DECISION

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

FILE: B-221028 **DATE:** February 11, 1986

MATTER OF: Kimberly-Clark Corporation

DIGEST:

1. Since a contracting officer's determination as to whether adequate small business competition may reasonably be expected under a prospective total set-aside is basically a business judgment within the contracting officer's broad discretion, GAO will uphold a set-aside determination absent a clear showing of abuse of discretion.

2. A contracting officer did not abuse her discretion in determining to set aside a majority of solicitation items for exclusive small business competition where the prior procurement history of the same items created the reasonable expectation that bids would be received from at least two responsible small business concerns and that awards would be at reasonable prices.

Kimberly-Clark Corporation, a large business concern, protests a determination by the General Services Administration (GSA) to set aside for exclusive small business competition 40 of 46 line items under invitation for bids (IFB) No. 9FCO-OKJ-A-A1262/86. The procurement is for the acquisition of industrial and institutional paper towels to meet GSA's needs for the period from February 1, 1986, through January 31, 1987. Kimberly-Clark contends that the contracting officer for the procurement abused her discretion in determining that adequate small business competition could reasonably be expected. We deny the protest.

Background

The IFB contemplated awards of multiple requirements contracts to furnish six types of paper towels (identified by National Stock Number (NSN)) to 46 line item locations:

		Line Items
(1) NSN	7920-00-543-6492	1 - 8
(2) NSN	7920-00-682-6710	9 - 16
(3) NSN	7920-00-721-8884	17 - 24
(4) NSN	7920-00-823-6931	25 - 30
(5) NSN	7920-00-982-1203	31 - 38
(6) NSN	7920-00-965-1709	39 - 46

NSN -6492, -6710, -8884, -1203, and -1709 (line items 1 through 24 and 31 through 46) were set aside for exclusive small business competition because the contracting officer determined that there was a reasonable expectation that bids from at least two responsible small business concerns would be received and that awards would be at reasonable prices. The contracting officer's determination was based on the history of the previous unrestricted solicitation for the same NSNs which had resulted in bids from five small business firms. NSN -6931 was not set aside because only one small business bid had been received under the previous solicitation.

Prior to bid opening, Kimberly-Clark filed this protest alleging that the contracting officer had abused her discretion in determining that adequate small business competition would be obtained. In this regard, Kimberly-Clark contends that Abel Converting, Inc. and Stirling Manufacturing Company, two of the small business firms which competed for all 5 NSNs, under the previous solicitation, should not have been treated as separate and independent concerns offering the products of different small business concerns, since they apparently share corporate officers and common management. Kimberly-Clark notes that it raised its concerns as to the firms' alleged lack of independence with GSA well before the contracting officer made her determination, and that GSA's Inspector General's Office accordingly initiated an investigation.

Moreover, Kimberly-Clark asserts that the contracting officer unreasonably determined that Abel and Stirling would be responsible to perform any contracts under the present solicitation because the contracting officer for the previous solicitation had determined that the firms were nonresponsible due to a perceived lack of financial capability. Although Kimberly-Clark acknowledges that the Small Business Administration (SBA) issued a certificate of competency (COC) for both firms under the previous

solicitation[1]/, Kimberly-Clark contends that the present solicitation is much larger in scope, and, therefore, that it was unreasonable for the present contracting officer to consider Abel and Stirling to be responsible for purposes of awards under this procurement.

With regard to John R. Lyman Company, the third small business firm which submitted bids for all 5 NSNs under the previous solicitation, Kimberly-Clark contends that the history of the previous solicitation demonstrates that Lyman submitted bids so much higher than those of any other bidder that the firm never had any realistic chance to win a contract. Therefore, Kimberly-Clark urges that the contracting officer erred in viewing Lyman as an effective small business competitor whose submitted bid prices would be reasonable. Kimberly-Clark also asserts in this regard that since Lyman has never performed a contract to furnish the paper towels being acquired, the firm cannot be considered to be responsible.

Finally, Kimberly-Clark asserts that Pacific Paper Products and Industrial Paper and Packaging, the other small business firms which competed under the previous solicitation, should not have been considered by the contracting officer as indicating a reasonable expectation of adequate small business competition for the present solcitation. Kimberly-Clark notes that, in the previous procurement, Pacific submitted bids for only 3 of the 9 line items under NSN -1709 and did not submit any bids under the other 4 NSNs.[2]/ Similarly, Kimberly-Clark points out that Industrial submitted bids for only 5 of the 9 line items under NSN -6492, did not submit bids under any other NSN, and its bid prices were not low. Kimberly-Clark also alleges that, in any event, Industrial cannot properly be viewed as a small business firm because, in fact, it is supplying products manufactured by a large business concern.

1/ The SBA has conclusive authority to determine the responsibility of small business concerns by issuing or refusing to issue a COC. The W.H. Smith Hardware Co., B-219327, et al., July 24, 1985, 85-2 CPD ¶ 82.

2/ Although Pacific's prices were low, the firm was not awarded any contract because it refused to extend its bid acceptance period.

Analysis

The Federal Acquisition Regulation (FAR) provides that in order to make a total small business set-aside, the contracting officer must determine that there is a reasonable expectation that offers will be received 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. FAR, § 19.502-2 (FAC 84-5, Apr. 1, 1985). Because any determination under section 19.502-2 as to whether adequate small business competition may reasonably be expected is basically a business judgment within the contracting officer's broad discretion, this Office will uphold the contracting officer's set-aside determination absent a clear showing of abuse of discretion. Advance Machine Co., B-217399, Sept. 20, 1985, 85-2 CPD ¶ 311. As the basis for making such determinations, contracting officers normally analyze factors such as the prior procurement history and rely upon the recommendations of appropriate small business specialists. See Mantech International Corp., B-216505, Feb. 11, 1985, 85-1 CPD ¶ 176.

The record in the present matter does not support Kimberly-Clark's assertion that the contracting officer abused her discretion in determining that, based upon the history of the previous procurement, there would be adequate small business competition for the present acquisition. At the time she made her determination, the contracting officer apparently knew that GSA's Inspector General's Office was investigating allegations that Abel and Stirling had engaged in collusive bidding practices, but that investigation (which ultimately found no evidence of collusive bidding) was not concluded until several months later.[3/] Therefore, although the results of that investigation may be cause for concern with regard to

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3/ Kimberly-Clark strenuously objects to the fact that GSA has not furnished the firm with a copy of the investigation report, which GSA believes is exempt from disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1982). Although Kimberly-Clark insists that the protest may not be decided until it has been able to obtain a copy of the document and submit its further comments thereon, we expressly reject the contention. The contracting agency has the primary responsibility for deciding which documents relevant to a protested procurement action are subject to release, 31 U.S.C.A. § 3553(f) (West Supp. 1985), (ft. nt. 3 cont'd on pg. 5)

future set-aside determinations, as we discuss more fully below, the contracting officer had no reasonable basis at the time to treat Abel and Stirling as other than two separate small business concerns which had competed effectively under the previous solicitation for all 5 NSNs.

Similarly, the fact that the contracting officer knew that Abel and Stirling were being investigated for collusive bidding practices did not, as Kimberly-Clark asserts, compel a conclusion that Abel, because of its purported relationship with Stirling, would not offer the products of "different small business concerns" as required by the FAR, § 19.502-2. Since the contracting officer had no reasonable basis to question the independence of Abel and Stirling when she made her set-aside determination, she clearly had no reason to assume that Abel would only furnish Stirling's product or the same products Stirling would supply.

To the extent Kimberly-Clark contends that the contracting officer acted unreasonably in viewing Abel and Stirling as responsible prospective contractors, we find no merit in the contention. Although the previous contracting officer had determined the two firms to be nonresponsible, the fact remains that the SBA, by issuing a COC for both firms, had conclusively determined that they were responsible for that previous procurement. The W.H. Smith Hardware Co., B-219327, et al., supra n.1. Because of the SBA's finding, and because the procurement history demonstrated that Abel and Stirling had satisfactorily performed on their respective contracts awarded under the previous solicitation, we cannot accept Kimberly-Clark's assertion that the contracting officer acted unreasonably in viewing the two firms as responsible prospective contractors for the present procurement, despite its greater scope. Moreover, we have expressly held that although standards of responsibility are relevant to deciding whether a reasonable expectation of adequate small business competition exists, a contracting officer is not required to make determinations tantamount

(cont'd fr. ft. nt. 3) and, therefore, absent fraud or bad faith, no showing of which has been made here, we will not question an agency's decision not to release documents. Employment Perspectives, B-218338, June 24, 1985, 85-1 CPD¶ 715. Moreover, this Office has no authority under the FOIA to decide what information the agency must disclose. Ikard Manufacturing Co., 63 Comp. Gen. 239 (1984), 84-1 CPD ¶ 266.

to affirmative determinations of responsibility on expected small business bidders before determining to make an exclusive small business set-aside, since this would constitute a prequalification procedure which would unduly restrict the competition. Fermont Division, Dynamics Corp. of America, et al., 59 Comp. Gen. 533 (1980), 80-1 CPD ¶ 438.

In reaching our conclusion, we recognize that GSA's investigative report reveals that Stirling's Vice-President of Operations is also a corporate officer of Abel, in the capacity of either President or Vice-President. (This individual acknowledges that he is Vice-President of Abel, but the individual he names as Abel's President has stated that their positions are reversed.) Therefore, since this individual appears to be a key employee of both firms, Abel and Stirling perhaps should be regarded as affiliates and not as two separate and independent small business concerns. Nevertheless, we do not believe this situation indicates that the present set-aside should be withdrawn. See generally FAR, § 19.506. Moreover, even if Abel and Stirling are in fact affiliated[4/], the presence of Lyman as another bidder satisfies the requirement for bids from at least two small business concerns. FAR, § 19.502-2, supra.

With respect to Lyman, we do not accept Kimberly-Clark's assertion that the firm's history of higher bid prices under the previous unrestricted solicitation necessarily demonstrates that those prices were unreasonable. By way of illustration, Lyman's unit prices for the 9 line items under NSN -1709 ranged from $20.02 to $21.90; Abel's prices for these 9 items ranged from $19.72 to $21.15; Stirling's from $18.90 to $20.85; and Fort Howard, the large business firm which was the low bidder on several of those items, submitted prices ranging from $18.50 to $21.00. The issue of excessive and unreasonable price is for the contracting agency to decide, and we will not disturb it where it is supported by a rational basis. Ling/L.A.B., subsidiary of Mechanical Technology, Inc., B-207414, Oct. 15, 1982, 82-2 CPD ¶ 341. Accordingly, we think that the previous procurement history provided adequate support for the contracting officer's determination that Lyman's submitted bid prices would be reasonable.

4/ The SBA, not this Office, is the proper forum to decide the matter. See Keystone Elevator Co., Inc., B-215540, July 20, 1984, 84-2 CPD ¶ 72.

Although Kimberly-Clark asserts that Lyman should not have been viewed by the contracting officer as a responsible prospective contractor because the firm has never performed a contract to furnish the paper towels being acquired under the present solicitation, the record indicates that the contracting officer's determination was based on the fact that Lyman has held previous GSA contracts for other products and has performed successfully. We believe that this was a sufficient ground for the contracting officer to regard Lyman as a responsible prospective small business bidder for purposes of the set-aside determination. As already indicated, she was not required to make an affirmative responsibility determination (or anything close to such a determination) at this initial stage of the procurement. Fermont Division, Dynamics Corp. of America, et al., 59 Comp. Gen. 533, supra.

Therefore, we find no legal basis to conclude that the contracting officer abused her discretion under FAR, § 19.502-2, supra, in determining that there was a reasonable expectation of competition from at least two responsible small business firms and that awards would be at reasonable prices. At the time she made that determination, the competition of Abel, Stirling and Lyman for all 5 NSNs under the previous solicitation could reasonably be viewed as indicating that there would be adequate competition[5/] for the 5 NSNs under the present solicitation if they were to be set aside, and we note that GSA's SBA agency representative concurred in that determination. See Mantech International Corp., B-216505, supra.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel

5/ Because the presence of Abel, Stirling, and Lyman as bidders under the previous solicitation satisfied the requirement for a reasonable expectation of adequate small business competition from at least two firms, there is no need to consider Kimberly-Clark's allegations regarding Pacific and Industrial.