



on April 2, and at that time it was learned that ED was large business. During the conversation he requested that the small business set-aside requirement be deleted from the invitation so that his firm might submit a bid on the procurement. He also asked whether the requirement had previously been restricted to small business, and when advised that it had been and that the present contractor was Lakeview, he questioned the size of Lakeview due to its alleged affiliation with Charles River Breeding Laboratories, Inc.

In view of these facts, amendment No. 2 to the solicitation was issued on April 2, deleting the small business set-aside requirement and extending the bid opening date to April 17. We are advised that the Small Business Administration (SBA) representative was informed of this decision on April 3, He, reportedly, concurred therein.

Three bids were received under the invitation. Evaluation of each showed the following:

- (1) ED had submitted the low bid of \$40,515; however, the bid was determined to be nonresponsive because the outline of the means of transportation to be utilized, as required by the invitation, did not include the method of transportation to be used in making deliveries to the laboratories at NIH.
- (2) Lakeview submitted the second low bid of \$43,875; however, the bid was determined to be nonresponsive because evidence of a viral serology test based on a representative sample of the colony and a written description or photographs of the interior and exterior of the facilities were not submitted with the bid as was required by the invitation.
- (3) Engle submitted the third low bid of \$44,175; however, the bid was determined to be nonresponsive because the bidder did not, as required by the invitation, provide information with its bid as to the type of vehicles to be used in transporting the hamsters to and from the airport, the qualifications of the driver(s) of the vehicle(s), and the name of the Washington, D.C., area firm which would pick the hamsters up at the airport.

Because all three bids were found to be nonresponsive, it was determined that the procurement would be negotiated under the authority of 41 U.S.C. 252(c)(10) which allows negotiations to be conducted in situations where it is impossible to secure competition for procurements of property or services.

Negotiations are now being conducted with Lakeview and SD under request for proposals 73P-(V)-510CC. Engle withdrew from the negotiated procurement when requirements for item No. 2, pregnant hamsters, were reduced from a quantity of 5,000 to 2,000.

As regards the decisions, first, to make the procurement a total set-aside for small business and, secondly, to delete this requirement, it has been the position of our Office that the determination of whether there is a reasonable expectation of receiving a sufficient number of bids under a total set-aside to assure reasonable prices is within the ambit of sound administrative discretion and will not be questioned by our Office without a clear showing of an abuse of such discretion. 45 Comp. Gen. 229, 231 (1965). We note that the total set-aside requirement was deleted on the grounds that at the time such action was taken, only one possible bid was at the procurement activity, that bid being from a firm which was alleged by a hopeful large business to be possibly large business. This, of course, ignores the fact that the size status of Lakeview was represented by that firm to be small business and no proof existed to disprove such representation. It also ignores the fact that Engle had submitted a bid on March 29, and although it had then withdrawn its bid after the time for bid opening was extended, it could have reasonably been presumed that it would submit another bid. At minimum, the firm could have been asked its intentions when the others were. From the record it does not appear that such was done. However, in view of the concurrence of the SBA representative with the deletion of the set-aside requirement, and the fact that Engle has now declined to bid on the procurement activity's changed needs, we will not object to the procedures currently being utilized in this instance. We do, however, recommend that any necessary action be taken to assure that in future procurements, the decisions to make a total set-aside, or the deletion thereof, be carefully considered, potential sources of small business interest be thoroughly investigated, and the basis of the determination be fully explained and documented.

Concerning the determination that all three bids were nonresponsive to the invitation and, consequently, that the procurement should be a negotiated one, we believe the procurement activity to have been in error. Firstly, we do not believe that information as to how the hamsters would be transported to the procurement activity goes to any question other than the bidder's ability to perform. The same is true for the description or photographs of the bidder's facilities. These are questions of a bidder's responsibility. Further, although in this case evidence of viral serology was required with the bid rather than as preaward testing, we believe that the requirement for that evidence also was properly a question of the bidder's responsibility rather than of the responsiveness.

of the bid. See B-169330, May 14, 1970. The bidder bound himself under the specifications to deliver hamsters "in physically sound and healthy condition \* \* \* free of wounds, scars, external parasites, and clinical signs of disease or of sub-clinical diseases such as ectromelia and lymphocytic choriomeningitis."

In this regard we are advised by the agency that a bidder would be rejected only if the animals tested had ectromelia or lymphocytic choriomeningitis. Results of testing for other subclinical diseases were to be used only by the agency official accepting delivery to determine for which tests a hamster could be used. If such is the case, we believe the agency has not clearly expressed its needs. The specifications state that the animals shall be free of all subclinical diseases, not just the two enumerated. In this respect also, the specifications call for "evidence of viral serology." The agency interprets this, apparently, to require submission of a test report from an independent testing laboratory. Lakeview enumerated the appropriate diseases in its bid and following these stated:

"Tests have been negative for all but PVM and Sendai. Samples are submitted to Seton Hall and to Charles River Breeding Laboratories."

This would appear to meet the specifications requirement. If the agency wanted more, then such should be spelled out in the specifications.

Although we conclude that award should have been made to the low bidder under the invitation for bids and that conducting subsequent negotiations instead was improper, we will not object to the negotiations now being conducted under the recently issued request for proposals inasmuch as the needs of the agency have changed since the opening of bids and inasmuch as we do not believe that use of negotiations will, in this case, negate the maximum possible competition which advertised procurements attempt to further. It seems apparent from the facts that those two firms engaged in the negotiations are the only ones which would compete on this procurement in any case.

We trust that actions will be taken to ensure that deficiencies such as those enumerated above will not occur in future procurements.

Sincerely yours,

Paul G. Dambling

For the Comptroller General  
of the United States