

DECISION



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

FILE: B-184400

DATE: October 9, 1975

60031
97845

MATTER OF: Society Brand, Incorporated
Waldman Manufacturing Co., Inc.

DIGEST:

1. Where four responsive bids were received from small businesses under totally set-aside IFB, and where low small business bid was less than 5 percent above low, big business bid submitted, adequate competition has been achieved.
2. Mere fact that lower bid price is submitted by big business does not per se make award to small business, at slightly higher price, against public interest pursuant to ASPR § 1-706.3, since 15 U. S. C. 631 states policy of Congress to award fair proportion of Government procurements to small business firms, and therefore, Government may pay reasonable premium price to small business firms on restricted procurement to implement above-mentioned policy of Congress.
3. Questions of alleged collusive pattern of bidding by small business firms should be referred to Attorney General by procuring agency for resolution pursuant to ASPR § 1-111.2, since interpretation and enforcement of criminal laws are functions of Attorney General and Federal courts, not GAO.

This is a protest filed by counsel on behalf of Society Brand, Incorporated (SBI), involving invitation for bids (IFB) No. DSA100-75-B-1115, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. This matter was previously before our Office, B-184400, August 7, 1975, 55 Comp. Gen. _____, wherein we determined that several of the issues of protest were untimely filed, and therefore, not for consideration. This decision will consider those issues of protest timely filed but not disposed of in the August 7 decision.

The IFB in question was totally set aside for small business. Six bids were received from the thirteen firms solicited, the prices offered being as follows:

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<u>BIDDER</u>	<u>UNIT PRICE</u>
SBI	\$2.235/\$2.249
Waldman Manufacturing Co., Inc. (Waldman)	2.29
Bernard Cap Co.	2.40
Propper International, Inc.	2.475
Bancroft Cap Co.	2.63
Tampa G. Manufacturing Co.	2.90

Neither Propper nor SBI certified as to their size status. Both firms, at present, have been determined by the Small Business Administration to be other than small business concerns. The four other bidders represented that they were small business concerns and that they are manufacturers of the items solicited.

INADEQUATE COMPETITION

Counsel for SBI first alleges that there was inadequate competition under this IFB and that it should be readvertised. However, as can be seen from the prices listed above, it appears that adequate competition from small business firms was received. DPSC points out that four responsive bids were received from small firms, all of whom offered on the total requirement at unit prices ranging from \$2.29 to \$2.90. The second low bid under the instant IFB (the low small business bid) was less than 5 percent above the low big business bid submitted. DPSC states, and we agree, that the foregoing represents adequate competition under the IFB.

REASONABLENESS OF PRICE

Counsel for SBI next contends that the small business prices received under the instant IFB were unreasonable, and therefore, the IFB should be cancelled and reissued on an unrestricted basis. Counsel submits that if an award is made to a small business in this instance, the Government will be paying an excessive price for the items in question, a premium which is neither within the intent of the Small Business Act nor in the public interest.

Armed Services Procurement Regulation (ASPR) § 1-706.3 (1974 ed.), entitled "Review, Withdrawal, or Modification of Set-Asides or Set-Aside Proposals" states, in pertinent part,

"* * * 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

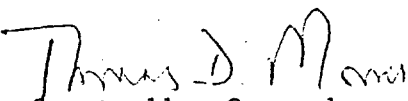
price), he may withdraw a unilateral or joint set-aside determination by giving written notice to the small business specialist, and the SBA representative if available, stating the reasons for the withdrawal * * *."

However, the mere fact that a lower bid price has been submitted by a large business under the IFB does not per se make an award to a small business, at a slightly higher price, against the public interest within the meaning of ASPR § 1-706.3 above. Fifteen U.S.C. § 631 (1970 ed.), states, as the policy of Congress, that a fair proportion of all Government procurement will be made to small business firms. Our Office, at 53 Comp. Gen. 307 (1973), has interpreted 15 U.S.C. § 631 et seq., to mean that the Government may pay a reasonable premium price to small business firms on restricted procurements to implement the above-mentioned policy of Congress. In our opinion, the less than 5-percent price differential between the first and second low bids does not constitute an unreasonable premium price to be incurred in awarding this procurement to a small business firm.

PATTERN OF BIDDING

The final issue raised by counsel for SBI is the alleged "questionable" pattern of bidding reflected on this and other restricted headwear procurements on bids submitted by Waldman and certain other bidders. In rebuttal, counsel for Waldman has fully denied this allegation. In any event, ASPR § 1-111.2 (1974 ed.), "Noncompetitive Practices," provides that evidence of violation of the antitrust laws (for example, collusive bidding) in advertised procurements should be referred to the Attorney General by the procuring agency involved. This is so because the interpretation and enforcement of the criminal laws of the United States are functions of the Attorney General and the Federal Courts, and it is not within our jurisdiction to determine what does or does not constitute a violation of a criminal statute. (We note, however, that SBI may directly request the Department of Justice to consider the case if it believes criminal law violations are involved.)

In view of the foregoing, the protest of SBI is denied.


Acting Comptroller General
of the United States