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## DECISION

12404  
THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

FILE: B-195967

DATE: January 2, 1980

MATTER OF: Image 7, Inc.

## DIGEST:

Protester has not substantiated allegations: (1) that awardee is ineligible for award; and (2) that negotiations were improperly conducted where: (1) record shows that competition was restricted to minority small businesses and awardee falls within that class; and (2) negotiations which caused protester to increase its price were aimed at insuring that protester had included all elements of statement of work in its price.

Image 7, Inc. protests the Department of Health, Education, and Welfare's (HEW) award of contract No. 140-0041-79 to Karisma Advertising (Karisma) on two grounds: (1) Karisma is ineligible for the award; and (2) HEW improperly negotiated the contract. Since, in our opinion, neither ground is supported by the record, we are denying the protest for failure of the protester to present the information and evidence necessary to substantiate its case. Kurz-Kasch, Inc., B-192604, September 8, 1978, 78-2 CPD 181.

HEW reports that it negotiated the contract during August 1979 on a public exigency basis, 41 U.S.C. § 252(c)(2) (1976), because performance was required in October 1979. In mid-July 1979 HEW intended to restrict competition to "known qualified small businesses." However in late-July 1979 HEW advised Image 7 that the competition was further restricted to "small minority businesses." HEW originally planned to solicit three firms: Karisma, Image 7, and G. Designs, Inc. (GDI). However, HEW was unable to contact GDI, so it instead sought quotations from only Karisma and Image 7, both of which are minority-owned small businesses.

Image 7's first ground of protest arose out of a postaward conversation with the contracting officer which left Image 7 with the understanding that Karisma was either: (1) a Small Business Administration (SBA) 8(a) firm or (2) a minority business under a General Services Administration (GSA) contract. When Image 7 learned that Karisma was neither, it concluded that Karisma was somehow an improper recipient of the award.

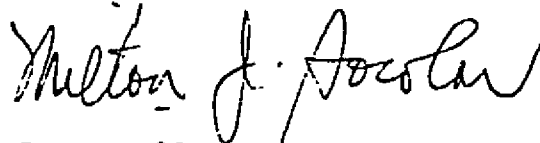
However, the record does show that Karisma is a minority firm. Since the procurement was restricted to minority small businesses and Karisma falls within that class, there is, in our view, no legal basis for questioning the award on the ground of Karisma's eligibility.

Image 7's second ground of protest (improper negotiation) resulted from the contracting officer's questioning Image 7's understanding of the scope of work. Image 7 appears to believe that the negotiations were aimed at giving Karisma an opportunity to quote a price lower than Image 7's price and/or inducing Image 7 to increase its price above Karisma's.

We do not agree. Image 7's initial offer was \$15,000. The contracting officer, confronted with a Government estimate of \$10,000, Image 7's offer of \$15,000, and Karisma's initial offer of \$20,000, decided it would be improper to award the contract on the basis of initial offers without negotiations in view of the wide variance between the estimate and the initial offers. Both offerors were contacted by telephone and advised of a closing date for best and final offers. HEW specifically advised Image 7 of the wide variance it had observed in the prices and asked Image 7 to review its price to insure that it had included all elements of the statement of work in the price. Karisma's best and final offer (received on August 2, 1979) lowered its price to \$19,319 while Image 7's best and final offer (received on August 10, 1979) increased its price to \$19,500. HEW awarded the contract to Karisma. The record fails to demonstrate any basis for concluding that HEW improperly negotiated the contract.

Accordingly, the protest is denied.

However, with regard to HEW's restriction of competition to minority firms, we have recently expressed doubt concerning the propriety of such a restriction unless it is accomplished under section 8(a) of the Small Business Act or other express statutory authority. Atkinson Builders, Inc., B-193735, September 11, 1979, 79-2 CPD 186. In the instant case, since neither party raised the issue and the contract is completed, we are taking no further action with respect to this procurement. We are, however, advising HEW of our concern.



For The Comptroller General  
of the United States