

DECISION



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

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FILE: B-212215.2; B-212215.3 **DATE:** May 2, 1984

MATTER OF: Reeves Brothers Inc.;
H. Landau & Company

DIGEST:

1. Where letter to agency expresses dissatisfaction with small business restriction contained in a solicitation and requests that that restriction be deleted, GAO will consider the letter an adequate expression of an intent to protest notwithstanding the fact that the word "protest" was not used.
2. Solicitation amendment that did not foreclose the possibility of further agency consideration of one of the issues raised in a protest to the contracting officer will not be considered adverse agency action on that issue.
3. Contracting officer could reasonably conclude that adequate small business competition could be expected so as to justify setting aside a procurement exclusively for small business participation when the information available to the contracting officer indicated that there were four small business finishers capable of producing the cloth required by the solicitation.

Reeves Brothers Inc. and H. Landau & Company protest the restriction in invitation for bids (IFB) No. DLA100-83-B-0770 setting aside the solicitation solely for small business participation. We dismiss Reeves' protest and we deny Landau's protest.

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The solicitation was issued by the Defense Personnel Support Center, Philadelphia, Pennsylvania as a total small business, labor surplus area set-aside on May 13, 1983. It solicited bids to supply 608,000 yards of Sage Green, Oxford Cloth. The agency amended the solicitation on June 8, in part to permit bidders to bid on 60 inch width cloth in addition to the 45 inch width cloth originally specified. Eight firms submitted bids by the June 20 bid opening date. Each of the firms indicated that it was bidding as a small business and each indicated that the cloth would be produced by the same small business finisher.

The agency contends that the protests are untimely because they concern an alleged solicitation impropriety and were filed after bid opening, contrary to our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983). We agree that Reeves' June 24 protest to our Office is untimely. (Reeves contends, but the agency denies, that it filed a pre-bid opening protest with the contracting officer. Reeves, however, has not come forward with evidence to support its contention.) We do not agree, however, that Landau's protest is untimely.

The record shows that Landau submitted a letter to the contracting officer on June 2 in which it requested relaxation of the specifications to permit the furnishing of 60 inch width cloth and also stated its objection to the set-aside provision and requested its deletion. The agency urges us not to consider this as a pre-bid opening protest because the letter does not state it was intended to be a protest. Moreover, the agency notes, it responded to Landau's letter by amending the solicitation on June 8, which amendment "incorporated a portion of what Landau was seeking in its letter . . . [while], at least implicitly, denying the balance of Landau's request." The agency argues that this amendment constituted adverse action with respect to the items in Landau's letter that were not addressed by the amendment--including the allegedly improper small business restriction--so that Landau's July 5 protest to this Office is untimely since it was not filed within 10 days of that adverse action as required by section 21.2(a) of our procedures.

A letter does not have to explicitly state that it is intended as a protest for it to be so considered. While it is preferable for a protester to actually use the word "protest," where, as here, a letter expresses dissatisfaction with a solicitation and requests corrective action, we think such a letter manifests sufficient expression of an intent to protest. See Monarch Enterprises, Inc., B-208631, May 23, 1983, 83-1 CPD ¶ 548; Applied Devices Corporation, B-203241, Sept. 9, 1981, 81-2 CPD ¶ 207. Thus, we consider Landau's June 2 letter a timely protest to the agency concerning the small business restriction.

Moreover, we are not inclined to view issuance of the June 8 amendment as adverse agency action on Landau's objection to the set-aside restriction. The agency cites International Research Associates, B-182344, May 8, 1975, 75-1 CPD ¶ 285, in support of its position that issuance of the amendment without a change to the small business restriction constituted adverse agency action on that portion of Landau's protest. That decision, however, involved a negotiated procurement in which the agency, after receiving objections to the specifications, issued an amendment calling for best and final offers without making any change to the specifications. The agency had also informed the protester orally that it viewed the specifications as adequate. Under the circumstances, we thought the amendment foreclosed any further possibility of agency consideration of the protest.

Here, however, we do not believe issuance of the amendment foreclosed the possibility of further consideration of Landau's complaint. The agency had not communicated to Landau that it had considered and rejected Landau's complaint concerning the small business restriction. Moreover, on its face the amendment was not prejudicial to the protester's position. Thus, unlike the situation presented by the agency's call for best and final offers in the cited case, there was nothing in the agency's actions that should have made the protester aware that the agency was not still considering its protest of the small business restriction. We note that prior to withdrawing a small business set-aside the regulations require the contracting officer to determine that an award under the set-aside would be detrimental to the public interest, and to notify the appropriate agency small business officials of

his determination. These officials are then allowed an opportunity to appeal that determination. Defense Acquisition Regulation (DAR) § 1-706.3. In light of the potentially lengthy procedures involved in withdrawing a small business set-aside, we believe it would be reasonable for Landau to assume that an amendment issued 4 working days after it complained of the restriction was not intended as agency action on that aspect of its complaint. Thus, we do not consider the adverse action to have occurred until bid opening on June 22. See, e.g., Office Products International, Inc., B-209610, April 5, 1983, 83-1 CPD ¶ 363; Monarch Enterprises, supra. Since Landau protested here within 10 days of bid opening, its protest is timely.

The protest is based on the alleged existence of only one small business finisher.¹ A contracting officer is not permitted to make a total small business set-aside unless he determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and that awards will be made at reasonable prices. DAR § 1-706.5(a)(1). Landau contends that there is only one small business firm capable of producing the cloth at reasonable prices.² Landau argues that while there may be other firms interested in producing the cloth, they lack the proper equipment to perform economically and efficiently and therefore they could not do so at reasonable prices. Landau contends that this information was widely known within the industry and should have been known to the contracting officer.

¹ Under applicable Small Business Administration regulations, 13 C.F.R. § 121.3-8, a non-manufacturer bidding on a small business set-aside is considered to be small when it meets the applicable size standard for number of employees and offers the products of a small business manufacturer. For purposes of this procurement, the finisher is considered to be the manufacturer of the cloth.

² Apparently, special equipment and expertise are required to produce the cloth in the color specified.

The record suggests that the contracting officer issued the solicitation as a small business set-aside based on his knowledge that two small business firms had been represented by the bidders on the prior procurement for this item. Subsequent to the issuance of the solicitation, however, apparently in response to a question raised by Reeves, the contracting officer requested information from his Directorate of Clothing and Textiles regarding the number of available small business finishers. The contracting officer was informed that four small business finishers existed. The agency argues therefore that the decision to set aside the procurement for small business participation was proper because the information available to the contracting officer reasonably led him to conclude that adequate competition would be obtained.

Landau responds that it was unreasonable for the contracting officer to rely on the previous procurement because the contracting officer should have been aware that Landau--the awardee on the previous solicitation--sought and obtained permission to substitute the lone capable small business finisher for the one it had originally planned to use when that finisher proved incapable of producing the cloth. Landau argues that if this finisher was not capable of performing under the contract awarded 1 year earlier, the contracting officer could not reasonably have viewed it as capable of performing under the present solicitation.

The decision as to whether the reasonable expectation required by DAR § 1-706.5 exists is basically a business judgment that will not be overturned absent a clear showing of abuse of discretion. Burrelle's Press Clipping Services, B-199945, March 2, 1981, 81-1 CPD ¶ 152. We see no such abuse of discretion.

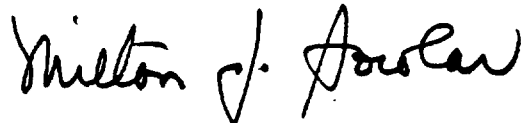
The record indicates that the agency contacted four small business finishers, two of which indicated that they had produced this item previously and could perform under this solicitation while two others, which had not produced the item previously indicated they could produce the cloth required under this solicitation. The contracting officer

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was also aware that two of them had been represented by the bids submitted on the prior procurement. Although, as Landau asserts, one of the two may not have been able to produce the cloth at that time, we believe the contracting officer could reasonably rely on that firm's statement that it was presently able to do so in determining that a small business set-aside was appropriate. In this regard, contracting officers need not make determinations tantamount to affirmative determinations of responsibility before determining to set aside a procurement for exclusive small business participation. Fremont Division, Dynamics Corporation of America, Onan Corporation, 59 Comp. Gen. 533 (1980), 80-1 CPD ¶ 438; Burrelle's Press Clipping Service, supra. Thus, we see no basis to object to the contracting officer's decision to proceed with bid opening on a set-aside basis.

Finally, we note that while Landau originally complained that reasonable prices could not be expected, it has not alleged that the bid price accepted here was unreasonable or that the contracting officer's determination that it was reasonable was the result of fraud or bad faith. See Multigraphics, B-212347, Dec. 6, 1983, 83-2 ¶ CPD 649.

Reeves' protest is dismissed and Landau's protest is denied.



Acting Comptroller General
of the United States