

DECISION



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

10,948

FILE: B-194885

DATE: August 8, 1979

MATTER OF: Anderson-Cottonwood Disposal

*[Protest Alleging Improper Set-aside Determination]*

DIGEST:

1. Protest alleging procurement should not have been set-aside for small business which is filed after bid opening is untimely and not for consideration on the merits.
2. Where bidder on procurement totally set aside for small business fails to check box on reverse side of Standard Form 33 to indicate whether or not it is certifying itself as small business concern, contracting officer acted reasonably and properly by telephoning bidder to give it an opportunity to cure deficiency which is considered a minor informality or irregularity in bid.
3. Protest against solicitation restricting procurement as total small business set-aside is denied where record discloses that reasonable expectation of adequate competition existed and bid price was reasonable, notwithstanding that only one bid was received from small business concern.
4. Protest concerning small business size status is not for consideration by GAO since by law it is matter for decision by SBA.
5. Whether contractor has obtained state and local permits is matter between contractor and state and local officials and has no bearing on bidder responsibility or award of contract.
6. Assertion that Government awarded valid contract to protester which subsequently was improperly cancelled is not supported by record.

Anderson-Cottonwood Disposal (Anderson-Cottonwood) protests the award of a contract for garbage collection services to Red Bluff Disposal Co. (Red Bluff) under IFB R5-14-79-27 issued by the U.S. Forest Service.

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Anderson-Cottonwood contends that the decision to totally set aside the procurement for small business concerns was arbitrary and capricious, that the contracting officer failed to follow proper procedures in determining it was not a small business, and that the firm awarded the contract may not be a small business. The protester also maintains that Red Bluff lacked the permits required to meet its obligations under the contract at the time award was made.

Finally, Anderson-Cottonwood maintains that the contracting officer awarded it a contract at the time of bid opening only to later award the contract to Red Bluff. Anderson-Cottonwood argues that under these facts the "Government was in breach even though no contract had been signed." As relief, Anderson-Cottonwood seeks money damages.

Bid opening occurred as scheduled on April 23, 1979, with two firms, Red Bluff and Anderson-Cottonwood, responding to the IFB. Anderson-Cottonwood bid \$17,280 while Red Bluff bid \$20,506. The IFB stated that the applicable size standard limited the size of firms eligible to bid on this procurement to those with average annual sales or receipts for the preceding three years not in excess of \$3,500,000.

Red Bluff, upon learning that Anderson-Cottonwood was low bidder, telephoned the contracting officer on April 24, 1979, and protested Anderson-Cottonwood's size status. The contracting officer reviewed Anderson-Cottonwood's bid and found it had failed to indicate its size on the reverse side of Standard Form 33 but had indicated on the same form that Anderson-Cottonwood was either owned or controlled by Sunset Scavenger Company (Sunset Scavenger). The record indicates that the contracting officer then telephoned Anderson-Cottonwood's manager and asked him to verify his connection with Sunset Scavenger. The manager confirmed the relationship and informed the contracting officer that Sunset Scavenger's average annual sales exceeded the \$3,500,000 size standard. The contracting officer then advised the

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manager that based on this information Anderson-Cottonwood was ineligible for award. The contracting officer also advised the manager that he had a right to appeal this size determination. When the manager did not appeal, the contracting officer awarded the contract to Red Bluff on April 26, 1979.

The first basis of protest, that the contracting officer's decision to set aside the procurement was improper, is untimely as the allegation relates to an impropriety in the solicitation which was apparent prior to bid opening. Section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1)(1979), provides that:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior bid opening...shall be filed prior to bid opening..."

Bid opening occurred on April 23, 1979, but the protester did not initially raise this issue until it filed its protest with our Office on May 17, 1979. Therefore, this basis of protest is untimely filed and will not be considered on the merits. Triple "A" South, B-193765, March 23, 1979, 79-1 CPD 300.

Anderson-Cottonwood's second basis of protest is that the contracting officer failed to follow appropriate procedures in determining that it was not a small business. Specifically, Anderson-Cottonwood complains that the contracting officer ignored 13 C.F.R. § 121.3-5 (1979) which sets forth "standards of procedural due process and orderly administration which were totally disregarded by the agency" and thereby effectively precluded the protester from presenting "critical information to a decision maker concerning its functional independence from Sunset Scavenger." Anderson-Cottonwood also contends that the contracting officer failed to follow the procedures set out in 13 C.F.R. § 121.3-8 in determining the protester's size status.

The procedures in 13 C.F.R. § 121.3-5 delineate the manner in which any bidder or other interested party may challenge the small business status of any bidder

on a particular Government procurement. If a protest is timely filed within 5 days of bid opening, the contracting officer must promptly forward the protest to the appropriate Small Business Administration (SBA) district office. Further, the contracting officer may at any time after bid opening question the small business status of any bidder by filing a protest with the SBA.

The procedures in 13 C.F.R. § 121.3-8 provide that the contracting officer shall accept a small business self-certification at face value in the absence of a protest or other information which would cause him to question the veracity of the self certification. If the contracting officer has cause to question the veracity of a self-certification and elects to do so, he must refer the eligibility issue to the SBA by filing a formal protest pursuant to 13 C.F.R § 121.3-5.

Both 13 C.F.R. §§ 121.3-5 and 121.3-8 contemplate a situation where a bidder has already certified itself as a small business and that self-certification is questioned. Neither regulation applies to the facts here where a bidder fails to check the box on the reverse side of standard Form 33 to indicate whether or not it was certifying itself as small. Nevertheless, the contracting officer apparently believed he was required to contact the protester to verify whether or not it intended to designate itself as a small business concern for this procurement. In the circumstances, we believe the contracting officer acted reasonably and properly.

In the absence of the protester's self-certification, the contracting officer held a bid which was ineligible for award. Federal Procurement Regulations (FPR) § 1-1.703-1(b) (1964 ed.) provides that "no bidder \* \* \* shall be eligible for award as a small business concern unless it has in good faith represented itself as a small business prior to the opening of bids \* \* \*." However, the cited regulation refers to FPR § 1-2.405(b) (1964 ed.) which provides that the contracting officer shall give a bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid such as a bidder's failure to furnish required information concerning the number of bidders' employees.

By way of comparison, Defense Acquisition Regulation (DAR) 2-405 (1976 ed.) cites the same example but also lists failure to make a size status representation as an example of a minor informality which may be waived without prejudice to the bid. Moreover, the contracting officer had good reason to suspect that the protester had made an inadvertent mistake inasmuch as Anderson-Cottonwood was the incumbent contractor for this work which had been advertised the previous year in a solicitation totally set aside for small business. Consequently, we cannot object to the contracting officer's informally telephoning the protester in the fashion that he did since it appears he took this action to give the protester an opportunity to cure any oversight and not to circumvent the protested procedures discussed above.

Notwithstanding the contracting officer's determination that it was ineligible for award, the protester asserts that the contracting officer should have withdrawn the set-aside once it was apparent only one responsive bid, offering a price 15 percent higher than that offered by Anderson-Cottonwood, was received. We disagree. The contracting officer's decision to set aside a particular procurement exclusively for small business should be made on the basis of circumstances which exist at the time the decision is initially made. U.S. Divers Company, B-192867, February 26, 1979, 79-1 CPD 132; DeWitt Transfer and Storage Company, B-182635, March 26, 1975, 75-1 CPD 180. In making this decision, the contracting officer must determine that there is a reasonable expectation that bids will be obtained from a sufficient number of responsible small business concerns so that award will be made at a reasonable price. FPR § 1-1.706-5(a). This is basically a business judgment which requires the exercise of broad discretion by the contracting officer. RCA Corporation, et al., 57 Comp. Gen. 809 (1978), 78-2 CPD 213. Thus, the reasonableness of the expectation will not be reevaluated in retrospect, and our Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of abuse of discretion. U.S. Divers Company, supra.

The record here reveals that there was a reasonable expectation of bids from a sufficient number of small business concerns at reasonable prices even though only one bid was received from a small business concern willing to certify itself as such. When the IFB was issued, it was sent to six firms, all of which the contracting officer believed to be small. The previous procurement for the same service resulted in the receipt of bids from both the protester and Red Bluff. The fact that only one acceptable bid was received does not affect the propriety of the determination to make the set-aside which was made prior to the issuance of the solicitation. U.S. Divers Company, supra.

With regard to the reasonableness of the award price, the previous contract was awarded for \$13,244 and the Government estimate was \$16,000. The protester bid \$17,280 and the awardee bid \$20,506, roughly 15 percent higher than the protester's bid. We have held that the Government may pay a premium price to small business firms on restricted procurements to implement the policy of Congress as expressed in the Small Business Act, 15 U.S.C. §§ 631 et seq. (1976). Society Brand, Incorporated, et al., 55 Comp. Gen. 372 (1975), 75-2 CPD 225; Tenco Construction Company, B-187137, December 21, 1976, 76-2 CPD 512. In Tenco Construction Company, supra, a case where the awardee, the only small business to bid on the solicitation, bid \$661,320 more than the protester, and \$450,835 more than the Government estimate, we said:

"Simply because a bid exceeds other bids or the Government estimate does not necessarily mean that the bid is unreasonable. There can be a range over and above the low bid and the Government estimate which is a reasonable price range. The determination of price reasonableness requires a degree of discretion. Therefore, determinations dealing with price reasonableness will be sustained barring bad faith or fraud."

Consistent with this position, we have held that a contract price was not unreasonable even where it exceeded

the "Government estimate by 22 percent and at an average 17 percent higher than other qualified firms, large and small business alike." CDI Marine Company, B-188905, November 15, 1977, 77-2 CPD 367.

The protester suggests that a contract price which is 15 percent higher than the bid price it offered is unreasonable. While we are not prepared to say that any contract price which falls within a predetermined percentage range of the next bid or the average of other bids must always be considered reasonable, a party attempting to demonstrate the unreasonableness of a contract price has the affirmative burden of proving its case. Here, Anderson-Cottonwood presents no facts or information beyond its bare allegation to support its position and so has not met its burden of demonstrating that the contract price was unreasonable. Ads Audio Visual Productions, et al., B-193248, B-193148.2, April 18, 1979, 79-1 CPD 275.

There being no indication that the contracting officer was motivated by either bad faith or fraud when he awarded the contract to Red Bluff, we will not question the reasonableness of the contract price.

The protester's third basis of protest is that Red Bluff may not be a small business. Pursuant to 15 U.S.C. § 637(b)(6) (1976), the conclusive authority to determine small business size status of a business concern lies with the SBA and is not subject to review by this Office. Cardan Company, B-193839, January 31, 1979, 79-1 CPD 76. To protest a determination of small business status properly, a protester must file a protest within five days of "bid or proposal opening" to the contracting officer, who promptly forwards the protest to the appropriate SBA district office. 13 C.F.R. § 121.3-5.

The protester also argues that the firm awarded the contract lacked the permits required to meet the obligations of the contract. The Forest Service advises us that the solicitation contained the following provision:

"It shall be the responsibility of the contractor to secure all licences, permits, and to comply with all state and county health laws and regulations."

Compliance with such state regulatory and licensing requirements is a matter between the appropriate state officials and the contractor and will not be considered by our Office. Whether the awardee has met these requirements has no bearing on bidder responsibility or the award of the contract. RCA Global Communications, Inc., B-191577, August 29, 1978, 78-2 CPD 150; Burn Construction Company, Inc., B-192196, August 21, 1978, 78-2 CPD 139.

Finally, Anderson-Cottonwood protests the contracting officer's improper cancellation of the allegedly valid contract which it claims came into being once bids were opened and the contracting officer congratulated a representative of the protester in attendance that award would be made to his firm. The protester maintains that the contracting officer, under the holding in Allen M. Campbell Company v. U.S., 467 F.2d 931 (Ct. Cl. 1972), had no authority to cancel the contract allegedly awarded to it even though it was subsequently declared not to be a small business. As a remedy, Anderson-Cottonwood seeks money damages in the form of "lost profit unless a contractual provision sets out other relief."


We point out initially that, contrary to the protester's suggestion, the cited court case does not hold that the Government has no right to terminate a validly awarded contract; rather, the Court of Claims ruled that the Government should have terminated the contract under the Termination for Convenience clause. As relief, the Court denied recovery of anticipated profits and remanded the case for a determination of the amount of recovery in accordance with the Termination for Convenience clause.

Here we see no basis for the assertion that a contract with the protester came into being. The protester, insofar as the record indicates, did not act and does not claim to have acted as if it had believed it was the recipient of an award and indeed did not even make the



assertion until well after the protest was filed. In any event, if the protester believes it is entitled to breach of contract damages, the matter should be pursued with the contracting officer pursuant to the Contracts Disputes Act of 1978, Public Law 95-563, approved November 1, 1978.

On the basis of the above, the protest is dismissed in part and denied in part.

  
Acting Comptroller General  
of the United States