

Halperin



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hopkinsville Aggregate Company
File: B-227830
Date: June 16, 1987

DIGEST

1. Protest filed after bid opening contending that the procurement was improperly set aside for small business is untimely and will not be considered.
2. Contention that contracting agency is required to withdraw a small business set-aside after bid opening where allegedly only one responsive small business bid is received is without merit because agency may properly make award to a sole small business bidder in such circumstances.

DECISION

Hopkinsville Aggregate Company protests the rejection of its low bid and the award of a contract to Asphalt Stone Company under invitation for bids (IFB) No. DAKF23-87-B-0093, issued as a small business set-aside by the Directorate of Contracting, Fort Campbell, Kentucky, Department of the Army, for the procurement of maintenance stone. Hopkinsville's bid was rejected because Hopkinsville certified in its bid that it is not a small business.

We dismiss the protest without obtaining an agency report because it is clear on the face of the protest that it is untimely in part and that the remainder is without merit. 4 C.F.R. § 21.3(f) (1986).

According to Hopkinsville, five bids were received by the bid opening date of May 6, 1987. Hopkinsville states that of the five bidders, two (itself and one other bidder) properly certified themselves to be large business concerns, and the three remaining bidders certified themselves to be small businesses.

Hopkinsville's first contention is that the IFB should not have been set aside for small businesses, but instead should

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have been competed on an unrestricted basis. This argument is untimely and not for our consideration.

Our Bid Protest Regulations require that protests against alleged improprieties apparent from the face of an IFB must be filed before the time set for bid opening. 4 C.F.R. § 21.2(a)(1). Hopkinsville's protest that the IFB should have been issued on an unrestricted basis constitutes an allegation of a solicitation impropriety which should have been filed prior to bid opening. Therefore, this basis of Hopkinsville's protest, filed for the first time after the award of a contract under the IFB, is untimely. 4 C.F.R. § 21.2(a)(1); Lundin Construction, Inc., B-226209; B-226210, Feb. 20, 1987, 87-1 C.P.D. ¶ 198; Warren/Dielectric Communications, B-212609, Jan. 26, 1984, 84-1 C.P.D. ¶ 121.

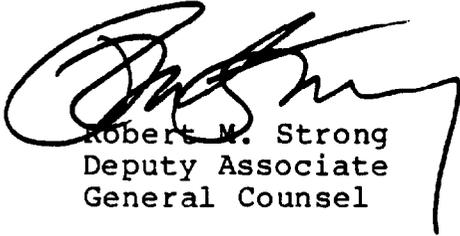
Hopkinsville's second contention relates to the award itself. Hopkinsville alleges that two of the three bidders which certified themselves to be small businesses have mistakenly done so and in fact are not small businesses. Hopkinsville states that the Asphalt Stone Company, the awardee, is the only small business bidder which bid. Hopkinsville argues that the contracting officer should have determined that there was only one small business bid submitted, that there was not sufficient small business participation to warrant an award under the set-aside, and therefore should have withdrawn the set-aside pursuant to Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.506 (1986). Hopkinsville further contends that the contracting officer's failure to withdraw the set-aside after receiving bids "was arbitrary, capricious and an abuse of discretion." We disagree.

FAR, 48 C.F.R. § 19.506, is a permissive (versus mandatory) regulation which allows the contracting officer to withdraw a set-aside determination if, before award, the contracting officer considers that award to a small business concern would be detrimental to the public interest. See Electronic Warfare Associates, B-224504, B-223938, Nov. 3, 1986, 86-2 C.P.D. ¶ 514 at 7. However, there is no requirement that a set-aside be withdrawn where (as alleged here) there is only one responsive small business bidder. U.S. Elevator Corp., B-224237, Feb. 4, 1987, 87-1 C.P.D. ¶ 110; Advanced Construction, Inc., B-218554, May 22, 1985, 85-1 C.P.D. ¶ 587. Therefore, even assuming, for argument's sake, that Hopkinsville's allegation that the Asphalt Stone Company is the only bidder under the IFB which could properly be considered a small business, Hopkinsville has not provided a basis upon which its protest could be sustained since the contracting officer may properly award to the sole small business bidder in such circumstances. U.S. Elevator Corp., B-224237, supra; Advanced Construction, Inc., B-218554,

supra. Moreover, besides making the bare allegation that the contracting officer acted arbitrarily and capriciously and abused his discretion, Hopkinsville has not shown or even attempted to explain how the contracting officer may have acted improperly or abused his discretion.

As a final matter, we note that the number of small business bidders responding to an IFB does not affect the propriety of the initial decision to set the procurement aside. See Mantech International Corp., B-216505, Feb. 11, 1985, 85-1 C.P.D. ¶ 176.

The protest is dismissed.



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