

G. Ruppert



**Comptroller General
of the United States**
Washington, D.C. 20548

Decision

Matter of: American Imaging Services
File: B-238969; B-238971
Date: July 19, 1990

Jeffrey M. Aquiar, American Imaging Services, for the protester.
Michael S. Roys, Esq., Department of the Navy, for the agency.
George Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest against dissolution of a small business set-aside and solicitation on an unrestricted basis is proper where the contracting officer had rational basis for determination that the prices submitted by eligible small businesses were unreasonably high.
2. In considering price reasonableness under a small business set-aside, contracting officer has discretion in deciding which factors to consider and a price submitted by an otherwise ineligible large business properly may be considered.

DECISION

American Imaging Services (AIS) protests the cancellation of request for proposals (RFP) No. N00612-90-R-0005, a total small business set-aside, and the decision instead to issue unrestricted RFP No. N00612-90-R-0127. Both solicitations called for maintenance of government-owned x-ray equipment.

AIS, a small business, asserts that the dissolution of the small business set-aside after it had submitted its best and final offer (BAFO) was improper because it resulted from a determination that the small business offerors' prices were unreasonable compared with an offer submitted by a large business, whose offer allegedly should not have been considered.

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We deny the protest.

Offers were received from a number of firms, including small and large businesses.^{1/} The contract negotiator, initially not realizing that the solicitation was set aside for small businesses, proceeded to review all offers. He determined that negotiations and minor changes in the solicitation were required. Thereafter, upon receipt of BAFOs (including AIS'), the negotiator noticed the set-aside and realized several offerors were large businesses not eligible for award. He also noted, however, the large price differences between the lowest large business and AIS' low small business prices. On 6 line items AIS' prices ranged from 5 to 50 percent above the low large business prices, and although AIS also was low on some line items, award to AIS for these 6 items would have cost the agency \$101,230.60 (26 per cent) more than an award to the large business. The Navy determined that the large price differential indicated AIS' prices on the 6 items clearly exceeded the fair market price. Since AIS bid on an all or none basis, the Navy could not make award to AIS for only the items on which it was low. It therefore dissolved the set-aside and issued the new, unrestricted solicitation. This protest followed.

AIS contends that a comparison of pricing between its firm and a large firm is unfair and should not serve as a basis to conclude that its prices are unreasonable, since its costs of doing business as a small business concern are much higher than those of a large concern. AIS asserts that since large business concerns were not eligible for award under the set-aside, large business prices should have had no bearing on the award determination.

An agency properly may dissolve a small business set-aside on the basis that award to a small business would be above the fair market price, that is, unreasonable. Federal Acquisition Regulation (FAR) § 19.506(a). A determination of price reasonableness of an offer on a small business set-aside is within the discretion of the procuring agency; we will not disturb such a determination unless it lacks a rational basis or there is a showing of fraud or bad faith on the part of the contracting officer. See R.G. Dunn & Assocs., Inc., B-230831, B-230832, July 8, 1988, 88-2 CPD ¶ 28; Warren/Dielectric Communications, B-212609, Jan. 26, 1984, 84-1 CPD ¶ 121. In making this determination, the contracting officer may consider pricing history

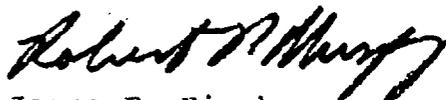
^{1/} The specific number of firms responding is not disclosed here because award under the RFP has not yet been made.

or other relevant factors revealed by the bidding, including prices submitted by an otherwise ineligible large business in a courtesy bid. Flagg Integrated Sys. Technology, B-214153, Aug. 24, 1984, 84-2 CPD ¶ 221.

We find that the Navy properly dissolved the set-aside based on the unreasonableness of AIS' low small business prices. As indicated above, AIS' all or none bid would require the Navy to pay in excess of 26 percent more for 6 of the IFB items if it made award to AIS. We have upheld an agency decision to cancel a small business set-aside where the courtesy bid of a large business was only 12 percent less than that of the only eligible small business offeror under the set-aside. See Flagg Integrated Sys. Technology, B-214153, supra. Since the Navy thus properly determined that AIS' bid was unreasonable, dissolution of the set-aside was unobjectionable. FAR § 19.506(a). The Navy's initial confusion over whether this procurement was a set-aside did not render this action improper.

We point out that while congressional policy intended to promote small business permits awarding contracts to small businesses under set-asides at a cost premium, that premium cannot be excessive. R.G. Dunn & Assocs., Inc., B-230831, B-230832, supra. Rather, the price paid a small business still must be reasonable generally. As indicated above and in our prior decisions, this determination may be made with reference to all prices, including those of large businesses.

The protest is denied.



for
James F. Hinchman
General Counsel