

DECISION

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

27606

FILE:R-210642; B-210642.2;
B-211730

DATE: March 6, 1984

MATTER OF:

Wilkinson Manufacturing Company

DIGEST:

1. Decision to cancel solicitation and thereafter set aside portion of procurement for small business is upheld where agency has shown that set-aside determination was reasonable.
2. Since agency decision to cancel solicitation had reasonable basis, protest concerning selection and application of transportation rates utilized in evaluation of bids under that solicitation is academic and will not be considered.
3. Protest alleging that solicitations are unlawful because they independently commit agency to purchase its total requirements for one-cent blanks from separate sources is denied where review of solicitations indicates that agency has merely set aside a fixed amount of its yearly requirement for small business and that any requirements in excess of that amount would be purchased from firm awarded requirements-type contract under second solicitation.
4. Protest alleging that solicitation provisions are ambiguous, contradictory and unduly restrictive is denied where review of provisions in question indicates that they are not ambiguous, contradictory or unduly restrictive.

Wilkinson Manufacturing Company (Wilkinson) has filed several protests in regard to the Department of the Treasury, Bureau of the Mint (Mint), procurement of its annual requirements for copper-plated, zinc one-cent blanks. The Mint issued three invitations for bids (IFB) numbered BM83-06, BM83-17 and BM83-18.

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We deny Wilkinson's protests in part and dismiss them in part.

Wilkinson's first protest concerned the award of a contract to LaSalle Rolling Mills, Inc. (LaSalle), pursuant to IFB-06. It was Wilkinson's argument that LaSalle's bid was nonresponsive. IFB-06 solicited bids for the processing, fabrication and delivery of one-cent blanks for the Mints in Philadelphia and Denver (estimated quantity - 33.5 million pounds for each Mint). Section I provided that the f.o.b. shall be at origin. LaSalle submitted a bid for a total of 20 million pounds to be delivered to Philadelphia and/or Denver in an amount specified by the Mint.

Subsequently, the Mint canceled IFB-06 and issued two other IFB's (IFB-17 and IFB-18). Wilkinson protested the cancellation (B-210642.2) and the Mint's selection and application of the transportation rates utilized in the evaluation of bids under IFB-06 (B-210642).

IFB-17, a total small business set-aside, solicited bids for the processing, fabrication and delivery of one-cent blanks for the Denver Mint and West Point Bullion Depository (estimated quantity - 15 million pounds for each facility). IFB-18, an unrestricted solicitation, also solicited for the processing, fabrication and delivery of one-cent blanks for the Denver and Philadelphia Mints (estimated quantity - 51.85 million pounds: 18.425 million - Denver; 33.425 million - Philadelphia). Section I of each of the latter IFB's provided that f.o.b. shall be at destination. Wilkinson protested IFB's-17 and -18, questioning the issuance of two requirements-type solicitations that split the needs of the Denver Mint and contends that the IFB's are unduly restrictive (B-211730).

We deny Wilkinson's protest concerning the cancellation of IFB-06 and, therefore, dismiss the protest against the transportation rates as academic. Wilkinson's protest involving IFB's-17 and -18 is denied.

It is the Mint's position that the cancellation of IFB-06 was proper. Essentially, the Mint submits that the IFB was defective. The Mint bases its opinion on the fact that the IFB did not contain a procedure for orders under the situation where multiple awards were issued. Furthermore, the Mint points to the omission of a delivery schedule in regard to the amounts required under the

multiple-award situation. Moreover, the record indicates that at the time of the issuance of IFB-06, the Mint was considering a small business set-aside, but was unable to complete its evaluation concerning the Mints involved and the amount prior to bid opening. At this time, two facilities beside Denver and Philadelphia, West Point Bullion Depository and San Francisco Assay Office, were producing the one-cent coin. However, this changed when it was determined that the San Francisco facility was needed for the production of Olympic and George Washington Commemorative Coins. With only three facilities remaining to produce the one-cent coins, the annual requirements were then reevaluated and it was discovered that there was a decline in the Federal Reserve Banks' demand for one-cent coins. Concomitantly, the small business set-aside decision was made--20 million pounds would be set aside (10 million each for West Point and Denver). Subsequent to the issuance of IFB-17 and IFB-18, the set-aside amount was increased to 30 million pounds (15 million each for West Point and Denver). We also note that the bids under the new solicitations were based on f.o.b. destination rather than origin.

Wilkinson contends that the Mint's arguments neither individually nor collectively support the cancellation of IFB-06. However, we need not discuss each of Wilkinson's objections since we find that the Mint's decision to set aside part of the procurement was not unreasonable and, therefore, an adequate justification, standing alone, to support cancellation of a solicitation.

In light of the mandate of the (Small Business Act, 15 U.S.C. § 637) et seq. (1982), that a fair proportion of procurement contracts be placed with small business and the absence of any requirement, statutory or regulatory, that a set-aside be made at any particular time, see (Federal Procurement Regulations (FPR) § 1-706.5 (1964 ed. amend 192), a set-aside determination is permissible after solicitation issuance if there is a reasonable basis for the determination at the time it is made. See American Dredging Company, B-201687, May 5, 1981, 81-1 CPD 344.

The determination, pursuant to FPR § 1-706.5, requires a reasonable expectation that bids will be received from a sufficient number of responsible small business concerns so that award will be made at a reasonable price. Since this type of determination is basically a business judgment, we

will sustain the determination absent a clear showing of abuse of discretion. Otis Elevator Company, B-196540, May 6, 1980, 80-1 CPD 327.

We find that the record adequately supports the set-aside decision. The Mint advises that IFB-06 was not set aside for small business because the Mint was unable to complete its evaluation concerning which Mints would be involved and the amount of the procurement. After IFB-06 was canceled, the Mint concluded its set-aside evaluation and determined that a portion of the procurement for Denver and all of West Point's requirements could be set aside and that there was a reasonable expectation of receipt of bids from small business. Five small businesses responded to the set-aside (IFB-17); however, two submitted a "no bid." Nonetheless, adequate competition was achieved and, therefore, we do not find the Mint's decision to set aside to have been unreasonable. See American Dredging Company, supra. Thus, IFB-06 need not be reinstated.

Wilkinson's final protest concerns the issuance of IFB's-17 and -18 to satisfy the Mint's total yearly requirements for one-cent blanks. IFB-17 was set aside exclusively for small business while IFB-18 was issued on an unrestricted basis. Wilkinson argues that the IFB's are unlawful and contradictory since they apparently commit the Mint to purchase all of the Denver facility requirements for one-cent blanks from more than one source. As a result, Wilkinson contends that the Mint would be obligated to purchase twice its actual requirements for the Denver facility and that such a result is clearly in excess of the government's needs. Also, Wilkinson argues that both IFB's are ambiguous and unduly restrictive of competition.

A necessary element of any requirements contract is that one party agrees to obtain the required goods and services from one party exclusively. See e.g. Shaden Contractors, Inc. v. United States, 149 Ct. Cl. 535, 276 F.2d 1 (1960). In the present case, the Mint has set aside a portion of its total requirements for the Denver facility for small business and, in our view, the subject contracts are not "requirements" contracts since the Mint has not agreed to procure all of its requirements exclusively from one source. However, since both IFB's relate to the same requirement and were issued simultaneously with the exact same closing date, the propriety of this procurement action must be based on an evaluation of both IFB's even though the award of two separate contracts is contemplated.

Our review of the IFB's clearly indicates that the Mint is not purchasing twice its actual requirements. The Mint has merely set aside a portion of its total requirements for small business and we find nothing improper in this decision. In addition, we believe the obligations and benefits of all parties, under both IFB's-17 and -18, were adequately defined in the solicitations. Although Wilkinson argues that there is an apparent conflict between the two IFB's as to the estimated quantity set aside under IFB-17, subsequent amendments to both IFB's-17 and -18 clearly demonstrate that 15 million pounds were, in fact, the amount set aside for the Denver facility under IFB-17. The overall estimate for the Denver facility was 33,425,000 pounds and originally 20 million pounds were to be purchased under the set-aside with the remainder, if any, to be purchased under IFB-18. On June 17, 1983, the Mint revised the estimate for the Denver facility under IFB-17 to 15 million pounds and, subsequently, on June 21, the estimate in IFB-18 was revised to 18,425,000 pounds. Even though paragraph C.20.D of IFB-18 was not formally amended to reflect the revised estimate, it appears clear that the initial 15 million pounds of Denver's requirements would be purchased under IFB-17 and that any requirements in excess of that estimate would be filled by the firm awarded the contract under IFB-18. Accordingly, we do not find the IFB's to be either unlawful or ambiguous.

Wilkinson also argues that both IFB's are unduly restrictive and were constructed by the Mint to specifically accommodate the incumbent contractors. Wilkinson contends that the 20-million pound estimate for the small business set-aside reflects LaSalle's available production capacity and that no other producer could afford to produce such a small quantity and effectively compete. In addition, Wilkinson argues that the first article requirement in IFB-18 precludes any producer that has not previously supplied the Mint from competing and, in effect, creates a sole-source procurement.

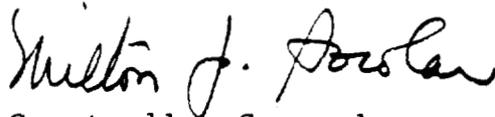
With respect to Wilkinson's allegation that the 20-million pound quantity set-aside under IFB-17 restricted the procurement to LaSalle, we note that, subsequent to the protest, the quantity was revised to 30 million pounds and three small businesses actually bid on the IFB.

Wilkinson also contended that the first article requirement in IFB-18 did not provide sufficient time for bidders to deliver first article samples. Although the IFB

was amended to give bidders 255 days after the award of the contract to deliver the first articles, Wilkinson argued that the period of performance required deliveries to begin the week of October 3, 1983, and that only one firm could meet this schedule. However, amendment 6, paragraph 3, resolved Wilkinson's concern. That paragraph deleted the October 3 date and provided for performance to begin within 30 days after the issuance of a delivery order.

Finally, Wilkinson contends that IFB-17 is ambiguous as to whether single or multiple awards will be made. Paragraph D.3 provides that bids will be evaluated on an all-or-none basis. Paragraph D.1 provides that a bid will be found nonresponsive if it offers a quantity less than the quantities shown in the schedule for item E.1 or E.2. Wilkinson argues that it is not clear whether the all-or-none provision applies to each line item, permitting a bidder to bid "all" for one item and "none" for the other, or to the total contract.

Paragraph C.33 of IFB-17 clearly states that multiple awards will not result from this solicitation. As a result, it is clear that the all-or-none provision applies to the total contract and that bidders, in order to be considered for award, must bid each line item.

for 
Comptroller General
of the United States