



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Cyanamid Company

File: B-230044, B-230045, B-230046, B-230047

Date: April 7, 1988

DIGEST

Contracting officer's determination to set 50 percent of procurements aside for exclusive small business participation is reasonable where it is supported by an analysis of past procurements and by an informal market survey. Agency need not consider whether small businesses have patent or proprietary rights allegedly necessary for performance, as these relate to responsibility, which is to be determined after the solicitation's closing date.

DECISION

American Cyanamid Company, a large business manufacturer of chemical light products, protests the restriction in requests for proposals (RFPs) Nos. DLA400-87-R-5496, DLA400-87-R-5497, DLA400-87-R-5498 and DLA400-87-R-5499, setting aside 50 percent of each solicitation for exclusive small business participation.

We deny the protests.

The RFPs were issued by the Defense Logistics Agency for indefinite quantities of various chemical light products. American Cyanamid contends that the partial set-asides for small business were improper because the agency could not have had a reasonable expectation that at least two responsible small businesses would submit bids. American Cyanamid alleges that it holds exclusive patent rights that are critical to the production of the chemical light products being procured. The protester also states that it has not licensed any other manufacturer to use its patented technology, nor is it aware of any alternative technology that is in current use for producing these products. The protester argues, on this basis, that the contracting officer could not have reasonably concluded that the contracts could be adequately performed by small business concerns.

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For a partial small business set aside, the regulations require that there be a reasonable expectation that offers will be submitted by one or more small business concerns with the technical competence and productive capacity to satisfy the set aside portion of the requirement at a reasonable price. Federal Acquisition Regulation § 19.502-3. If there is a reasonable expectation that only two concerns (one large and one small) with capability will respond, then the partial set-aside may only be made if it is authorized by the head of the procuring agency. Id.

We have held that the decision to set aside a procurement for small business is basically a business judgment within the broad discretion of the contracting agency, so that we will not question a decision to set aside unless a clear showing is made that the agency abused its discretion. Burrelle's Press Clipping Service, B-199945, Mar. 2, 1981, 87-1 CPD ¶ 152. Under this standard, we have held that procurements properly have been reserved for small business concerns where the set-aside determinations were based on such factors as prior procurement history, market surveys, or advice from the agency's small business specialists and technical personnel. Litton Electron Devices, B-225012, Feb. 3, 1987, 87-1 CPD ¶ 164.

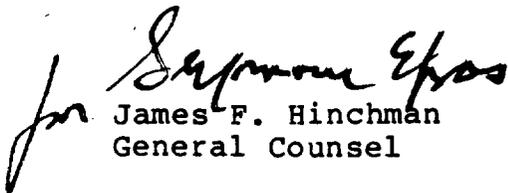
Here, the record indicates that the contracting officer considered the agency's past experience with the purchase of substantially similar items. DLA previously had purchased chemical light products from American Cyanamid on a sole-source basis. In 1985, the agency replaced American Cyanamid part-numbered item descriptions in an RFP for chemical light products with performance-based purchase descriptions. A number of firms submitted offers. Pre-award surveys conducted in connection with that procurement produced satisfactory ratings on small business concerns competing with American Cyanamid, indicating that they were eligible for award.

In addition to the previous procurement history, the contracting officer considered information provided by an informal market survey that the Defense General Supply Center Competition and Pricing Office had conducted. In response to this survey, a number of small business concerns indicated that they could produce the required items, and would submit offers in response to the solicitations at issue here. Our Office has also received letters from several small businesses in response to this protest, asserting their ability to produce the chemical light products and their interest in competing for these contracts.

We believe the previous procurement history and the market survey provided ample support for the contracting officer's conclusion that adequate small business competition could be expected.

The protester insists, however, that no small business could produce these items without violating American Cyanamid's patent rights. The protester argues that the mere fact that small business concerns have somehow expressed a willingness to respond to the solicitation does not establish their technical competence. In essence, the protester argues that the contracting officer could not properly make an informed business judgment regarding the set-asides without considering the question of American Cyanamid's patents. American Cyanamid's allegation that other firms may infringe its patents serves as no basis for objection to award. We previously have recognized that 28 U.S.C. § 1498, gives patent holders an adequate and effective remedy for infringement of their patents, while saving the Government from having its procurements delayed pending litigation of patent disputes. American Sealcut Corp., B-201573, Apr. 28, 1981, 81-1 CPD ¶ 327. Thus, we have concluded the acquisition may go forward and that all potential sources should be permitted to compete for the contract regardless of a patent infringement allegation. Moreover, the issue of whether any firm other than the protester has the capacity to furnish the chemical products with necessary licenses or otherwise, relates to the responsibility of other firms. In this regard, we have similarly taken the position that if a protest concerning proprietary rights directly or indirectly questions the responsibility of other concerns, the matter is not appropriate for our review. Thermionics Laboratory, Inc., B-196074, Oct. 19, 1979, 79-2 CPD ¶ 273. Finally, we also note that our Office does not generally consider it appropriate to review a protest that an agency should procure an item for a particular firm on a sole-source basis, which is essentially American Cyanamid's contention. Id.

The protests are denied.


James F. Hinchman
General Counsel