

**DECISION**

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

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**FILE:** B-212609

**DATE:** January 26, 1984

**MATTER OF:** Warren/Dielectric Communications

**DIGEST:**

1. Protest filed after bid opening contending that the procurement was improperly set aside for small business is untimely and will not be considered under the exception to the timeliness rules for significant issues since the issue raised has been considered on the merits in previous decisions.
2. Contention that the sole responsive bid received is unreasonably high is without merit where the agency determined that the bid was fair and reasonable and the protester has not shown that the agency's determination was unreasonable.
3. Protest by a non-small business firm that the specifications in a small business set-aside were "written around" the products of a particular small business manufacturer will not be considered since the protester is ineligible for award and thus is not an interested party to raise such an issue.

Warren/Dielectric Communications protests the award of a contract to any other bidder under invitation for bids (IFB) No. DTFA01-83-B-37218 issued by the U.S. Department of Transportation, Federal Aviation Administration. Warren, a large business, contends that the solicitation was improperly set aside for small business; that the only responsive small business bid price was unreasonably high; and that the specifications were unduly restrictive. We dismiss the protest in part and deny it in part.

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The procurement was synopsisized, as a total small business set-aside, in the Commerce Business Daily on June 1, 1983. The IFB, issued on June 22, solicited bids to provide 78 wattmeters and related accessories. At the July 28 bid opening, the agency received the following bids:

Warren	\$140,296.75
Bird Electronic Corporation	144,082.30
MISCORP	157,132.36

Warren filed its protest in our Office on August 4. It contends that based on the procurement history for these wattmeters, the contracting officer could not have had a reasonable expectation of receiving bids from a sufficient number of small businesses to insure award at a reasonable price. The protester recognizes that its protest may be untimely, but argues that we nevertheless should consider the matter under the exception to our timeliness rules for significant issues, because numerous agencies procure wattmeters under small business set-asides, thereby excluding the protester and other large business manufacturers and dealers of wattmeters. Warren further contends that the agency should not award the contract to the proposed awardee--Bird--because that firm's bid price is unreasonably high. Warren also argues that the specifications were "written around" Bird's wattmeters, and the solicitation thus amounted to a sole-source procurement.

Inasmuch as the provision restricting participation to small businesses was evident from the face of the solicitation, Warren is correct that under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), its protest, filed after bid opening, is untimely. We do not agree, however, that Warren's protest raises a significant issue requiring waiver of our timeliness rules.

In order to invoke the significant issue exception to our timeliness rules, the subject matter of the protest must not only evidence a principle of widespread importance to the procurement community, see, e.g., Williamette-Western Corporation; Pacific Towboat and Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 CPD 259, but must also involve

a matter that has not been considered on the merits in previous decisions. CSA Reporting Corporation, 59 Comp. Gen. 338 (1980), 80-1 CPD 225. We have numerous prior decisions setting forth the basic principles that should govern an agency's consideration of whether to set aside a procurement for small business participation. See, e.g., Central Texas College, B-209626, January 17, 1983, 83-1 CPD 49; Ingersoll-Rand, B-207005, April 12, 1982, 82-1 CPD 338. Thus, while we recognize the importance of this matter to the protester, we do not consider the propriety of the decision to set this procurement aside a significant issue under our Bid Protest Procedures.

Warren also contends that the proposed awardee's bid is unreasonably high. The agency responds that Bird's bid exceeds the protester's bid by less than \$4,000 and the government's estimate by less than \$7,500, and states that it therefore considers Bird's bid to be fair and reasonable.

The fact that a small business bid is more than a courtesy bid (a bid by an ineligible large business on a small business set-aside) or the government estimate does not mean that it must be rejected, since there is a range over and above those amounts that may be considered reasonable in a set-aside situation. In other words, in view of the congressional policy favoring small businesses, a fair proportion of government contracts may be awarded to such firms, even at premium (albeit reasonable) prices. Browning-Ferris Industries, B-209234, March 29, 1983, 83-1 CPD 323. Since the determination of whether a small business bid is reasonable is ultimately a matter within the administrative discretion of the contracting agency, we will not question the determination unless it is clearly unreasonable or there is a showing of bad faith or fraud. Id.

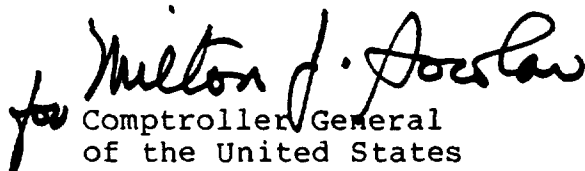
Here, Warren merely states that in its opinion the circumstances under which this procurement was conducted did not maximize competition and thus did not result in the agency receiving a reasonable bid price. This alone, however, is not sufficient to show that the agency acted unreasonably in determining that a bid price that is approximately 6 percent more than the government estimate,

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and approximately 4 percent more than the protester's bid, is unreasonable. Under these circumstances, we cannot conclude that there is any basis for disturbing the agency's determination. Triple "A" South, B-193721, May 9, 1979, 79-1 CPD 324; CDI Marine Company, B-188905, November 15, 1977, 77-2 CPD 367.

Finally, we will not consider Warren's contention that the solicitation's specifications were "written around" Bird's wattmeters so that this solicitation amounted to a sole-source procurement. As a large business, Warren is not an interested party to protest alleged solicitation deficiencies in a small business set-aside because it is ineligible for award and thus could not be affected by the resolution of such issues. Central Texas College, supra. In any event, Warren's protest on this basis would be untimely inasmuch as it involves an alleged defect in the solicitation which was apparent from the face of the solicitation but was not protested until after bid opening. 4 C.F.R. § 21.2(b)(1).

The protest is dismissed in part and denied in part.

  
for Comptroller General  
of the United States