

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

25414

FILE: B-210407**DATE:** June 9, 1983**MATTER OF:** Institute for Aerobics Research**DIGEST:**

1. Protester rejected as other than small business under 100-percent small business set-aside procurement contending it was improperly rejected is interested party under GAO Bid Protest Procedures because if protest is sustained the protester would be eligible for award.
2. To qualify as a small business concern a concern must be a business entity organized for profit. The contracting officer acted reasonably in rejecting a bid in which bidder represents that it is a nonprofit organization, thus indicating that bidder is other than a small business concern and ineligible for award under a small business set-aside.
3. An invitation for bids which states that in the evaluation for award the bidders' "technical submittals" will be weighted at 80 percent and cost 20 percent is improper because award under this evaluation scheme could be made to a bidder other than the one which bid the lowest price. A formally advertised contract must be awarded on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder is responsible.

The Institute for Aerobics Research protests the rejection of its bid under invitation for bids No. DABT15-83-B-0001, a 100-percent small business set-aside, issued by the Department of the Army for developing and presenting physical fitness classes at Ft. Benjamin Harrison, Indiana. Aerobics contends that the Army erroneously determined it to be other than a small business concern and followed improper procedures in making this determination.

O25847

We deny the protest.

This procurement was for a "pilot course of instruction on Physical Fitness and Wellness Systems and their impact on soldier lifestyle." The contractor was to develop and deliver all the course materials necessary for 20- and 80-hour basic programs of instruction and an 80-hour advanced program of instruction, as well as present these programs of instruction to personnel at Ft. Benjamin Harrison. The training program, including all supplemental training aids, lesson plans, programs of instruction, course outlines, tests and handouts would then become the property of the Government, whose employees presumably would conduct any subsequent courses.

A public bid opening was held on December 3, 1982. The Army's Abstract of Bids shows the following bids were received:

<u>Bidder</u>	<u>Size Status</u>	<u>Amount</u>
Chicago State University	"Non-profit"	\$53,348
Institute of Human Performance (awardee)	Small	73,195
Walter G. Moore & Sons	Small	75,000
Institute for Aerobics Research (protester)	"Non-profit"	90,910

The protester's bid included Standard Form 33, in paragraph 1 of which the protester represented that it is a small business concern and in paragraph 5 of which it represented that it is "a nonprofit organization." The Army regarded these two representations as inconsistent. The Army consequently telephoned the firm, explaining its concern over these representations, and asked Aerobics for "clarification." Aerobics responded that it is a nonprofit organization. The Army then telephoned a regional office of the Small Business Administration (SBA) about Aerobics' bid and was advised that a nonprofit organization is not eligible to receive award under a small business set-aside procurement. The Army subsequently made award to the Institute of Human Performance, whose bid was described by the Army in its report to our Office as "the lowest * * * received from a small business concern."

Upon being notified of the award to the Institute of Human Performance, Aerobics protested to our Office, objecting to the Army's rejection of its bid. For the reasons stated below, we deny Aerobics' protest. In

addition, however, although Aerobics did not object to the procedures used by the Army for evaluating bids, we find these procedures to be inappropriate. We discuss the deficiencies in those procedures below also.

As a preliminary matter, the Army contends that since Aerobics is a nonprofit organization, Aerobics does not qualify as a small business concern and therefore is not an interested party capable of pursuing this protest. See 4 C.F.R. § 21.1(a) (1983). Our Office has held that where an other than small business protests that the procuring agency followed improper procurement procedures in a small business set-aside, the protester is not an interested party, because if our Office determines that the challenged procedures are improper and sustains the protest, the protester would still be ineligible for award. See Central Texas College, B-209626, January 17, 1983, 83-1 CPD 49. However, where a bidder for a small business set-aside procurement protests that it was improperly determined to be an other than small business after bid opening and would otherwise be eligible for award of the contract in question, as is the case here, it clearly has a direct interest in the outcome of the protest. Therefore, we will consider the protest.

Aerobics' principal contention is that since it represented itself as a small business concern in its bid, the Army could not reject it as an other than small business without referring any question of the firm's small business status to the SBA for a size determination. See Defense Acquisition Regulation (DAR) § 1-703(b). It also argues that it is in fact a small business concern eligible for award under this procurement, even though it is a nonprofit organization. It reasons that since the SBA's regulations provide that an entity organized for profit owned by a nonprofit entity qualifies as a small business concern, the SBA could not have intended to preclude a nonprofit entity from receiving a small business set-aside contract since it would only be a matter of "form" for a nonprofit entity to create a for-profit subsidiary. See 13 C.F.R. § 121.3-2(i) (1982). It adds that since the solicitation treated small business status and type of business organization in separate questions, the answers to these questions are not mutually exclusive.

"Small business concern" is defined by DAR § 1-701.1 (a)(1), which states that "concern" means any business entity organized for profit. The SBA regulations define "concern" in the same manner and add that this includes a

"for profit" entity even if it is owned by a nonprofit entity. 13 C.F.R. § 121-3.2(i). Aerobics correctly represented in its bid that it is a nonprofit organization. By making such a representation, Aerobics indicated on the face of its bid that it is other than a small business concern and thus ineligible for award under this small business set-aside. We therefore believe the contracting officer acted reasonably in rejecting Aerobics' bid. We cannot accept Aerobics' rationale that the SBA must not have intended to disqualify nonprofit entities from the award of small business set-asides in the face of clear and unambiguous language to the contrary in SBA's regulations.

The protest is denied.

We note, however, that this procurement was deficient in that the solicitation set out a method for evaluating bids which was inappropriate for a formally advertised invitation for bids. There are references throughout this solicitation which identify it as an invitation for bids and those who respond to it as "bidders," and there was a public bid opening. The award of a formally advertised contract must be made on the basis of the most favorable cost to the Government, assuming the low bid is responsive and the bidder responsible. 10 U.S.C. § 2305(c); Emerson Electric Company, Environmental Products Division, B-209272, November 4, 1982, 82-2 CPD 409.

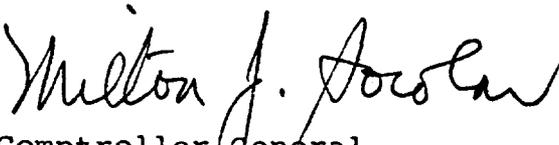
Most of the solicitation does not conflict with the requirements for award for a formally advertised contract. Sections L and M, however, required bidders to submit "proposals" and provided that the contract would be awarded based on an evaluation of both the technical submittal and of "cost," in which the technical score would be weighted at 80 percent and "cost" at 20 percent. These provisions are inappropriate to a formally advertised procurement because they establish an evaluation scheme under which cost becomes secondary to the quality of a bidder's "technical submittal" and the qualifications of its employees. This kind of evaluation is appropriate only in a negotiated contract, which the record suggests may have been more suitable for the kind of services the Army was seeking here. As it was, the solicitation was a checkerboard of "formal advertising" and "negotiation" provisions.

These evaluation provisions explain something which the Army did not address in its report to our Office: why

it gave first consideration for award to the highest bidder. Aerobics is of the "belief" that its technical submittal received the highest rating. Since the solicitation stated that the technical evaluation would be weighted at 80 percent in determining the award, Aerobics contends that it should have received the contract.

It may be, as Aerobics asserts, that if eligible it would have been first in line for award according to the solicitation's evaluation criteria. Those criteria, however, cannot be used under the method of procurement--formal advertising--which the Army chose here. Aerobic's protest was not filed until after award; had we been in a position to review this procurement earlier, we would have recommended that IFB -0001 be canceled and the procurement resolicited with evaluation provisions appropriate to the method of procurement used. Even if Aerobics had not been rejected on the basis of its size status, therefore, we would not have concluded that it should receive the award of this contract.

Since the contract has been completely performed, it is not feasible to recommend any corrective action. However, we are advising the Secretary of the Army of the deficiencies noted.

for 
Comptroller General
of the United States