

DECISION

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

26379

FILE: B-209753.3**DATE:** October 4, 1983**MATTER OF:** Polaroid Corporation**DIGEST:**

Where a product offered by a large business conforms to all expressed requirements of unrestricted line item in a solicitation for multiple award contracts under the Federal Supply Schedule, it may not be rejected solely because of the agency's previously unexpressed concern that acceptance might adversely impact another line item which has been set aside for small business firms.

Polaroid Corporation protests the rejection of its offer submitted in response to solicitation No. 3YC-82-N-020 which was issued by the General Services Administration (GSA). This solicitation for photographic equipment contemplated indefinite quantity, multiple award schedule (MAS) contracts under the Federal Supply Schedule program. The solicitation's Special Item Numbers (SINs) with which this protest is concerned are SIN 20-219 (219) for "Cameras, Still Picture, Self-Processing" and SIN 20-216 (216) for "Cameras, Identification, Self-Processing." SIN 216 is a total small business set-aside. Polaroid, a large business, proposed several models for 219, which was unrestricted, and received an award for two of its models. Polaroid's Miniportrait model was excluded from award under 219 because GSA believed it could be more appropriately listed under 216. Polaroid argues that its Miniportrait camera meets the description for 219 as well as 216 and that the exclusion of this camera from 219 was arbitrary and capricious.

We sustain this protest.

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Under the MAS program conducted by GSA, a number of commercial firms are awarded indefinite quantity contracts for a particular product category. Prices are based on negotiated minimum discounts off the vendors' commercial prices. Agencies select the particular product that best meets their needs and order directly from the contractors. The purpose of the MAS program is to decrease agency open market purchases by offering a wide variety of commercial products at prices lower than otherwise available and to make commercial items available when it is impracticable to draft adequate specifications for formally advertised or negotiated procurements. Although the General Services Administration Procurement Regulations (GSR) provide that the evaluation and award of Federal Supply Schedule contracts shall be in accordance with the normal procedures governing formal advertising and negotiation, see 41 C.F.R. § 5A-73.301, a MAS contract is generally awarded to any vendor that offers price discounts comparable to those offered by other vendors.

The solicitation here states that the Government may make multiple awards to those responsible offerors whose offers conforming to the request for proposals, would be most advantageous to the Government, taking into consideration the multiplicity and complexity of the equipment and the differences in performance required to accomplish the required end results, price, compliance with the delivery requirements and other pertinent factors. See GSPR, 41 C.F.R. § 5A-73.217-2. The solicitation does not limit an offeror from offering the same camera for several different SINS or several different cameras for the same SIN.

GSA argues that including the Miniportrait camera under 219 would circumvent the purposes of setting aside 216 for small businesses, from which Polaroid was excluded, because the agencies could continue to obtain the Miniportrait camera by ordering it under 219 rather than under 216. This concern is not without foundation because the category in which a product is listed does not preclude an agency from acquiring it for other uses. J.J. Broderick Company, B-205209, August 10, 1982, 82-2 CPD 120. GSA also contends that the Miniportrait camera fits the description of 216 better than 219 because cameras offered under 219

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generally have only a single lens capability while the Miniportrait camera has dual or quad lens capability, a laminator and a die cutter for cutting the resultant identification cards. GSA points out that Polaroid's current GSA catalog under another contract states that the primary function of the Miniportrait camera is to take self-processing photographs for use in passports and visas.

Polaroid contends that the solicitation did not restrict 219 only to cameras with a single lens capability and points out that its Miniportrait camera has been accepted under 219 for approximately 10 years. It notes that GSA does not argue that the camera lacks any specified characteristic for 219 and that the solicitation gave no indication that a multipurpose camera could not be submitted under 219. Polaroid asserts that if GSA desired to limit the scope of 219 so as to protect the effectiveness of the small business set-aside under 216, it should have done so in the solicitation.

Where a procurement has not been set aside for small business and the solicitation does not provide for special consideration of small business firms, the agency has no legal basis for giving preferential treatment to small business firms in the selection process. Umpqua Research Corporation, B-199014, April 3, 1981, 81-1 CPD 254.

The basis for award as stated in the solicitation is broad and while it reflects an attempt to leave much to the discretion of the agency, it is our view that it cannot be reasonably interpreted as informing offerors that their conforming cameras may be excluded from 219 solely because of the possible adverse impact on the set-aside portion of the procurement. Reliance upon this concern as the basis for rejecting Polaroid's camera violates the fundamental principle that all evaluation factors be made known in advance so that all competitors can compete on an equal basis. See Northern Virginia Van Lines, Inc., B-204518, December 21, 1981, 81-2 CPD 485.

The protest is sustained.

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Since the majority of the contract year has passed, we are not recommending any corrective action. We are recommending that the agency take steps to avoid this situation from arising again.

for *Milton J. Fowler*
Comptroller General
of the United States