

Ms. Glass



**The Comptroller General  
of the United States**

Washington, D.C. 20548

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**Decision**

**Matter of:** John Bowman, Inc.

**File:** B-239543

**Date:** August 28, 1990

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Thomas C. O'Brien, Esq., Mattox & O'Brien P.C., for the protester.

Col. Herman A. Peguese, Office of the Assistant Secretary, Department of the Air Force, for the agency.

Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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**DIGEST**

1. The Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C. § 644 note (1988), which provides, on a test basis, for the issuance of solicitations on an unrestricted basis in four designated industry groups where agency small business participation goals have been met, specifically exempts procurements set aside for small disadvantaged business (SDB) concerns pursuant to section 1207 of the Defense Authorization Act of 1987, 10 U.S.C. § 2301 note (1988). Therefore, protest against SDB set-aside in one of four designated industry groups is denied.

2. Agency decision to set aside procurement for small disadvantaged business (SDB) concerns was proper where contracting officer determined that there was a reasonable expectation that offers would be obtained from two responsible SDB firms at a fair market price.

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**DECISION**

John Bowman, Inc. protests the Department of the Air Force's decision to set aside for small disadvantaged business (SDB) concerns request for proposals (RFP) No. F05611-90-R-0005, for maintenance, repair and minor construction services referred to as Simplified Acquisition Base Engineering Requirements (SABER) for the United States Air Force Academy, Colorado. Bowman, the incumbent contractor, principally contends that the set-aside for SDBs is in

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direct conflict with the requirements of the Small Business Competitiveness Demonstration Program (SBCDP) Act of 1988, 15 U.S.C. § 644 note (1988), and the Federal Acquisition Regulation (FAR) implementation, FAR subpart 19.10 (FAC 84-56), which provides for a test of unrestricted competition in four designated industries, one of which is construction of the type involved here. The protester also asserts that, in any event, the set-aside was improper because the contracting officer failed to establish that the agency could expect to obtain offers from at least two responsible SDBs.

We deny the protest.

The RFP was issued on April 10, 1990, on an unrestricted basis to fill a continuing need for SABER services. The services are currently being performed under contract with Bowman due to expire in December 1990. The contracting officer subsequently determined that the solicitation should be set aside for SDB concerns. That determination was based on statements of interest from SDB concerns and review of the applicable rules and regulations governing SDB set-asides. Accordingly, on April 20, 1990, the agency issued Amendment 0001 setting the solicitation aside for SDBs. The closing date was then extended to June 22. Bowman filed a protest with our Office on May 4.

First, the protester objects to the SDB set-aside, asserting that the Department of Defense Federal Acquisition Regulation Supplement (DFARS) provisions authorizing the SDB set-aside conflict with the SBCDP Act and implementing FAR provisions (providing for unrestricted procurement in four test categories) and, as such, are an unauthorized deviation from the FAR.

DOD established the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act, 1987, 10 U.S.C. § 2301 note (1988), which left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the stated objective of awarding 5 percent of the dollar value of its contracts to SDB concerns. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125; see also Pub. L. No. 100-180, § 806(b), 10 U.S.C. § 2301 note (1988) (requiring the Secretary of Defense to issue regulations to ensure progress toward meeting the 5 percent goal). DOD has established by regulation an SDB set-aside program. DFARS § 219.502-72 (DAC 88-13).

The SBCDP Act establishes a demonstration program under which solicitations for construction services are to be issued on an unrestricted basis where the agency has attained its small business participation goals. However, the Act specifically provides that set-asides for SDBs under 1207 of the 1987 Defense Authorization Act, which DFARS § 219.502-72 implements, are exempt from the demonstration program. See Kato Corp., B-237965, Apr. 3, 1990, 69 Comp. Gen. \_\_\_\_\_, 90-1 CPD ¶ 354.

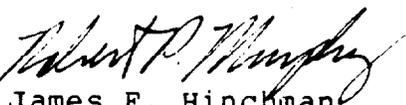
The FAR implementation of the demonstration program lists participating agencies and designated industries and provides that the procedures for implementing this program may be set forth in participating agency supplements. FAR § 19.1001. DOD implemented the program through DFARS § 219.10 (DAC 88-13). DFARS § 219.1070-1 provides that "acquisitions in the designated industry groups shall continue to be considered for placement under the 8(a) program (see FAR subpart 19.8) and for small disadvantaged business set-asides (see DFARS § 219.502-72)." Since the demonstration program, by the specific terms of the SBCDP Act, is not applicable where there is a set-aside under section 1207, we see nothing inconsistent between the law and the FAR and DFARS implementation. Therefore, we find no basis to object to the set-aside as inconsistent with the SBCDP Act.

The protester also alleges that the SDB set-aside was improper because the contracting officer had no basis to conclude that at least two responsible SDB concerns would compete.

The regulations implementing the DOD SDB program, set forth in the DFARS, part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The regulations also provide that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12 month period a responsive offer from at least one responsible SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services, and (2) the contracting officer has reason to know (from the activity's relevant solicitation mailing list, response to presolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

We review a decision to conduct a procurement as an SDB set-aside to determine if the contracting agency has a reasonable basis to so restrict competition. Paragraph (c)(1) of DFARS § 219.502-72 identifies a responsible SDB source as one which has submitted a responsive bid which was within 10 percent of the award price on a similar procurement within the last 12 months. The contracting officer had information showing that there were two SDBs which had not only submitted responsive offers, but had been awarded contracts and were performing them. Since, as stated above, the regulation requires the contracting officer to presume that the SDB set-aside requirements are met under these circumstances, we find that the contracting officer's determination is supported by the record.

Accordingly, the protest is denied.

  
for James F. Hinchman  
General Counsel