



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20541

B-179085

November 5, 1973

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Booz-Allen Applied Research  
4753 Bethesda Avenue  
Bethesda, Maryland 20014

Attention: Kenneth J. Wees, Manager

Gentlemen:

By letter dated September 6, 1973, and prior correspondence, you protest award of a contract on a total set-aside basis for small business under request for quotations (RFQ) No. DAAA21-73-Q-0148, issued at Picatinny Arsenal, Dover, New Jersey, for the Modernization of Materials Handling in Loading Plants.

The subject RFQ was issued on June 11, 1973, and the deadline for receipt of quotations was the close of business on July 11, 1973. The original solicitation was unrestricted in terms of the size of business which could compete. Amendment No. 0001, issued on June 28, 1973, restricted the procurement to small business concerns.

You are a large business and you report that at the time the amendment was issued you had substantially completed the preparation of your quotation. Despite the small business set-aside, you completed your quotation and submitted it to the agency prior to the deadline for receipt of quotations. You were the only large business to submit a quotation. It is your position that it was improper to restrict the procurement solely to small business concerns and that, therefore, Booz-Allen Applied Research (Booz-Allen) is entitled to have its quotation opened and evaluated.

The record indicates that the contracting officer decided to issue the solicitation without any restriction as to size on the basis that the required technical capability, background, experience and personnel normally could be found only in large business firms. Thereafter, upon the request of the SBA representative, the contracting officer agreed to set aside this procurement for exclusive participation by small business firms. Apparently, the contracting officer became convinced that offers could be obtained from a sufficient number of responsible small business concerns so that award could be made at

*Small Business*  
[Protest of Award of Total Set-Aside]

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a reasonable price. There was a previous procurement for a similar requirement in which three small business firms submitted proposals considered to be within the competitive range of acceptability. Accordingly, on June 28 the solicitation was amended as a total set-aside for small business.

You advance several arguments in support of your position that it was improper and illegal to issue the subject amendment. First, you contend that the contracting officer lacked any authority to amend the solicitation after its issuance for the purpose of restricting the procurement to small business. Although there is no specific provision in the Armed Services Procurement Regulation (ASPR) authorizing a contracting officer to amend a solicitation to provide for a small business set-aside, we do not think the contracting officer was precluded from doing so.

First of all, ASPR 1-706.5, which deals with the making of total small business set-asides, does not require that such determinations be made only prior to the issuance of the solicitation. Moreover, ASPR 1-706.3(d) contemplates that contracting officers review set-aside proposals suggested by SBA representatives and, in the event a contracting officer disagrees with a particular recommendation, it specifically permits the suspension of the procurement action. We think this provision reasonably may be interpreted as authorizing the delay of a procurement already in progress for the purpose of resolving whether the existing procurement should be changed to a set-aside for small business. Where, as here, the contracting officer is persuaded that his original decision to go forward with an unrestricted solicitation is unwarranted, and he agrees to set aside the procurement for small business participation, we believe he would be authorized to effect the necessary change in the solicitation pursuant to the provisions in ASPR 3-505 for amending solicitations prior to the closing date for receipt of quotations.

You contend, however, that the contracting officer was estopped from modifying the solicitation to exclude large business firms since your firm had been invited to respond to the original solicitation and had prepared a comprehensive and responsive proposal prior to notification of the set-aside action. We agree that good procurement procedure dictates that determinations concerning set-asides should be made prior to the issuance of the solicitation. But we do not agree that such decisions become irrevocable once the

solicitation has been issued. The Small Business Act of 1958, 15 U.S.C. § 631 et seq states, as the policy of Congress, that a fair proportion of all Government contracts be let to small business. Part 7 of Section 1 of ASPR implements this policy. In view of this congressional policy, we do not believe that a contracting officer may be entopped from setting aside a procurement for small business even after the solicitation has been issued unless such action is arbitrary or in bad faith, and we do not find that the contracting officer acted arbitrarily or in bad faith in this case.

In this connection, you contend that the SBA representative exerted undue influence on the contracting officer to alter his original decision to proceed with an unrestricted procurement. You state that if the SBA representative disagreed with the contracting officer's decision, the proper procedure was to appeal the contracting officer's determination to the head of the procuring activity.

However, there is no indication in the record of any undue influence on the part of the SBA representative. The record indicates only that on June 27, 1973, the SBA representative presented his reasons for recommending that the procurement be set aside for small business and that the contracting officer was persuaded to change his position in this regard.

You point out that prior to making a total small business set-aside the contracting officer must determine that there exists a "reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices." ASPR 1-706.5(a)(1). You claim that the contracting officer did not have a sufficient basis to make such a determination. As indicated above, the contracting officer reports that his determination was made on the basis of a prior unrestricted procurement for similar services in which three proposals were received from small businesses which fall within a zone of consideration. Although you contend that the work to be performed under this contract is much more demanding than the work to be performed under the prior procurement, we must defer to the administrative judgment in the matter, since the determination as to whether a particular procurement should be set aside is within the province of the agency involved and the SBA. 41 Comp. Gen. 351, 362 (1961).

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You also argue that you are entitled to have your quotation opened for the purpose of determining the reasonableness of the prices submitted by the small business concerns. We do not agree. While we have held that a contracting officer may consider unsolicited bids received from large business concerns in determining whether small business bids are unreasonable, see 49 Comp. Gen. 740, 743 (1970), we do not believe that a contracting officer should be required to consider a proposal from a large business concern under a small business set-aside. In our opinion, a requirement that offers from large businesses be considered under a small business set-aside, even if only for the purpose of determining the reasonableness of the offers submitted by small businesses, is incompatible with the Small Business Act and the set-aside program. Procurements may be negotiated with small businesses at a higher cost to the Government than is otherwise obtainable. 41 Comp. Gen. 306, 315 (1962). Moreover, where, as here, a Cost-Plus-Incentive Fee type contract is contemplated, the proposed costs of performance may not be the determining factor for award.

Finally, you contend that if the Army refuses to consider your quotation for award you would be entitled to the costs incurred in preparing your quotation, citing Heyer Products Co. v. United States, 140 F. Supp. 403 (Ct. Cl. 1956). Also see id., 177 F. Supp. 251 (Ct. Cl. 1959). While the courts have recognized that a contracting agency's failure to fairly and honestly consider bids would give rise to a cause of action to recover bid preparation expenses, standards and criteria to be applied in allowing such a claim have not been established to our knowledge. Accordingly, this Office must decline to attempt the settlement of claims for bid preparation costs until appropriate criteria and standards are judicially established. See Lovvill v. United States, 17 Ct. Cl. 288 (1881); Charley v. United States, 19 Ct. Cl. 316 (1884); B-177429, December 14, 1972.

Accordingly, both your protest and your claim for the costs of preparing your quotation must be denied.

Sincerely yours,

Paul G. Dabbling  
For the  
Comptroller General  
of the United States