Comp PL-I

DECISION

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

FILE: B-220560 **DATE:** November 13, 1985

MATTER OF: J.M. Cashman, Inc.

DIGEST:

1. Where agency knew the specific aspect of the procurement to which the protester objected in a protest at that level, subsequent protest to GAO will not be dismissed on the basis that the actual agency-level filing was not sufficiently detailed.

2. GAO will not object to a contracting officer's pre-bid-opening decision to withdraw a small business set-aside and issue the solicitation on an unrestricted basis where the record does not show the official abused his discretion in determining that offers from at least two responsible small businesses could not reasonably be expected.

J.M. Cashman, Inc., protests the U.S. Army Corps of Engineers' decision not to set aside for small businesses invitation for bids (IFB) No. DACW33-85-B-0051 for maintenance dredging of the Thames River in Connecticut. Although the IFB as originially issued was set aside, the contracting officer subsequently concluded that the Corps could not reasonably expect offers from two responsible small businesses and, therefore, withdrew the set-aside by amendment to the invitation. Cashman contests the contracting officer's conclusion.

We deny the protest.

The Corps' New England Division, upon issuing the IFB as a set-aside for small business, received protests from two large business firms complaining that the division had set aside every dredging project that year. The firms argued that while set-asides might be appropriate for small projects, the scope of work involved in this deep draft dredging effort was so extensive that large businesses should be permitted to compete, as they had on past projects of this type and size.

033781

In response to these protests, the contracting officer proceeded to review the history of earlier similar dredging projects. This review showed that in the past, the Department of the Navy had been responsible for dredging the Thames River and had procured the services on an unrestricted basis, with large businesses winning the competitions. Further, the history of four deep draft dredging procurements in the general geographical area, requiring the same type of equipment needed to perform the Thames River work, showed that, of four small businesses that had requested plans and specifications, only Cashman bid on all four (winning one), with one other firm, Hydrodredge, bidding on two.

Based on this information, the contracting officer, with the concurrence of the activity's small business adviser, decided that a set-aside was inappropriate under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2 (1984), which requires a set-aside only where there is a reasonable expectation of offers from at least two responsible small business concerns and that award will be at a reasonable price. The contracting officer therefore withdrew the restriction by amending the IFB.

Cashman asserts that Hydrodredge tried to bid on a third project, but the bid was rejected as late. Cashman further asserts that both it and Hydrodredge bid on a fifth, earlier contract and argues that the Corps should have included that project in its historical analysis. Cashman also states that since the last deep dredging project, a new small business has been formed and questions how the contracting officer could assume that this firm would not compete if the procurement in issue were restricted. Finally, Cashman suggests that the limited degree of small business competition on the reviewed unrestricted procurements is misleading, since small businesses that might have bid against similar size firms probably chose not to bid against large businesses.

Initially, the Corps argues that the protest should be dismissed without considering its merits. The Corps points out that under section 21.2(a)(1) of our Bid Protest Regulations, 4 C.F.R. part 21 (1985), a protest alleging an apparent solicitation impropriety, like the decision not to restrict a procurement, must be filed with either the contracting agency or our Office before bid opening in order to be timely. While Cashman initially filed with the Corps shortly before bid opening--the protest to our Office was

filed within 10 working days after the Corps opened bids without acting on Cashman's complaint (see section 21.2(a)(3))--the Corps notes that the pre-bid-opening complaint stated only that any award under the invitation was protested, without providing any basis for complaint. The Corps argues that this filing was inadequate under section 21.1(c)(4) of our Regulations, which requires that a protest include a detailed statement of its legal and factual grounds.

We will not dismiss the matter. Cashman states, and the Corps does not dispute, that before protesting to the Corps, Cashman had numerous conversations with contracting officials about its concern. Since the agency knew of the specific aspect of the procurement to which the objection was being made in the pre-bid-opening protest, dismissal of the matter for the reason argued, particularly at this point in the protest process, is not warranted. Cf. Marine Logistics Corp., B-218150, May 30, 1985, 85-1 C.P.D. ¶ 614.

As to the protest's merits, it is not clear why the Corps originally set this procurement aside. We see no legal basis, however, to object to the decision to withdraw the restriction.

The judgment as to whether there is a reasonable expectation that offers will be received from a sufficient number of small businesses to warrant a set-aside under FAR, 48 C.F.R. § 19.502-2, basically involves a business decision within the broad discretion of the contracting officials, and our review generally is limited to ascertaining whether those officials have abused that discretion. Automated Datatron, Inc., B-218284, May 9, 1985, 85-1 C.P.D. ¶ 516.

We appreciate Cashman's argument that the history of limited small business bidding on unrestricted procurements should not be held to establish a lack of small business interest on restricted ones. Nevertheless, the fact is that an agency must have some basis on which to make the judgment whether a set-aside is warranted, and we believe prior related procurement history necessarily is an appropriate and important consideration in that respect. See Mantech International Corp., B-216505, Feb. 11, 1985, 85-1 C.P.D. ¶ 176. Here, the Corps' historical analysis encompassed four of its more recent deep draft dredging jobs and, while the Corps could have gone back in time and included one or more jobs for its review, we see nothing improper in the agency's basing its judgment on the actual results of its

most recent projects. Further, Cashman's suggestion that there was a new small business that might have been interested in bidding on a set-aside clearly does not establish, without any input from the new firm, that the Corps reasonably could expect it to submit an offer.

Under the circumstances, we cannot say that the contracting officer abused his discretion in withdrawing the set-aside. The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel