposals. We recognize that on March 23 the protester was not aware of this precise basis of protest. There is no evidence, however, that Triple "A" had any more information regarding its allegation after that date than it had before March 23. It was incumbent for the protester during the period between receipt of the original solicitation and the closing date for receipt of initial proposals to diligently seek the information it needed. A protester may not sit idly by and decide after almost two months to raise a protest allegation based on speculation as to whether a particular document exists. See Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172.

Set-Aside Decision

We recognize, as the protesters argue, that good procurement policy dictates that set-aside determinations should be made prior to the issuance of a solicitation, 53 Comp. Gen. 307 (1973); Ampex Corporation, et al., B-183739, November 14, 1975, 75-2 CPD 304, and that in general revision of a solicitation well into the procurement process to reflect needs that could or should have been determined earlier is not desirable. See Honeywell Information Systems, Inc., B-193177.2, December 6, 1979, 79-2 CPD 392. Nevertheless, in light of the statutory mandate that a fair proportion of procurement contracts be placed with small businesses, we have held that a set-aside determination is permissible after a solicitation is issued if there is a reasonable basis for the determination at the time it is made. Gill Marketing Co., Inc., B-194414.3, March 24, 1980, 80-1 CPD 213; American Dredging Company, B-201687, May 5, 1981, 81-1 CPD 344.

Here, the record contains information reasonably supporting the Navy's final judgment that under a small business set-aside it would receive offers from at least two responsible small businesses, resulting in reasonable prices. In this regard, the SBA representative's letter of January 9 asserted that the second small business firm, Arcwell, was expected to compete with Southwest Marine; that despite the contracting officer's initial misgivings Arcwell would be able to make up for any shortcomings in its experience or resources through subcontracting; and that the resulting competition should result in reasonable prices.

The contracting officer necessarily adopted this position when he restricted competition to small business firms upon completion of the appeal process. Although it is clear that the protesters do not agree with the agency's judgment here, there has been no showing that, in the context of this particular procurement the agency's determination was unreasonable. It should also be noted that the Navy's judgment was confirmed by later events, as competitive proposals were received from two small business firms.

Notwithstanding the validity of the agency's final judgment that adequate small business competition could be obtained, the protesters further argue that the timing of the set-aside determination was arbitrary as that determination was made after the issuance of an unrestricted solicitation and without any prior notice to large businesses which were already preparing proposals. We recognize the hardship caused by the belated set-aside determination made here. The record shows, however, that it was caused by a good faith disagreement which necessitated invoking the appeals process mandated by DAR § 1-706.3. The fact that the protester incurred costs in preparing to submit proposals does not establish that the later decision to restrict the procurement to small businesses was an arbitrary one. See Ampex Corporation; RCA Corporation, B-183739, November 14, 1975, 75-2 CPD 304.

#### SBA Size Determination

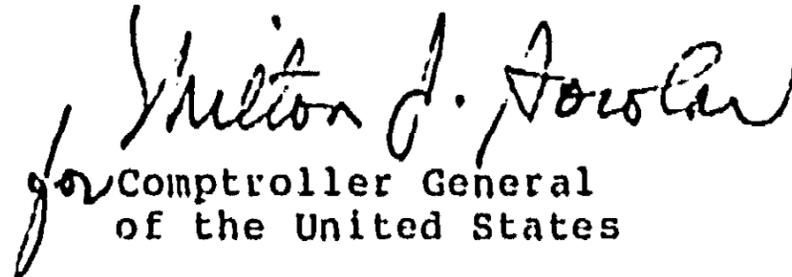
The protesters object to the SBA size standard for ship repair concerns. They recognize that our Office normally defers to the judgment of SBA as to whether an individual contractor comes within a particular small business size standard and whether a procurement should be governed by a particular Standard Industrial Classification Code. They contend, however, that the question raised is different from those we do not review because it concerns the establishment of a size standard. They argue that GAO is the appropriate forum for resolution of the question because the SBA Size Appeals Board lacks jurisdiction to hear the issue.

We do not agree. 15 U.S.C. § 632 directs the Administrator of SBA to make a detailed definition of a small business for various industries. It is not within our province to second-guess the definitions established by the Administrator pursuant to specific statutory authority. Rather, we think our role properly is limited to considering whether an agency's regulations are clearly contrary to the law they purport to implement. See, e.g., Digital Equipment Corporation, B-194363, April 23, 1979, 79-1 CPD 283; Midwest Service and Supply Co., and Midwest Engine Incorporated, B-191554, July 13, 1978, 78-2 CPD 34. We see no basis for concluding that the challenged regulatory definition is contrary to the Small Business Act.

Proposal Preparation Costs

The protesters claim that they are entitled to proposal preparation costs because the Navy delayed its approval of the SBA set-aside recommendation until initial proposals were nearly due. This delay caused them to unnecessarily expend money preparing proposals. It is unfortunate that the dispute between SBA and the contracting officials resulted in the set-aside determination being made after the solicitation was issued on an unrestricted basis. However, since we have not found that the agency acted improperly, there is no basis for our Office to grant the protesters proposal preparation costs. See R&E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110.

The protests are dismissed in part and denied in part and the claims denied.

  
for Comptroller General  
of the United States