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L. Keating
7/10/77

DECISION



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

FILE: S-188905

DATE: November 15, 1977

MATTER OF: CDI Marine Company

DIGEST:

1. Protest after closing date for receipt of proposals against decision to set aside procurement for small business on basis that there was not sufficient number of small business competitors is untimely under Bid Protest Procedures.
2. Although small business offer on total set-aside exceeded offer of firm determined to be other than small business, Small Business Act has been interpreted to mean that Government may pay premium price to small business firms on small business restricted procurements.
3. Determination dealing with price reasonableness will be sustained barring bad faith or fraud.
4. Award may be made under total set-aside where there is only one small business offeror remaining in competitive range.

CDI Marine Company (CDI) has protested the proposed award to M. Rosenblatt & Son, Inc. (Rosenblatt), under request for proposals No. N02612-76-R-0051, issued by the Naval Supply Center, Charleston, South Carolina. The solicitation was issued on May 11, 1976, as a 100-percent set-aside for small business for design services for the supervisor of shipbuilding, Jacksonville, Florida.

The RFP was issued to 15 prospective offerors. Some of those firms were selected from small businesses on a Bidders' Mailing List Application. Other small business firms which had indicated an interest in performing the services required were added. Five proposals were received by the closing date of June 18, 1976.

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CDI protested the small business size status of Rosenblatt and J. J. Henry Co. on May 21, 1976. The protest was forwarded to the Small Business Administration (SBA) for a determination as to size status. In July 1976, the SBA determined both Rosenblatt and J. J. Henry to be small businesses for the purpose of the instant procurement. Later, on September 27, 1976, of the five offerors, only Rosenblatt and J. J. Henry were found to be within the competitive range.

On January 17, 1977, CDI appealed the SBA small business size determination of Rosenblatt and J. J. Henry. After it appeared that J. J. Henry would be awarded the contract, CDI protested again to the SBA on February 17, 1977. The SBA found J. J. Henry to be other than a small business on March 23, 1977, for failing to respond to its inquiry. The contracting officer then proposed award to Rosenblatt. CDI's protest of April 5, 1977, to the SBA was denied on April 22, 1977, as Rosenblatt was found to be a small business. On April 22, 1977, CDI protested to our Office.

CDI first alleges that there was not a reasonable expectation that offers would be obtained from a sufficient number of responsible small business concerns to insure that award would be made at reasonable prices in violation of ASPR § 1-706.5 (1976 ed.). However, a protest after bid opening, or the closing date for receipt of proposals, against a decision to set aside a procurement for small business on the basis that there was not a sufficient number of small business competitors is untimely under our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976). Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350.


Secondly, CDI contends that the small business price received under the RFP was unreasonable requiring cancellation and resolicitation on an unrestricted basis. The basis for the allegation that the Rosenblatt price was unreasonable is that it exceeds the Government estimate by 22 percent and at an average 17 percent higher than other qualified firms, large and small business alike. Our Office has interpreted the Small Business Act, 15 U.S.C. § 631, et seq. (1970), to mean that the Government may pay a premium price to small business firms on restricted procurements to implement the policy of Congress. Society Brand, Incorporated, Waldman Manufacturing Co., Inc., 55 Comp. Gen. 372 (1975), 75-2 CPD 225; J. H. Rutter Rex Manufacturing Co., Inc., 55 Comp. Gen. 902 (1976), 76-1 CPD 182.

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Moreover, simply because a bid or offer exceeds other bids or offers or the Government estimate does not necessarily mean that the quoted price is unreasonable. There can be a range over and above the low bid or offer and the Government estimate which is a reasonable price range. The determination of price reasonableness requires a degree of discretion. Therefore, determinations dealing with price reasonableness will be sustained barring bad faith or fraud. See B-161797, September 6, 1967; B-164931, September 5, 1968 (both dealing with the opposite situation considered here--bids rejected as unreasonable).

Finally, CDI seems to imply that since there was only one offeror left in the competitive range that qualified as a small business, the procurement was not competitive and was tantamount to a sole-source award. However, our Office has recognized the right of the contracting activity to make an award under a total small business set-aside where there is only one responsive bid. Berlitz School of Languages, supra. We believe the same principle should apply to a negotiated procurement where only one offeror which qualifies as a small business is determined to be within the competitive range.

In the circumstances here, we find no basis for any legal objection to the proposed award in this case. Therefore, the protest is denied.


Deputy Comptroller General
of the United States