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DECISION

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

FILE: B-213363 **DATE:** April 17, 1984

MATTER OF: James S. Scroggins & Co.

DIGEST:

1. Protest against the contracting officer's decision to withdraw a small business set-aside because of unreasonable prices is denied in the absence of a showing of bad faith or fraud. Based on other substantially lower prices received, even though from large business concerns, we do not find contracting officer's decision unreasonable.

2. Under applicable regulations, the question of whether a prospective contractor qualifies as a manufacturer or regular dealer for Walsh-Healey Public Contracts Act purposes is for the contracting officer, with appeal to the Department of Labor or, in appropriate circumstances, the Small Business Administration and, thus, will not be considered by GAO.

3. GAO does not review affirmative determinations of responsibility except in limited circumstances not present here. Fact that firm is in bankruptcy proceedings does not necessitate a finding of nonresponsibility.

James S. Scroggins & Co. (Scroggins), a small business, protests under several solicitations issued by the Defense General Supply Center (DGSC). Scroggins protests (1) DGSC's decision to withdraw the small-business restricted solicitations in favor of unrestricted competition, (2) DGSC's determination that the awardees on the solicitations in excess of $10,000 were qualified for award under the Walsh-Healey Public Contracts Act and, (3) DGSC's award to an offeror which was in bankruptcy proceedings at the time of award.

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The protest is denied in part and dismissed in part.

Regarding Scroggin's contention that several small business set-asides were wrongfully converted into unrestricted solicitations, the contracting officer states that three of the small business set-asides were dissolved according to Defense Acquisition Regulation (DAR) § 1-706.3 (Defense Acquisition Circular (DAC) No. 76-28, July 15, 1981). On DLA400-83-Q-LS86 which became DLA400-84-M-0913, a dealer offering the product of a large manufacturer quoted 45 percent lower than the small manufacturer. On DLA400-83-Q-LS10 which became DLA400-83-M-HP66, the difference was 36 percent and on DLA400-83-Q-LS14 which became DLA400-83-M-HP65, the difference was 65 percent.

The withdrawal of small business set-asides based upon a determination that prices received from small business concerns are unreasonable is a valid exercise of the authority of the contracting agency and our Office will not question that determination absent a showing of unreasonableness, bad faith or fraud. Gregory Elevator, Inc., B-193043, January 19, 1979, 79-1 CPD 32. There is no allegation of bad faith or fraud in this case, and neither is apparent in the record. Therefore, there is no basis for our Office to disagree with the contracting officer's judgment on this issue. See Lipps, Inc., B-196588, February 15, 1980, 80-1 CPD 137; North American Signal Company--Reconsideration, B-190972, August 4, 1978, 78-2 CPD 87.

Scroggins objects to utilizing unsolicited price offers from large business firms to determine whether the bids received from small business firms are unreasonable. We have recognized that large business offers on small business set-aside procurements may be considered in determining whether a small business offer submitted on the procurement is unreasonable. Jim Boring Specialists, Inc., B-192878, February 15, 1979, 79-1 CPD 189; Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD 21. Therefore, the bids of the large business concerns were properly considered in comparing prices. In this case, the contracting officer found that the prices offered by large business firms were between 36 and 65 percent lower than those offered by small business firms.

We have upheld the rejection of an offer as unreasonable where the lowest eligible offeror under a small business set-aside exceeded the basis for comparison by as little as 7.2 percent. Coil Company, Inc., B-193185, March 16, 1979, 79-1 CPD 185. Here, Scroggins' prices are substantially above the large business prices and, therefore, we cannot say the contracting officer's action in finding Scroggins' price unreasonable was improper.

Scroggins also contends that the awardees have not proved their qualifications as manufacturers or regular dealers and are therefore in violation of the ~~Walsh-Healey~~ Public Contracts Act, 41 U.S.C. §§ 35-45 (1982). This Office does not consider the legal status of a firm as a regular dealer or a manufacturer within the meaning of the Walsh-Healey Public Contracts Act. Under 41 C.F.R § 50-201.101 (1983), Walsh-Healey Public Contracts Act qualifications are for review by the contracting officer, with appeal to the Department of Labor and, in appropriate circumstances, the Small Business Administration, rather than our Office. See Surgical Instrument Company of America, B-212653, November 30, 1983, 83-2 CPD 628. Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD 25. Therefore, this protest ground is dismissed.

Scroggins also objects to the award of several contracts to Petralloy Corporation (PC) since the firm has filed for bankruptcy under Chapter XI of the United States Bankruptcy Code. A firm's ability to meet contract requirements is a matter of responsibility, which must be determined by the contracting officer prior to award. We do not review affirmative determinations of responsibility unless fraud is alleged on the part of procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Federal Data Corporation, B-196643, November 14, 1979, 79-2 CPD 353. Neither exception is applicable here and, consequently, we will not consider this issue. In any event, the mere fact that a contractor is undergoing bankruptcy does not require a finding of nonresponsibility. Hunter Outdoor Products, Incorporated, 54 Comp. Gen. 276 (1974), 74-2 CPD 207, and cases cited therein.

The protest is dismissed in part and denied in part.

for Milton J. Socolar
Comptroller General
of the United States