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Proc I
Hordell

DECISION



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

FILE: B-195761

DATE: September 12, 1979

MATTER OF: Shaban Manufacturing Inc. *DLG02722*

DIGEST:

[Protest of

Agency failure to insert one-sentence notification of small business set-aside on face of invitation] or cover sheet, see Federal Procurement Regulations § 1-2.201(a)(26) (1964 ed. amend. 153), was procedural deficiency rather than one of substance where protester had constructive notice of set-aside due to procurement's synopsis in Commerce Business Daily and protester's "scientific distributors" had actual notice of set-aside since each received IFB which contained notice of restriction on page 9.

On June 12, 1979, the United States Department of Agriculture, Forest Service (Forest Service), issued *AGC 00034* solicitation No. (IFB) RF-79-67 for turbidimeters. Initially, bid opening was scheduled for July 2, 1979; however, pursuant to an amendment it was changed to July 11, 1979. Shaban Manufacturing Inc. (Shaban) filed a protest with our Office on August 13, 1979.

By way of background, Shaban states that it is a small business which manufactures instruments and speciality chemicals. In addition, Shaban states that "[d]ue to the small size of the company, sales at the customer level have historically been handled by Fisher Scientific Company *CNG00375* [(Fisher)] and V.W.R. Scientific Inc. [(V.W.R.)]." Shaban advises that it became aware of the Forest Service's future need for approximately 40 turbidimeters and, as a result, its employees and those of V.W.R. had several meetings with the Forest Service. Sometime after these meetings, the instant IFB was issued. Shaban states that "on our behalf," Fisher and V.W.R. responded to the IFB. It is Shaban's understanding that the bids of both Fisher and V.W.R. were determined to be nonresponsive and rejected "since they do not qualify as small businesses."

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Shaban contends that "the fact that business in this case was restricted to small business was not readily and clearly evident." Shaban believes that "the solicitation should have been clearly marked or stamped on the first page as reserved for small business." It is Shaban's position that had it known that this procurement was a small business set-aside, Shaban "would have requested release from its normal arrangements with its scientific distributors (Fisher and V.W.R.) and bid directly to the Forest Service, thus being able to offer a better price * * * and effectively increase competition in this instance." (Shaban's emphasis.)

The IFB clause 14, page 9, provided under the Supplemental Instructions and Conditions to Standard Form 33A that this procurement was a total small business set-aside. We note that, with the exception of clause 14, the IFB had no other notification to the bidders concerning the set-aside restriction. Consequently, the Forest Service did not follow the procedure set forth in the Federal Procurement Regulations (FPR) § 1-2.201(a) (26) (1964 ed. amend. 153), which provides in pertinent part:

"When the procurement involves a set-aside for * * * small business concerns, the following provision will be placed on the face of the invitation or cover sheet:

This is a ----- percent set-aside for (small business) * * * concerns."

However, this procurement was synopsisized in the Commerce Business Daily (CBD) on June 15, 1979, and the synopsis also advised prospective bidders that this was a total small business set-aside. It is our view, therefore, that Shaban, Fisher and V.W.R. were on constructive notice of the fact that this procurement was a small business set-aside when the CBD synopsis was published. See Del Norte Technology, Inc., B-182318, January 27, 1975, 75-1 CPD 53, clarified, Delphi Industries, Inc., 58 Comp. Gen. 248 (1979), 79-1 CPD 67. Moreover, since Fisher and V.W.R. received a copy of the IFB, they were on actual notice that this was a restricted procurement. Therefore, even though the Forest Service did not follow the procedure set forth in the FPR, which we believe was a procedural deficiency

rather than one of substance, Shaban was not prejudiced by the Forest Service's failure to insert the aforementioned provision.

Generally, our Office will request a report from the procuring agency upon receipt of a bid protest in accordance with our Bid Protest Procedures. However, where it is clear from a protester's submissions that the protest is without merit, we will decide the matter on that basis. Northern Illinois University, B-194055, March 15, 1979, 79-1 CPD 184. Therefore, the protest is summarily denied.

Nonetheless, by separate letter we are pointing out to the Secretary of Agriculture the deficiency in this procurement to prevent a recurrence in the future.


Deputy Comptroller General
of the United States

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