DECISION

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

FILE: B-210927 **DATE:** August 8, 1983

MATTER OF: Bill Conklin Associates, Inc.

DIGEST:

1. While agencies should formulate their needs so as to maximize competition, burdensome requirements which may limit competition are not unreasonable so long as they reflect the Government's legitimate minimum needs.

2. Protester who did not enter the competition is not an interested party under GAO's Bid Protest Procedures to challenge determinations of technical acceptability, as protester was not improperly denied the opportunity to compete and therefore does not have the necessary direct economic stake in the selection decision.

3. Small business set-aside is appropriate when the contracting officer reasonably expects that a sufficient number of small businesses will respond to the solicitation.

4. GAO will not consider one firm's complaint that another's bid may be mistaken as only the contracting parties are in a position to assert rights and bring forth all necessary evidence to resolve mistake-in-bid questions. Moreover, the submission of a bid considered by another firm as too low does not constitute a legal basis for precluding awards.

5. The Federal court, not GAO, is the proper forum for seeking injunctive relief to prevent award until a protest is resolved.

Bill Conklin Associates, Inc. protests the award of a contract to Flex-Y-Plan Industries, Inc. under solicitation No. 10-0019-3, a two-step formally advertised procurement, issued by the National Aeronautics and Space Administration (NASA) for the manufacture, delivery and installation of interior acoustical panels and partitions for an interim office area in the vehicle assembly building at the John F. Kennedy Space Center. The procurement is a total small business set-aside. Conklin alleges that:

(1) the first step requirement for layout designs unduly restricted the competition;

(2) the awardee and the second low bidder under step two were not technically acceptable under the first step;

(3) the small business set-aside was unjustified because NASA did not receive responses from the requisite number of responsible small business concerns; and

(4) the awardee's bid price was mistaken.

Conklin also complains that NASA awarded the contract while the protest was pending before this Office.

We deny the protest in part and dismiss it in part.

(1) Step One Layout Design Requirement

The first step solicitation called for the submission of technical proposals, and required that offerors of the acoustical panels submit with their proposals a floor plan layout design. Only those firms found technically acceptable under step one were allowed to bid under step two. Of 35 firms solicited in the first step, 4 submitted proposals. Two of the four, Flex-Y-Plan and Business Furniture, Inc., were found technically acceptable under step one and, consequently, only those two firms were allowed to bid under step two, submitting bids of $776,877.89 and $1,491,417, respectively. (While the first step of a two-step formally advertised procurement is similar to a negotiated procurement in that technical proposals

are evaluated and discussions may be held, the second step simply involves the submission of bids by the firms found acceptable under step one. See International Medical Industries, Inc., B-208235, October 29, 1982, 82-2 CPD 386.)

Conklin, a small business manufacturer of acoustical panels, did not submit a step one proposal, contending that the floor plan layout design requirement unduly restricted competition. Conklin alleges that the costs of obtaining a layout design from a "licensed space planner" would be a minimum of $17,000, and that neither Conklin nor other small business partition suppliers can afford to spend that much money to prepare a proposal that the Government might not accept. The protester contends that the requirement therefore precludes a great number of small businesses from participation in the procurement; Conklin argues that NASA should have secured the floor plan layout design first, either through the General Services Administration or a design competition, and then purchased the panels and partitions through a small business set-aside that Conklin argues would have resulted in substantially more than four offerors.

NASA relates that the layout design requirement in step one was needed to satisfy its minimum needs. The agency states that it lacks the necessary expertise to prepare a layout design in-house, and that it was deemed necessary for the manufacturer to do the layout design because the manufacturer would have flexibility in closely fitting the type and number of panels and partitions offered to the plan. In this respect, NASA estimates the layout design costs to be in the $4,000 to $7,000 range, and points out that even Conklin's $17,000 estimate represents less than 2 percent of the estimated contract price of approximately $1,000,000. NASA also argues that a separate procurement for the layout would have created an unacceptable delay in fulfilling it needs, given the urgent nature of the procurement. According to NASA, the panels are urgently needed so that more than 1,200 employees can be housed in interim office areas away from the Space Shuttle vehicle assembly building, the old worksite; the vehicle assembly building, recently designated an ordnance

facility, houses the solid-fuel rocket boosters that are mated to the Space Shuttle.

The contracting agency has the primary responsibility for determining its minimum needs, and for drafting requirements that reflect those needs. Dynalectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. It is the contracting agency that is most familiar with conditions under which the services and supplies have been and will be used, and our standard for reviewing protests challenging agency requirements has been fashioned to take this fact into account. Specifically, our Office will not question agency decisions concerning their needs and the best methods of accommodating them absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Four-Phase Systems, Inc., B-201642, July 22, 1981, 81-2 CPD 56. While agencies should formulate their needs so as to maximize competition, burdensome requirements which may limit competition are not unreasonable so long as they reflect the Government's legitimate minimum needs. Educational Media Division, Inc., B-193501, March 27, 1979, 79-1 CPD 204.

Conklin has not shown that NASA's inclusion of the layout design requirement in the two-step procurement did not reflect the agency's minimum needs or otherwise was unreasonable. The fact that NASA might have been able to conduct two procurements for its requirement--one to secure the layout design and another to purchase the panels and partitions--if it had begun the procurement process sooner than it did, does not establish that the ultimate use of a single two-step procurement was not necessary to meet the agency's needs in a timely manner once the agency acted to do so. We have no basis to question NASA's position that under Conklin's approach there would have been an unacceptable delay in moving agency employees from the now-dangerous old worksite to a safe area. Indeed, NASA has awarded the contract while this protest has been pending because, as NASA advises:

> "* * * now that the Space Shuttle has completed its tests and is operational, flights

> will occur with increasing frequency. Consequently, numerous hands-on personnel currently housed in the Vehicle Assembly Building (VAB) must be relocated away from the VAB for safety reasons as rapidly as possible."

Moreover, as all offerors had to incur layout design costs in some fashion, the fact that Conklin may have opted for more expensive services than were necessary was a business decision that, while it may have prejudiced the firm in terms of a price competition, certainly did not preclude Conklin from entering the competition so that we should take legal objection to it. All bid and proposal preparation requires pre-award expense that will not be reimbursed unless the firm wins the competition. Where an agency has shown that a particular requirement constitutes part of its minimum needs, as NASA has done here, that requirement is not unreasonable merely because it necessitates some pre-award expenditures by offerors. Romar Consultants, Inc., B-206489, October 15, 1982, 82-2 CPD 339.

(2) Technical Unacceptability of Awardee and Second Low Bidder

Conklin contends that the awardee, Flex-Y-Plan, and the second low bidder, Business Furniture, were technically unacceptable under step one in that neither firm offered "nonprogressive" panels as required by the solicitation. "Nonprogressive" is an industry term meaning that a particular panel may be inserted or removed without disturbing adjacent panels. We dismiss this aspect of Conklin's protest, as the firm is not an interested party under our Bid Protest Procedures, 4 C.F.R. § 21.1(a) (1983).

Under our Bid Protest Procedures, a party must be "interested" before we will consider its protest allegations. A party is interested to protest alleged defects in a solicitation when it asserts that it would have submitted an offer but for the defects. S.A.F.E. Export Corporation, B-207655, November 16, 1982, 82-2 CPD 445. Therefore,

Conklin had standing to protest the allegedly unduly restrictive requirement for a layout design under step one.

A firm that was not improperly denied the opportunity to enter a competition, however, generally is not an interested party to complain about the administration of the procurement among the field of competitors, since the firm does not have the appropriately direct economic stake in the selection decision . See Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374. (There are, of course, exceptions to that rule, specifically, where there is no other identifiable group of potential protesters whose members have a more direct interest in asserting the basis for protest. See Cardion Electronics, 58 Comp. Gen. 591 (1979), 79-1 CPD 406.)

We have concluded above that the layout design requirement did not make the solicitation unduly restrictive of competition. In our view, therefore, Conklin's failure to submit a proposal under step one was the result of its own business judgment that the risk of losing the competition was not worth the cost of preparing a proposal, rather than the result of a legally improper obstacle to competing. Conklin's status for purposes of standing to pursue a protest thus is no different from that of any other party that decided it was not in its own business interest to try to win the contract. Conklin therefore is not an interested party to complain that proposals are not acceptable for a reason that had no bearing on Conklin's own decision, since there are two competitors--the two firms that submitted step one proposals but were not invited under step two--whose economic interests in the matter are more direct than Conklin's. See Cardion Electronics, Inc., supra.

(3) Small Business Set-Aside

Conklin contends that the results of the competition show that NASA should not have set the procurement aside for small business. Conklin urges that because Flex-Y-Plan and Business Furniture are not technically acceptable, NASA has not received small business competition adequate to justify the set-aside.

Conklin's protest on this issue implies that the firm, which is a small business concern, would want the procurement canceled and resolicited on an unrestricted basis. We do not see how Conklin would benefit from that action, however, since NASA certainly would include in an unrestricted resolicitation the same layout design requirement that caused Conklin not to enter the restricted competition.

In any event, under the procurement regulations set-asides are appropriate when offers are expected to be obtained from at least two responsible small business concerns. NASA Procurement Regulation § 1-706-5. Thus, the contracting officer is only required to make an informed business judgment that there is a reasonable expectation that a sufficient number of responsible small business offerors will respond to the solicitation. Whether Flex-Y-Plan and Business Furniture are ultimately found technically acceptable cannot retroactively affect NASA's original expectation and decision to set aside this procurement. See Fermont Division, Dynamics Corporation of America; Onan Corporation, 59 Comp. Gen. 533 (1980), 80-1 CPD 438.

(4) Flex-Y-Plan's Bid Price

Conklin alleges that Flex-Y-Plan's step two bid price, which is almost half that of Business Furniture, clearly demonstrates that there was a mistake in bid. This issue of Conklin's protest is dismissed.

We have consistently held that only the contracting parties--the Government and the firm in line for award--are in a position to assert rights and bring forth all necessary evidence to resolve mistake-in-bid questions. Southwest Truck Body Company--Request for Reconsideration, B-208660.2, December 28, 1982, 82-2 CPD 585; Southwest Truck Body Company, B-208973, December 27, 1982, 82-2 CPD 580. Moreover, consideration of a protest such as this in effect would necessitate that we judge whether the low bid appears unreasonably low, and if it does, whether the Government must reject it. We have consistently stated, however, that the submission of a bid considered by a

competitor as too low does not constitute a legal basis for precluding award. Contra Costa Electric, B-206487.2, May 7, 1982, 82-1 CPD 440. (Of course, even a verified low bid may not be accepted if it would be unconscionable to require performance at that price. See 53 Comp. Gen. 187 (1973); Southwest Truck Body Company, supra.)

(5) Award During Pendency of Protest

Conklin contends that NASA has acted arbitrarily in awarding the contract prior to our resolution of the protest. In view of our conclusions above, however, Conklin has not been prejudiced by NASA's award of the contract while the protest was pending. In any event, we point out that the Federal court is the proper forum for seeking injunctive relief to prevent award until a protest is resolved. See Keith Donaldson, 61 Comp. Gen. 417 (1982), 82-1 CPD 498.

The protest is denied in part and dismissed in part.

Milton J. Socolar

for Comptroller General
of the United States