

DECISION



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

60161

FILE: B-183739

DATE: November 14, 1975

MATTER OF: Ampex Corporation
RCA Corporation

97737

DIGEST:

1. Although agency may be estopped from setting aside initially unrestricted procurement for exclusive small business participation where such action is arbitrary or in bad faith, such conduct is not evidenced here as agency had reasonable basis for set-aside, that is, reasonable expectation of sufficient small business participation to insure reasonable prices, even though course of conduct exhibited less than sound procurement procedures.
2. Where it is alleged procurement involves off-the-shelf items which are obtainable from Federal Supply Schedule, GAO has no basis for objecting to Army not using FSS since Army's technical opinion that FSS items will not meet its needs is not shown to be unreasonable.
3. Agency's action in imposing small business set-aside after issuance of step 1 request for proposals does not give rise to claim for proposal preparation costs by large business concerns who had participated in procurement prior to imposition of set-aside since agency did not act in bad faith.

The Ampex Corporation (Ampex) and the RCA Corporation (RCA) have protested against the award of a contract pursuant to request for technical proposals No. DAAG08-75-R-0122, which was issued January 9, 1975, by the Sacramento Army Depot (Army) as step one of a two-step formally advertised procurement. Basically, the protesters contend that the Army acted improperly in issuing an amendment to the solicitation shortly before the closing date for submission of technical proposals which changed the procurement to a total small business set-aside thus precluding the protesters from competing for the contract. Moreover, RCA objects to the Army's use of two-step formal advertising because it alleges that the supplies requested are off-the-shelf items which may be obtained from the Federal Supply Schedule.

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Consequently, the protesters have requested that either the procurement be cancelled and the Government's requirements be procured under the Federal Supply Schedule, the amendment restricting the procurement to small businesses be rescinded, or that Ampex and RCA be awarded proposal preparation costs.

This procurement initially involved the purchase of heavy and intermediate duty studio camera and film camera sub-systems for the world-wide color conversion of American Forces Television Stations. The resultant contract is to be a requirements type with options to extend it for a maximum of three years. The solicitation was issued on January 9, 1975, on an unrestricted basis because, according to the Army, " * * * there was no past procurement history by which to determine whether there were sufficient small business manufacturers available that were capable of furnishing acceptable camera sub-systems of the quality desired at reasonable prices." The closing date for receipt of proposals was set for February 10, 1975.

On January 28, amendment 0001 was issued to clarify certain requirements and extend the closing date to February 24. However, a pre-proposal conference was held on February 14 and attendees were cautioned not to proceed with their proposals until another amendment was issued which would define the minimum needs of the Government and establish a new closing date. The Army notes that among the attendees at the conference were representatives of the two protesters and four known small businesses. Subsequently, the closing date was tentatively extended two more times pending issuance of an RFP amendment. On March 27, amendment 0002 was issued deleting heavy duty camera sub-systems from the procurement and setting April 30 as the closing date.

On April 17, the Army began to give consideration to whether the procurement should be set aside for small businesses. Based on the determination that since the heavy duty camera sub-systems had been deleted bids could now be obtained from a sufficient number of responsible small businesses to insure that an award could be made at reasonable prices, amendment 0005 was issued on April 21 which changed the procurement to a total small business set-aside. The amendment was reportedly received by Ampex on April 23 and by RCA on April 24. Due to the protests, the closing date has been subsequently postponed on several occasions.

Both Ampex and RCA contend that the amendment implementing the set-aside should be rescinded because: (1) the decision to set-aside a procurement for small business should be made before the solicitation is issued and (2) the contracting officer acted arbitrarily or in bad faith in effectuating the set-aside long

after issuance of the solicitation and shortly before proposals were due and, therefore, should be estopped from proceeding on a restricted basis. Ampex also contends that the belated set-aside action was tantamount to cancellation of the solicitation without a compelling reason.

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 believe that the contracting officer must necessarily restrict the solicitation at the time of its issuance. As was stated in 53 Comp. Gen. 307(1973) (Booz - Allen):

"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."

Also, in Booz - Allen, supra, we stated that we do not believe a contracting officer may be estopped from setting aside a procurement for small business even after the solicitation has been issued unless such action was arbitrary or in bad faith. In the instant case the protesters argue that the contracting officer's action was arbitrary and/or in bad faith because: (1) the contracting officer should have known that the procurement was appropriate for a set-aside before the issuance of the solicitation or at least at the time of the pre-proposal conference, (2) the amendment came unreasonably late in the bidding cycle, and (3) small businesses were already receiving a fair proportion of the total contracts for intermediate duty camera sub-systems.

In support of the contention that the contracting officer should have known well before the amendment was issued that the procurement was appropriate for a small business set-aside, Ampex

argues that the original solicitation referenced the products of at least two small businesses as having the requisite quality for each of the four classes of cameras (including heavy duty types) and, " * * * these same concerns already held requirements contracts with GSA to supply products presumably at reasonable prices to all agencies of the Government." In this connection, it is argued that the contracting officer's apparent failure to give consideration to a set-aside prior to issuance of the solicitation and failure to refer his decision not to set aside the procurement to an SBA representative were contrary to ASPR § § 1-704.3(b)(iii) and 1-706.3(d), respectively.

It is also pointed out that whereas the set-aside in Booz - Allen, supra, was effected 17 days after issuance of the solicitation and 14 days before the closing date, the set-aside here was effected more than 90 days after issuance of the solicitation and 9 days before closing. It is argued that to set aside the procurement in these circumstances was arbitrary.

It is also argued that the statutory requirement that small business concerns be awarded a fair proportion of contracts had been satisfied because GSA has awarded requirements contracts to all of the small business concerns which supply television cameras of the type required here.

We believe on the basis of the present record that the protesters are correct in their charge that adequate consideration was not initially given to the possibility of restricting the procurement to small business concerns. Although it is stated in the administrative report that there was no procurement history to determine whether there would be sufficient competition from small business, there is no documentation in the administrative report indicating that the contracting officer and/or the agency's small business advisor or an SBA representative in fact considered the possibility of a total or partial set-aside as contemplated by ASPR § § 1-704.3(b)(iii) and 1-706, et seq. In this connection, we note that Ampex alleges and the Army does not deny, that the solicitation referenced the products of at least two small businesses as having the requisite quality for each of the four classes of television cameras specified, and these two firms held GSA Federal Supply Schedule contracts for these cameras. In addition, when the set-aside determination was finally made more than 90 days after issuance of the solicitation, the agency's small business advisor cited numerous procurements for the "same or similar" equipment where there was adequate small business participation. This memorandum does not distinguish between heavy and intermediate duty cameras, and it is not clear whether the cited procurements involved both types. Furthermore, we note that while the heavy duty cameras were deleted on March 27, it was not until April 17 that consideration was given to a set-aside and the determination therefor made.

Moreover, the Army reports that four small businesses were represented at the pre-proposal conference on February 14, 1975.

We indicated in Booz - Allen, supra, that while arbitrary or bad faith conduct in setting aside a procurement may give rise to an equitable estoppel, an estoppel would not result where there is a reasonable justification for a set-aside. With regard to the basis for a total set-aside, ASPR § 1-706.5(b) provides that a procurement shall be set aside if the contracting officer determines that there is reasonable expectation that offers will be received from a sufficient number of responsible small business concerns so that award will be made at a reasonable price. In this connection, contrary to RCA's contention, we believe the history of small business participation in the "same or similar" procurements referred to in the small business advisor's memo relied upon by the contracting officer justified his determination as to the sufficiency of potential small business competition. While this action was, in effect, a cancellation of the solicitation insofar as large businesses are concerned, it was not without a compelling reason.

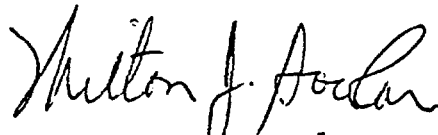
However, we believe that the agency's belated recognition of the appropriateness of initiating a small business set-aside after large businesses had substantially developed their step one proposals, constitutes less than sound procurement procedures. By letter of today we are calling to the attention of the Secretary of the Army the need to promptly initiate small business set-asides in order to avoid a recurrence of the instant situation.

RCA has also argued that the procurement should be cancelled and the Army's requirements fulfilled from equipment listed on the Federal Supply Schedule. In response, Army engineering personnel have stated various technical reasons why procurement from the FSS will not meet the Army's needs. While RCA vigorously disputes the Army's position in this regard, the Army's technical opinion is not shown to be unreasonable. Therefore, there is no basis for our Office to object to the Army not using the FSS to fulfill its requirements.

Finally, RCA and Ampex have asked us, in the alternative, to conclude that they are entitled to proposal preparation costs. In a series of cases beginning with Heyer Products Company v. United States, 140 F. Supp. 409: (Ct. Cl. 1956) the Federal courts have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award, the preparation costs of a bid or proposal which was not so considered may be recoverable in certain circumstances. Heyer held that recovery could be had only where clear and convincing proof showed a fraudulent inducement of bids, that is, that bids were not invited in good faith,

but as a pretense to conceal the purpose to award the contract to some favored bidder or bidders, and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to the bidder whose bid was most advantageous to the Government, 140 F. Supp., supra, at 414.

Subsequently, the courts have modified the standard set forth in Heyer in order to allow recovery of bid preparation costs in the situation where the Government's evaluation of bids has been so arbitrary or capricious as to preclude a particular bidder from an award to which it was otherwise entitled. McCarty Corporation v. United States, 499 F. 2d 633 (Ct. Cl. 1974); Armstrong & Armstrong, Inc. v. United States 356 F. Supp. 514 (D.D.C. 1973); see T & H Company 54 Comp. Gen. ____ (1975), 75-1 CPD 345. However, as our Office held in Keco Industries, Inc., 54 Comp. Gen. 215 (1974), 74-2 CPD 175, and Federal Leasing Inc., DPF Inc., 54 Comp. Gen. 872 (1975), 75-1 CPD 236, the courts have not indicated that we should deviate from the higher standard of the Heyer decision when a claim for bid preparation costs is based on an agency's action in issuing or cancelling a solicitation. Using the Heyer standard we are unable to conclude that the protesters are entitled to reimbursement for their proposal preparation costs since there is no indication that the agency acted in bad faith when it issued the unrestricted solicitation or when it imposed the small business restriction after it determined that it was feasible to do so.



Acting Comptroller General
of the United States