

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

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**FILE:** B-212514.3**DATE:** November 16, 1983**MATTER OF:** Norfolk Dredging Company--Second  
Request for Reconsideration**DIGEST:**

Second request for reconsideration is denied where the protester again fails to show an error of law or fact in GAO's decision not to object to an agency's continued small business set-aside of the procurement of dredging services.

Norfolk Dredging Company again requests reconsideration of our decision, Norfolk Dredging Company, B-212514, August 8, 1983, 83-2 CPD 188, in which we summarily denied the firm's protest regarding the decision by the U. S. Army Corps of Engineers, Savannah District, to continue the total set-aside of dredging services in Savannah Harbor for small business. We denied Norfolk's first reconsideration request in B-212514.2, September 19, 1983, 83-2 CPD 345. Norfolk now argues that since a substantial portion of the procurement at issue involves what is termed in the solicitation as "new work," the Corps of Engineers cannot show a prior history of successful acquisition which Norfolk urges is a prerequisite to the continued set-aside of the dredging services. We deny the request for reconsideration.

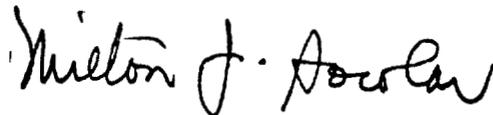
As we already have emphasized in our two prior decisions, Defense Acquisition Regulation (DAR) § 1-706.1(f) (DAC 76-40, November 26, 1982) provides that once a service has been successfully acquired through a small business set-aside, all future requirements for that service must be set aside unless the contracting officer determines that there is not a reasonable expectation that offers from two responsible small businesses will be received and the award will be at a reasonable price. See Otis Elevator Company, B-195831, November 8, 1979, 79-2 CPD 341. In its latest submission, Norfolk again fails to offer evidence that any prior procurements were not successfully acquired or that the contracting officer, in his business judgment, lacked a reasonable expectation of a sufficient number of small business offers at reasonable prices. As Norfolk itself correctly points out, it is the protester and not the agency that bears the burden of proof in such matters. See Ingersoll-Rand, B-207005, April 12, 1982, 82-1 CPD 338.

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Norfolk contends that since approximately 27 percent of the dredging services has been classified by the Corps of Engineers as "new work," DAR § 1-706.1(f) is inapplicable because there is no prior history of successful acquisition for that portion of the project. We see no merit to the argument. The procurement calls for both maintenance dredging and new work in the amounts of 2.7 million and 1 million cubic yards, respectively, and Norfolk does not suggest that there is any significant difference between these two operations. In our view, DAR § 1-706.1(f) is clearly applicable to this procurement in that the prerequisite for prior successful acquisition relates to the dredging of Savannah Harbor as a total offered service, and there is no meaningful distinction in that regard being drawn between maintenance and new work.

In essence, we believe that Norfolk is really alleging that the continued total set-aside unfairly precludes the firm, a large business, from any opportunity ever to compete in a procurement of the service. There is, however, nothing about such a set-aside that is either inherently illegal or inconsistent with procurement statutes or regulations. Relying in part on our decisions in Fermont Division, Dynamics Corporation of America; Onan Corporation, 59 Comp. Gen. 533 (1980), 80-1 CPD 438, and J. H. Rutter Rex Manufacturing Co., Inc., B-190905, July 11, 1978, 78-2 CPD 29, the United States Court of Appeals for the Fifth Circuit held recently that such a small business set-aside does not violate the federal procurement statutes' requirement for competition, and that a large business is not deprived by such a set-aside of any "constitutional property interest in equal access to the bidding process." J. H. Rutter Rex Manufacturing Co., Inc., v. United States, 706 F.2d 702, 712 (5th Cir. 1983).

We again find no basis upon which to reconsider our prior decision in this matter. The request for reconsideration is denied.



Acting Comptroller General  
of the United States