



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: APAC-Tennessee, Inc.

File: B-231388

Date: June 27, 1988

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### DIGEST

Protest of contracting officer's decision to continue to set aside the procurement of items for small business concerns is denied where the record indicates that based on the prior successful set-asides the contracting officer had a reasonable expectation that bids would be received from at least two small business concerns and that award would be made at a fair market price, i.e., a reasonable price under normal market conditions.

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### DECISION

APAC-Tennessee, Inc., a large business, protests the Army Corps of Engineers' issuance of invitation for bids (IFB) No. DACW66-88-B-0033 as a total small business set-aside. APAC contends that the contracting officer's determination to restrict the procurement to small businesses was improper because there was no reasonable expectation that bids would be received from at least two small business concerns and that contract award would be made at a reasonable price, as required by Federal Acquisition Regulation (FAR) § 19.501(g) (FAC 84-31).

We deny the protest.

The solicitation was issued for the purchase of articulated concrete mattresses to be cast at the Helena, Arkansas, Casting Field and used for riverbank stabilization. The protester, whose predecessors have provided mattresses to the Corps, states that in the time since the procurement of mattresses at various locations along the Mississippi River was set aside for small businesses in 1982, the same three companies have been the only small business bidders. APAC further asserts that whichever of those firms was awarded the contract for that location almost always won the competition for the follow-on contract as well. As a result, APAC argues, there effectively can be no reasonable expectation of bids from at least two small businesses at a

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given location, including Helena. Additionally, APAC contends that since the government estimate is based on past set-aside awards, the estimate is not a true reflection of a reasonable price. In this regard, APAC points out that its courtesy bid for last year's Helena contract was 13 percent lower than the second low bid, and that its courtesy bids were lowest in the procurements for three out of the five mattresses contracts let by the Corps in 1987.

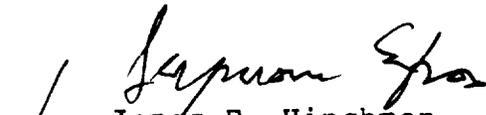
APAC previously raised these issues in protests of five prior Corps procurements for mattresses. Our Office considered and denied the protests in APAC-Tennessee, Inc., B-226365, et al., Apr. 27, 1987, 87-1 CPD ¶ 438, and APAC-Tennessee, Inc., B-229710, et al., Feb. 8, 1988, 88-1 CPD ¶ 124, (reconsideration request denied in B-229710.2, et al., Mar. 3, 1988, 88-1 CPD ¶ 226). In our decisions, we noted that once an agency contracting office has successfully acquired a product on the basis of a small business set-aside, that office's subsequent requirements for the product must be acquired on the basis of a repetitive set-aside, unless the contracting officer determines that there is not a reasonable expectation that at least two responsible small business firms will bid and that the contract award will be made at a reasonable price. FAR § 19.501(g). We found that APAC's protests were without merit because in immediately preceding procurements the agency had successfully acquired mattresses on the basis of total small business set-asides; the contracting officers properly determined that there was sufficient interest among small business concerns to meet the FAR requirements for restricted solicitations; and the government reasonably expected to receive bids at reasonable prices.

Those same circumstances are evident here. The previous solicitations were limited to small businesses, and the expectation of at least two small business bids obviously existed. With respect to price, we point out that although FAR § 19.501(g) states that a set-aside decision must include an expectation of a reasonably priced award, the Small Business Act, 15 U.S.C. § 644(b) (1982), as amended by section 921(b) of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3927 (1986), precludes a set-aside award at more than the fair market price, which is a price based on reasonable costs under normal competitive conditions. See FAR § 19.001 (FAC 84-31); Cherokee Enterprises, Inc., B-228330, Dec. 4, 1987, 87-2 CPD ¶ 552 (concerning the same award mandate for procurements set aside for small disadvantaged businesses).

In any event, we think it is apparent from the APAC bid protest decisions cited above that we see nothing improper in a contracting officer relying on prior set-aside results in terms of the necessary expectations just because those procurements might have included a particular group of competitors; indeed, because the issue involves the propriety of a repetitive set-aside, such reliance is implicit in the attendant presumption in favor of continuing the restriction.

We further note that the results of the protested competition--bids were opened the day after APAC filed its protest--support the contracting officer's decision. The bidding abstract furnished by the Corps shows that the agency received five bids--four from small businesses and one from APAC. Two of the small business concerns submitted bids that were lower than APAC's bid; a third small business bid was just 1.7 percent higher in price than APAC's.

The protest is denied.

  
for James F. Hinchman  
General Counsel