

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

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FILE: B-185714

DATE: June 8, 1976

MATTER OF: KDI Electro-Tec Corporation

DIGEST:

1. Decision to make total small business set-aside is appropriate where there is no evidence to indicate that contracting officer abused his discretion in determining, pursuant to ASPR § 1-706.5(a)(1), that there was reasonable expectation of receiving adequate competition at reasonable prices. Fact that lower price is submitted by large business concern does not mean that award to small business is at unreasonable price.
2. Although there are no specific provisions addressed to "courtesy" offers in ASPR, contracting officer may consider such offer in determining reasonableness of small business offer, but he is not required to do so, for to so require would be incompatible with Small Business Act and set-aside program.

The KDI Electro-Tec Corporation (KDI) has protested against the award of a contract pursuant to request for proposals No. (RFP) DAAA09-76-R-6764, issued on October 29, 1975, by the United States Army Armament Command (ARMCOM). The solicitation was issued as a 100-percent small business set-aside for the procurement of slip ring assemblies and was negotiated, rather than formally advertised, because of the urgency of the requirement. The solicitation was issued on a restricted basis because, according to the Army, " * * * on the most recent procurement of the item, the contractor was a small business concern and another bid, considered to be competitive, had been received from a small business concern."

The solicitation was issued to 25 prospective offerors and was published in the Commerce Business Daily. Four offers were received, including a "courtesy" offer by KDI (a large business) by December 1, 1975, the date specified for receipt of proposals.

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The proposals received were as follows:

<u>Offeror</u>	<u>Unit Price With First Article Approval</u>	<u>Unit Price W/O First Article Approval</u>
KDI Electro-Tec Corp.	\$798.87	\$756.28
Cert Instrument Corp.	873.00	No offer
Precision Specialty	878.76	831.91
Airflyte Electronics	904.00	838.00

(All offerors but KDI Electro-Tec Corporation certified that they were small business concerns.)

Because of the "courtesy" offer the contracting officer initially believed that the lowest price offered by a small business concern was excessive and notified the ARMCOM Business Adviser that the set-aside determination was withdrawn in accordance with the Armed Services Procurement Regulation (ASPR) § 1-706.3 (1975 ed.). This belief was based on a mistaken assumption that the lowest acceptable offer was from Cert Instrument Corp. at \$873 w/FA. The ARMCOM Small Business Administrator appealed the proposed withdrawal in accordance with ASPR § 1-706.3(e). The appeal was based primarily on the fact that the price paid on the last procurement was \$995 each and that the small business prices received on the current procurement were all lower than that price. The contracting officer on receipt of the appeal requested a price analysis on the offers submitted by the small business concerns. The price analysis concluded, among other things, that (1) a price of \$865 w/FA and \$817 wo/FA was fair and reasonable (2) that all offers submitted by small business concerns were considered fair and reasonable, with the exception of Airflyte Electronics offer of \$904 w/FA, and recommended the award to a small business.

Based upon the price analysis and the contracting officer's conclusions regarding that analysis, the contracting officer determined that the prices received from the three small business concerns were fair and reasonable and that there was no basis to withdraw or dissolve the 100-percent small business set-aside. The lowest offer received from a small business concern that could be accepted was the \$838 price without first article approval from Airflyte Electronics, the prior producer under contract DAAA09-74-C-6883. While a lower price had been received, \$831.91 each without first article approval, from Precision Specialty, that price could not be accepted because that offeror had never produced the item and first article approval could not be waived. The contracting officer was aware that the difference between the low small business offer and the large business courtesy offer was as follows:

	<u>Unit Price</u>	<u>Total Price</u>
Airflyte Electronics	\$838.00 w/o FA	\$149,164.00
KDI	<u>756.28 w/o FA</u>	<u>134,617.84</u>
	\$ 81.72	\$ 14,546.16

First article approval would be waived for KDI based upon the fact that it has produced this item for the prime contractor for the M163 Vulcan System and is named as a suggested source of supply for this item, United States Army Drawing No. 8437092.

On January 8, 1976, KDI protested to our Office the contracting officer's decision to award to a small business firm and her refusal to dissolve or withdraw the 100-percent small business set-aside. The protest is also based on the use of the guidelines, or a lack thereof, established to determine whether an offer received from a small business is excessive or is fair and reasonable, and whether they were followed in this procurement.

Section 1-706.3 of ASPR (1975 ed.) states:

"* * * Review, Withdrawal, or Modification of Set-Asides or Set-Aside Proposals.

(a) Prior to issuing solicitations each individual procurement governed by a class set-aside shall be carefully reviewed to ensure that any changes in the magnitude of anticipated requirements, specifications, delivery requirements, or competitive market conditions, since the initial approval of the class set-aside are not of such

material nature as to result in the probable payment of an unreasonable price by the Government or in a change in small business capability. If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), he may withdraw a unilateral or joint set-aside determination by giving written notice to the small business specialist, and the SBA representative if available, stating the reasons for the withdrawal. In a similar manner, a unilateral or joint class set-aside may be modified to withdraw one or more individual procurements."

The contracting officer did not make a determination that award to a small business was detrimental to the public interest because of unreasonable price nor did she consider such an award would be detrimental to the public interest in any way. Although the award price would be larger than the large business courtesy offer, the amount of difference was not considered to be excessive. The policy of the United States Government under the provisions of the Small Business Act, 15 U.S.C. § 644 (1970), is to make a fair proportion of awards of Government contracts to small business firms and this policy includes paying higher costs than are otherwise obtainable.

KDI protests the restriction to the small business set-aside because two small businesses had responded to the previous solicitation, resulting in the systematic elimination of KDI as a quality supplier to the United States Government on the Vulcan Air Defense System for the instant as well as future requirements. The determination to restrict the current solicitation to participation by small business firms only was made by the contracting officer because competitive bids had been received from small business firms on the prior procurement and one of those small business firms, Airflyte Electronics, had received the award of contract DAAA09-74-C-6883. The receipt of two competitive bids from small business concerns is sufficient to permit a 100-percent small business set-aside, in the judgment of the contracting officer. This decision by the contracting officer is in accordance with the policy of the Department of Defense, as expressed in ASPR § 1-706.5(a)(1) (1975 ed.), which states:

"1-706.5 Total Set-Asides.

(a)(1) Subject to the order of precedence established in 1-706.1(a), the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, shall be set aside for exclusive small business participation (see 1-701.1) if the contracting officer determines that there is 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. Total set-asides shall not be made unless such a reasonable expectation exists. (But see 1-706.6 as to partial set-asides.) Although past procurement history of the item or similar items is always important, it is not the only factor which should be considered in determining whether a reasonable expectation exists."

With regard to the administrative determination of whether a reasonable expectation for adequate competition exists, we have held that:

"* * * the determination as to whether a reasonable expectation exists for adequate competition from small business firms is within the ambit of sound administrative discretion [of the agency] and we will not substitute our judgment for that of the contracting officer in the absence of a clear showing of the discretion permitted him."

See B-171693, April 22, 1971; B-168534(1) and (2), January 16, 1970; 45 Comp. Gen. 228 (1965); DeWitt Transfer and Storage Co., B-182635, March 26, 1975, 75-1 CPD 180. The fact that lower offers or bids may be expected from large business concerns in an unrestricted procurement is not a significant factor in determining whether a procurement should be set aside for small business participation, and we have held there is no requirement that the prices offered under a total set-aside procurement be equal to, or better than, prices which might reasonably have been anticipated as a result of unrestricted competition. See 43 Comp. Gen. 497 (1963).

The other question raised by KDI in its protest is what guidelines are established to be used in (1) determining that offers received from small business firms are fair and reasonable and (2) evaluating "courtesy" offers received that are lower than small business proposals.

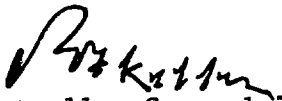
ASPR does not define "fair and reasonable." Therefore, each case must be considered on an individual basis, and we believe no arbitrary cutoffs should be established to determine the reasonableness of a small business price submitted. The contracting officer in the instant procurement determined, as indicated above, that the proposed award price was fair and reasonable based on the competitiveness of the prices received, past procurements, and the effect inflation would have on the prices. A price analysis subsequently made also advised that the prices received from the small business concerns were fair and reasonable and recommended award to a small business firm.

Concerning the protester's desire to be advised what guidelines are used to evaluate courtesy offers received when they are lower than the small business proposals, no specific provisions dealing with "courtesy" offers are found in ASPR to provide guidelines to the contracting officer under such circumstances. Large business bids on small set-aside procurements, while nonresponsive, are regarded as "courtesy" [offers] and may be considered in determining whether small business bids submitted on the procurement are reasonable. See 49 Comp. Gen. 740 (1970). However, the contracting officer is not required to consider an offer from a large business concern, since such a requirement would be incompatible with the Small Business Act and the set-aside program. See Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350; 53 Comp. Gen. 307 (1973).

Even if the lower price by a large business is received this does not per se mean that the award to the small business is at an unreasonable price. As indicated above, an award to a small business under a set-aside may be at a higher price to the Government than is otherwise available. Although we have not objected in the past to the withdrawal of set-asides where there have been differences of less than 10 percent, our review in these protest situations is confined to whether the contracting officer acted unreasonably in the circumstances and not to second-guessing the contracting officer's determination, since ASPR § 1-706.5(a)(1) designates the contracting officer as the person to determine reasonableness of price. Therefore, the determination must depend upon the analysis of the facts and circumstances by the contracting officer in each case.

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We do not find that the contracting officer acted unreasonably in this case. Accordingly, the protest is denied.


Deputy Comptroller General
of the United States