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United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply
Refer to: B-194414

FEB 21 1980

Anthony L. Kalloch, Vice President
Sales and Marketing
Savory Equipment Company *DLF 02805*
Box 608
Neptune, New Jersey 07753

Dear Mr. Kalloch:

This letter responds to your telegram received October 19, 1979, requesting clarification of our decision in Savory Equipment Company B-194414, September 19, 1979, 79-2 CPD 203, wherein we denied your protest that the General Services Administration (GSA) lacked a reasonable basis to set aside solicitation FPGG-Z-36350-N-3-27-79 for the acquisition of "Toasters, Rotary, Heavy Duty" under the multiple award Federal Supply Schedule (FSS).

That decision, responding to your allegation that only one small business concern--Hatco Company--was capable of meeting the solicitation requirements, held that at the time the contracting officer determined to set aside the acquisition he reasonably anticipated competition from the suppliers of toasters manufactured by three small business concerns--Hatco, Wells and Prince Castle--which the suppliers had certified to be small in the previous procurement. GSA actually received only two small business bids, offering toasters manufactured by Hatco and the Holman Group (Holman). Hatco's toasters conventionally toast bread by indirect heat, whereas Holman's toasters grill bread by placing it in direct contact with the heating element. Savory unsuccessfully contended that Holman's products were not toasters within the meaning of the solicitation, and therefore GSA only received one offer which complied with the requirements of the solicitation.

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*[Request for
Clarification]*

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You now contend that our decision ignores the "sole source" implications of the acquisition and also fails to consider that Holman's offered toasters never had been marketed commercially prior to the submission of Holman's offer.

We view your telegram as a request for clarification of our decision, not for its reconsideration. Even if we were to consider your telegram a request for reconsideration, it would be untimely under our Bid Protest Procedures because you would have filed the request more than 10 days after you should have received our decision. 4 C.F.R. § 20.9(b) (1979); S.A.F.E. Export Corporation--Reconsideration, B-192335, March 29, 1979, 79-1 CPD 214; Vanir Research Company--Reconsideration, B-189977, October 19, 1977, 77-2 CPD 306.

As we indicated in our prior decision, this Office has recognized the right of a contracting activity to make an award under a small business set-aside where only one offeror qualifies as a small business. See CDI Marine Company, B-188905, November 15, 1977, 77-2 CPD 367. However, we presume that your concern over the sole source implications of the acquisition stems from the fact that there will be no competition for orders of conventional toasters among multiple award FSS contractors since only one contractor supplies such toasters. Since the FSS does not distinguish between toasters which conventionally toast bread and toasters which grill bread, there will be competition among two FSS contractors--Hatco and Holman--for the orders of FSS user agencies requiring toasters. Therefore, there are no sole source implications which our decision should have addressed.

Regarding your contention that Holman's toasters had not been commercially available prior to this acquisition, we are not aware of any legal requirement that a product be marketed commercially before it is offered for an FSS contract. The solicitation did require that if offered prices are based on catalog or market prices of commercial items, the offeror must certify that substantial quantities of the items have been sold to the general public at such

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prices. CSA has informally advised us that Holman's prices were based on catalog prices and that Holman submitted the required certification. We point out that Savory had the burden of affirmatively proving its case, and the record contained no evidence that Holman falsely certified that it had sold substantial quantities of its offered product to the general public. Therefore, we could not take legal objection to award to Holman. See Bell & Howell Corporation; Realist, Inc., E-193301, February 6, 1979, 79-1 CPD 82.

Sincerely yours,

for Harry R. Van Cleve

Milton J. Socolar
General Counsel