



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: McGhee Construction, Inc.

File: B-241556

Date: January 10, 1991

Timothy S. Kerr, Esq., Starfield & Payne, for the protester. Major William R. Medsger, Esq., and Sharon B. Patterson, Esq., Department of the Army, for the agency. Linda S. Lebowitz, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency reasonably determined not to award a contract to a small disadvantaged business (SDB), the ninth low of ten bidders, as its bid exceeded the low priced, non-SDB's bid by 115 percent.
2. Protest filed after bid opening and after award challenging agency's decision not to set aside the procurement before issuance of the solicitation for small disadvantaged business is untimely since protest of alleged improprieties in a solicitation must be filed prior to bid opening.

DECISION

McGhee Construction, Inc., a small disadvantaged business (SDB), protests the award of a contract to Taylor Moore, Inc., a small business, under invitation for bids (IFB) No. DAAH03-90-B-0130, issued by the Department of the Army for the replacement of closet doors in military family housing units at Redstone Arsenal, Alabama. The protester contends that it was entitled to award as the low, responsive, responsible SDB firm that submitted a price within 10 percent of the fair market price for the construction services.

We dismiss the protest as it fails to state a valid basis of protest. Bid Protest Regulations, 4 C.F.R. § 21.3(m) (1990).

The solicitation was issued to 86 firms on July 31, 1990. The solicitation included the following provision:

"This will be set aside for [a] small disadvantaged business if two or more responses are received from a responsible small disadvantaged business with the recognized bonding capability,

and bids are fair and reasonable. Otherwise, this will be awarded to the low, responsive, responsible bidder on an unrestricted basis . . ."

Ten firms, including three SDBs, submitted bids by the time of bid opening on September 13. With respect to this protest, the following bids and respective rankings are relevant:

(1) Taylor Moore, Inc. (non-SDB)	\$259,261
(2)-(4) (non-SDBs)	\$299,900-\$353,499
(5) Thomas Brand Aluminum (SDB)	\$440,000
(6)-(7) (non-SDBs)	\$445,777-\$494,000
(9) McGhee Construction, Inc. (SDB)	\$558,000
(10) Team/Ace (SDB)	\$647,595

At the time of bid opening, the government estimate, which was based on 1987 prices as reflected in the 1987 R.S. Means Manual, was \$514,143. Subsequent to bid opening and prior to award, the agency reviewed its most recent data and revised the government estimate to \$343,785, based on 1990 prices as reflected in the 1990 R.S. Means Open Shop Building Construction Cost Data Manual.

In determining whether a contract would be awarded to an SDB, the contracting officer evaluated the bids. The contracting officer rejected Thomas Brand's bid as nonresponsive because it failed to establish its bonding capability in accordance with the solicitation. For McGhee and Team/Ace, the contracting officer compared these SDB bids with the other bids received to determine price fairness and reasonableness. The contracting officer rejected McGhee's bid because it exceeded Taylor Moore's bid by 115 percent and the contracting officer rejected Team/Ace's bid because it exceeded Taylor Moore's bid by 150 percent.

Because the agency did not receive two or more bids from responsible SDBs at fair and reasonable prices (or within 10 percent of the fair market price), it awarded a contract to Taylor Moore, a non-SDB and the low priced, responsive and responsible bidder. McGhee filed this protest on October 9.

McGhee alleges that the contracting officer improperly determined its bid was not fairly and reasonably priced by comparing its bid with the bids received from the other bidders. McGhee argues that comparing an SDB's bid with the bids of non-SDB's "tainted" the procurement.

Before awarding any contract, the contracting officer is required to determine that the price at which the contract would be awarded is reasonable. FAR § 14.407-2; Adrian Supply Co., B-240871; B-240872, Dec. 21, 1990, 90-2 CPD ¶ _____. The FAR provides that the contracting officer is responsible for

selecting and using whatever price analysis techniques will ensure a fair and reasonable price. See id.; FAR § 15.805-2. These techniques include a comparison of bid prices received in response to the solicitation. FAR § 15.805-2(a).

Here, the record shows that ten bidders participated in this competition. In accordance with the solicitation provision, the contracting officer properly compared the bids received in response to the solicitation and reasonably determined to award the contract to Taylor Moore, a non-SDB and the low priced, responsive and responsible bidder, as the agency did not receive any bids from SDBs which could be deemed fair and reasonable or within 10 percent of the fair market price. In this regard, we consider bids received after full and open competition as generally the best indicator of the fair market price for the requirement. With respect to McGhee, the ninth low out of ten bidders, its bid was 115 percent higher than Taylor Moore's bid. Thus, we find the contracting officer properly determined McGhee's bid was not reasonably priced based on the other bids received, and the agency was not required to award a contract at an excessive price to McGhee.

McGhee also argues that the agency should have determined prior to the issuance of the solicitation (instead of waiting until after bid opening) whether it had a reasonable expectation of receiving bids from at least two responsible SDBs at fair and reasonable prices pursuant to the requirements of the Department of Defense FAR Supplement (DFARS) Part 219. To the extent McGhee is challenging the terms of the solicitation as written, including the procedures for conducting this procurement as described in the solicitation, we will not consider this ground of protest because it is untimely. Our Bid Protest Regulations require that a protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 21.2(a)(1). Here, McGhee's objection to the terms of the solicitation concerns an alleged solicitation impropriety apparent from the face of the solicitation. McGhee did not protest this issue to our Office until after the bid opening date and the award. Accordingly, this ground of protest is untimely. KASDT Corp., B-235889, July 19, 1989, 89-2 CPD ¶ 63.

Although McGhee acknowledges that this ground of protest is untimely and should have been raised prior to bid opening, McGhee requests that we consider this ground of protest under the significant issue exception to our timeliness rules, 4 C.F.R. § 21.2(b). We decline to do so. The timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the

procurement process. Air Inc.--Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent these rules from becoming meaningless, exceptions are strictly construed and rarely used. Id.

Accordingly, the protest is dismissed.

for *Andrew T. Pozany*
Michael R. Golden
Assistant General Counsel