

DOCUMENT RESUME

02983 - [A2013085]

[Protest against Removal of Restriction of Prior Small Business Set-Aside]. B-189323. July 13, 1977. 4 pp. + 2 enclosures (2 pp.).

Decision re: Tufco Industries, Inc.; by Paul G. Dembling (for Elmer B. Staats, Comptroller General).

Issue Area: Federal Procurement of Goods and Services (1900).  
Contact: Office of the General Counsel; Procurement Law II.  
Budget Function: General Government: Other General Government (806).

Organization Concerned: General Services Administration; Island Supply Corp.; Small Business Administration.

Authority: 15 U.S.C. 644. B-153264 (1974). B-170698 (1971). B-171693 (1971). B-184296 (1975). B-182635 (1975). F.P.R. 1-1.706-3. F.P.R. 1-1.706-5. 49 Comp. Gen. 740. 53 Comp. Gen. 307.

Protest was made to agency decision to solicit bids without restricting participation to small business concerns as had been done in prior years. GAO has no jurisdiction to question decision by procuring agency and Small Business Administration to remove small business set-aside absent evidence of arbitrary or capricious action. Past procurement history indicated that there was insufficient expectation of competition adequate to insure reasonable prices. Large business bids on set-aside procurements, while nonresponsive, are "courtesy" offers and may be considered to determine reasonable prices. (Author/DJM)

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Feldman  
PL #2

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20540

FILE: B-189323

DATE: July 13, 1977

MATTER OF: Tufco Industries, Inc.

**DIGEST:**

1. Administration of small business set-aside program is solely the responsibility of Small Business Administration and procuring agency. GAO will not question decision of contracting officer and SBA representative to withdraw set-aside in absence of convincing evidence of arbitrary or capricious action.
2. Decision not to make total small business set-aside is not arbitrary where past procurement history indicates that only two small business concerns submitted bids and bid price of one bidder was unreasonably high. Contracting officer could reasonably determine pursuant to FPR 1-1.706-5 that there was insufficient expectation of receiving adequate competition to insure reasonable prices.
3. Large business bids on small business set-aside procurements, while nonresponsive may but are not required to be considered in determining whether small business bids submitted on the procurement are reasonable.

Tufco Industries, Inc. (Tufco) protests the decision by the General Services Administration (GSA) to solicit bids under invitation for bids (IFB) FPOP-FY-54548-A for double fold toilet tissue without restricting participation to small business concerns. Award has not been made by GSA pending resolution of this protest.

In prior years this item was totally set-aside for small business concerns. The last procurement, a class set-aside covering requirements for fiscal year 1977, was restricted to small business. Three bids were received; two bids were received from small businesses,

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Tufco and Island Supply Corp. One large firm, Stevens & Thompson (Stevens), offered a price approximately 28 percent below Tufco's price. Island Supply Corp's price was approximately 23 percent above that of Tufco. Stevens was declared nonresponsive because the procurement was set-aside for small business, and award was made to Tufco.

The contracting officer expected to receive only one response from a small business firm, Tufco, at a reasonable price. We are advised by GSA that the contracting officer, pursuant to Federal Procurement Regulations (FPR) 1-1.706-3, notified the Small Business Administration (SBA) representative of his intention to withdraw this item from the class set-aside. In addition, we are informed that with the concurrence of the SBA representative, the small business set-aside was removed for the instant IFB.

Tufco states that the decision not to set-aside this procurement for small business concerns is due to the fact that in the last procurement for this item a large business submitted a "substantially" lower courtesy bid. The protester further argues that the decision not to set-aside the procurement for small business concerns should be reconsidered because two small business concerns competed for the prior procurement, in addition to the large business concern which submitted a courtesy bid. The protester expresses concern that the practice of giving consideration to such courtesy bids ultimately could result in the discontinuance of all small business set-aside procurements.

Large business bids on small business set-aside procurements, while nonresponsive, are regarded as "courtesy" offers and may be considered in determining whether small business bids submitted on the procurement are reasonable. See 49 Comp. Gen. 740 (1970). However, the contracting officer is not required to consider an offer from a large business concern, since such a requirement would be incompatible with the Small Business Act and the set-aside program. See Berlitz School of Language, B-184296, November 28, 1975, 75-2 CPD 350; 53 Comp. Gen. 307 (1973). The purpose of the set-aside program is to make a fair proportion of awards of Government contracts to small business firms at reasonable prices even if it

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is necessary to pay higher prices than are otherwise obtainable. Apparently, the contracting officer considered Tufco's prior bid to be reasonable, rejected Steven's bid on the previous procurement and made award to Tufco.

However, Federal Procurement Regulations (FPR) 1-1.706-5 (1964 ed.) provides for the set-aside of an individual procurement or a class of procurements for exclusive small business participation where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that award will be made at reasonable prices. This regulation prohibits total small business set-asides unless such a reasonable expectation exists. Past procurement history is an important factor for consideration.

If the contracting officer considers the procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g. because of unreasonable price) the contracting officer may withdraw a set-aside determination. The contracting officer must inform the procuring agency's SBA representative of his intention to do so. FPR 1-1.706-3 (1964 ed). Furthermore, the matter of whether a procurement should be set-aside for award to small business concerns is one for determination jointly by the procurement agency and the Small Business Administration. By statute 15 U.S.C. § 644, the administration of the small business set-aside program is solely the responsibility of the SBA and the procurement agency. Our Office will not question individual determinations in the absence of convincing evidence of arbitrary or capricious action. B-153264, April 13, 1964.

Here, we are informed, the contracting officer and the agency SBA representative decided that withdrawal of the small business set-aside would be in the public interest. In light of the history of the procurement of this item, we believe that the decision was not arbitrary or capricious. B-170698, May 4, 1971.

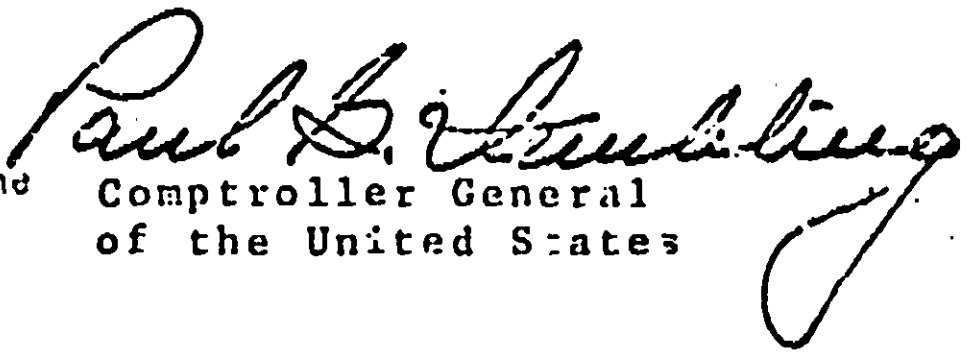
With regard to the administrative determination of whether a reasonable expectation for adequate competition exists, we have held that:

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"\* \* \* the determination as to whether a reasonable expectation exists for adequate competition from small business firms is within the ambit of sound administrative discretion [of the agency] and we will not substitute our judgment for that of the contracting officer in the absence of a clear showing of abuse of the discretion permitted him."

See B-171693, April 22, 1971; DeWitt Transfer and Storage Co., B-182635, March 26, 1973, 75-1 CPD 180.

Accordingly, the protest is denied.

  
For the Comptroller General  
of the United States



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

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July 13, 1977

Senator William Proxmire  
United States Senate

Dear Senator Proxmire:

Reference is made to inquiries made by a member  
or your staff, Ms. Pat Tidwell, concerning the protest  
of Tufco Industries, Inc. and the decision by the  
General Services Administration to delete the small  
business set-aside provision of Invitation for Bids  
No. FPOP-FY-54548-A.

Enclosed is a copy of our decision of today  
denying the protest.

Sincerely yours,

*Paul B. Armstrong*  
For the Comptroller General  
of the United States

Enclosure



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

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Jun 14 1977

The Honorable Robert J. Cornell  
House of Representatives

Dear Mr. Cornell:

Reference is made to your letter dated June 7, 1977, concerning the protest of Tufco Industries, Inc. and the decision by the General Services Administration to delete the small business set-aside provision of Invitation for Bids No. FPOP-VY-54548-A.

Enclosed is a copy of our decision of today denying the protest.

Sincerely yours,

Paul G. Dembling

For the Comptroller General  
of the United States

Enclosure