

14104 PL

DECISION



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

Protest Against Agency Decision To Set Aside Procurement

FILE: B-195431

DATE: June 23, 1980 For Small Business

MATTER OF: *DLG 03899*
Fermont Division, Dynamics Corporation
of America; Onan Corporation

DIGEST:

DLG 00567

1. Contracting officer need not make determinations tantamount to affirmative determinations of responsibility on expected small business bidders before determining to set aside procurement for exclusive small business participation. Under DAR § 1-706.5(a)(1), contracting officer has broad discretion and is only obligated to make informed business judgment that there is "reasonable expectation" of sufficient number of responsible small business bidders so that awards may be made at reasonable prices taking into account circumstances which exist at time determination to set aside is made.
2. Protest alleges unwritten Department of Defense/Department of Army policy to set aside procurements for exclusive small business participation whenever two or more small businesses are expected to compete without considering responsibility of anticipated small business bidders. Protest is denied because record does not support allegation.
3. Statutory provisions that "fair proportion" of Government contracts be awarded to small business concerns refer to proportion of total Government awards for all goods and services. Therefore, Department of Army may properly set aside significant proportion of Government

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contracts for particular category of items (or even make class set-aside of all contracts for particular items) without violating statutory provisions.

4. Ordinarily GAO does not review protests against affirmative determinations of responsibility unless fraud is alleged on part of procuring officials or solicitation contains definitive responsibility criteria which have not been met. Standard is much the same as that followed by courts which view responsibility as discretionary matter not subject to judicial review absent fraud or bad faith. Since protester does not allege fraud or failure to apply definitive responsibility criteria, protester has failed to meet standard for review by GAO or courts.
5. Allegation of buy-in does not provide basis upon which award may be challenged.
6. Decision to make 100-percent small business set-aside is not objectionable where contracting officer reasonably determined that procurement was within capability of small business concerns and that there was reasonable expectation of receiving adequate competition.
7. Awards made pending resolution of protests before GAO were properly made where awards were approved at appropriate level above contracting officer and GAO was notified of intention to make awards.

Fermont Division, Dynamics Corporation of America (Fermont), and Onan Corporation (Onan) have protested under invitation for bids No. DAAJ09-79-B-5034, issued by the United States Army Troop Support and Aviation Materiel Readiness Command (TSARCOM) for large quantities of 5 and 10 kilowatt, diesel engine, generator sets, and

a small quantity of related generators. The protests relate to the contracting officer's decision to set aside the procurement for exclusive participation by small businesses.

We find no merit to the protests.

BACKGROUND

In 1978, during the preliminary planning stages for this procurement, the contracting activity received an inquiry from the John R. Hollingsworth Company (Hollingsworth) concerning the possibility of setting aside a portion of the proposed procurement for exclusive small business participation. TSARCOM also received copies of correspondence Hollingsworth had sent to a United States Senator and a Small Business Administration (SBA) representative, dated September 5, 1978, pointing out that the proposed quantities for the impending procurement would be sufficiently large as to make a partial set-aside for exclusive small business participation appropriate. Shortly thereafter, the SBA representative issued to TSARCOM a preliminary request that the procurement be made a 50-percent set-aside for small businesses.

In response, TSARCOM prepared a letter to the Senator which explained that the only known previous supplier of 5 and 10 kilowatt generator sets was Onan, a large business, and indicated that the production quantity was expected to be too small for an economical production run. Therefore, TSARCOM did not believe that any part of the requirement for 10 kilowatt sets could be set aside at that time. This letter also showed that a careful review of the 5 and 10 kilowatt generator program would be undertaken. The contracting officer acknowledged the SBA's preliminary request by letter of September 20, 1978, and stated that TSARCOM's proposed course of action regarding possible set-asides would be coordinated with the SBA representative when program quantities and funds were better defined.

Approximately 7 months later, on April 16, 1979, the contracting officer issued a determination and findings that the procurement of 5 and 10 kilowatt generator sets should be procured under a 100-percent small business set-aside since he had determined that a sufficient number of responsible small business concerns would bid so that award could be made at reasonable prices in accord with Defense Acquisition Regulation (DAR) § 1-706.5(a)(1) (1976 ed.). In support of the total set-aside determination the contracting officer stated in pertinent part:

"* * * In the previous procurement of the 5 & 10 KW Generator Sets, competition was unrestricted with Bogue Electric a Small Business Concern receiving the award. John R. Hollingsworth a small business and Onan a large business were close behind in fierce competition. Another small business Libby Welding is a keen competitor of the above companies. All of these companies have produced Generator Sets of a comparable size to the 5 & 10 KW Sets. The small quantity of the first program year (FY 79) of the 10 KW Set does not lend itself to a 50% Small Business Set-Aside."

On April 17, 1979, the contracting officer, with the concurrence of the SBA representative, recommended that the proposed procurement of 5 and 10 kilowatt generator sets be set aside 100-percent for small business participation. The Director of Procurement and Production, TSARCOM, forwarded a procurement plan to the Assistant Secretary of the Army for approval on April 20, 1979, which showed that TSARCOM had decided to set aside the procurement for exclusive participation by small businesses. The project manager responded to the procurement plan on April 30, 1979, and objected to the recommendation to make a total small business set-aside out of the procurement. The project manager recommended that both large and small businesses be allowed to bid in unrestricted competition. He indicated that small businesses which

were likely to bid included Hollingsworth, Libby Welding Company (Libby), and Bogue Electric Manufacturing Company (Bogue). The project manager pointed out that Bogue had not performed well on the previous contract and that he believed Bogue to be in a weak financial position. He concluded that only Libby and Hollingsworth would be able to compete if the procurement were set aside for small businesses. In light of the large quantity of generator sets being procured and the high estimated cost of such equipment, the project manager did not believe that the Government would be guaranteed adequate competition.

During this period, Onan representatives had apparently contacted Department of Defense officials to express their concern about the exclusion of large businesses from competition and the "shrinking industrial base." In response to inquiries from Department of Defense personnel and the objections voiced by the project manager, the contracting officer held a meeting on May 1, 1979, to discuss the possibility of reversing his decision. The fact that Onan, a large business, had developed the generators used in these generator sets, and the fact that Bogue, a small business, was not performing satisfactorily on the previous contract were among the arguments made in favor of reversing the set-aside decision. The SBA representative at that meeting indicated that he would not agree to any change in the set-aside status.

After review of the above arguments, the Director, Procurement and Production, TSARCOM, by memorandum of May 11, 1979, affirmed the contracting officer's determination and the procurement plan's recommendation to set aside this procurement for exclusive small business participation. The Director acknowledged that an unrestricted procurement had originally been considered but rejected in view of the SBA representative's insistence on at least a partial set-aside. TSARCOM procurement personnel had concluded that the applicable provisions of the DAR supported the SBA representative's view. TSARCOM procurement officials also determined that a partial

set-aside would not be in the Government's best interest because it would result in duplication of procurement and contract administration costs. This memorandum stated that at least two small businesses, Libby and Hollingsworth, were expected to compete, that these firms have been very competitive in the past, and that these firms have the capability to successfully produce the items in accord with the delivery schedule. Moreover, TSARCOM took into account that, since the engines used in these generator sets are source-controlled items which must be purchased from Onan, a large business would benefit from about one-third of the program dollars spent.

Solicitation DAAJ09-79-B-5034 was issued on July 5, 1979, as a set-aside for exclusive small business participation, and called for bids on either a single-year or multi-year basis (or both) with options.

Fermont filed its initial protest against TSARCOM's determination to set aside the procurement for small business participation only in our Office on August 10, 1979, prior to the August 23, 1979, bid opening. Bids were received from four small businesses: Hollingsworth, Libby, Seaboard International Equipment Company, and Precision Products. (Precision Products withdrew its bid by letter of September 20, 1979).

On September 12, 1979, Onan filed a Complaint in the United States District Court for the District of Minnesota, Fourth Division (Civil No. 4-79-423), seeking, among other things, a declaratory judgment and injunctive relief on matters related to TSARCOM's determination to set aside this procurement exclusively for small business participation. The Court, in its Memorandum and Order dated September 24, 1979, granted Onan's motion for limited discovery and denied Onan's motion for a temporary restraining order. Pending resolution of Fermont's protest before our Office and Onan's litigation before the United States District Court, TSARCOM proceeded on September 28, 1979, to make split awards to Hollingsworth for a multi-year

contract for 5 kilowatt generator sets and stator generators and to Libby for a single-year contract for supply of 10 kilowatt generator sets. On October 15, 1979, a hearing was held before the District Court, and by Memorandum and Order of October 23, 1979, the Court indicated its interest in our resolution of the issues raised in Onan's September 12, 1979, Complaint.

Counsel for Onan then filed its protest in our Office on November 1, 1979, but indicated that negotiations were being conducted with the Department of Defense and the Department of Justice with regard to limiting the issues to be resolved by our Office. By letter of December 12, 1979, the Court wrote us and indicated that it desired our decision on the three counts of Onan's September 12, 1979, Complaint, and that our Office should fully develop the protest in accord with our Bid Protest Procedures (4 C.F.R. part 20 (1980)). In accordance with the Court's request of December 12, 1979, we have limited our consideration of Onan's protest to those issues which were originally raised in Onan's September 12, 1979, Complaint.

ISSUE I

In Counts I and II of its September 12, 1979, Complaint, Onan concedes that it is the policy of Congress, as expressed in the Armed Services Procurement Act of 1947 (10 U.S.C. § 2301 (1976)) and the Small Business Act (15 U.S.C. § 631 (1976)), that a "fair proportion" of all Government contracts be placed with small business concerns. Onan points out that this policy has been implemented by the Department of Defense in section 1, part 7, of the DAR. However, Onan also points out that DAR § 1-706.5(a)(1) required the contracting officer to make a determination that a reasonable expectation existed that bids would be obtained from a sufficient number of responsible small business concerns so that awards would be made at reasonable prices. Onan protests that it is a general policy of the Department of Defense and the Department of the Army to totally set aside procurements for small

businesses whenever there are two small business concerns which are expected to bid on the procurements without considering the matter of the responsibility of the expected small business bidders. Onan alleges that this illegal policy directive was followed by the contracting officer and other TSARCOM procurement officials in contravention of the specific requirements of DAR § 1-706.5(a)(1).

At the time the determination to set aside this procurement was made, DAR § 1-706.5(a)(1) stated, in pertinent part:

"* * * the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, shall be set aside for exclusive small business participation (see 1-701.1) if the contracting officer determines that there is reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. * * *" [Emphasis supplied.]

Onan argues that this provision requires a contracting officer to consider the responsibility of some or all of the potential small business offerors prior to making a determination to set aside a particular procurement. While Onan concedes that the contracting officer need not make a complete or final responsibility determination on any of the prospective offerors, it is clear that Onan interprets the DAR as requiring something very close to affirmative responsibility determinations before a set-aside can be made. Onan appears to interpret the phrase "reasonable expectation" as calling for a strict standard approaching virtual certainty. We do not agree with this interpretation, and we find that DAR § 1-706.5(a)(1) does not require such an interpretation.

The responsibility of a prospective contractor is to be determined after bid opening on evidence available

up to the date of award. See, for example, Eastern Microwave Corporation, B-181380, May 27, 1975, 75-1 CPD 312. A contracting officer's determination not to set aside a procurement under DAR § 1-706.5(a)(1) need not be referred to the SBA for a responsibility determination under the certificate of competency procedures. Cosmos Engineers, Inc., B-193203, December 15, 1978, 78-2 CPD 419. We believe that allowing contracting officers to make determinations concerning prospective offerors' responsibility prior to deciding whether to set aside procurements would amount to a system whereby small businesses would have to be prequalified before they could compete under exclusive small business set-asides. Such a procedure would unduly restrict competition. While we have allowed prequalification of prospective offerors in limited circumstances where the usual preaward methods of determining responsibility were found inadequate because the urgency of the requirements restricted the extent of the responsibility investigations which could be performed, there are no such compelling circumstances in the present case. See, for example, 53 Comp. Gen. 209 (1973). Accordingly, it is clear that responsibility determinations as that term impacts on eligibility for award cannot properly be made prior to bid opening.

Moreover, relevant DAR provisions require that responsibility determinations for award purposes be made after bid opening. Section 1-705.4(c)(i) states that under no circumstances should the matter of the responsibility of a small business bidder be referred to the SBA before the contracting officer makes a determination that the small business bid is responsive; section 1-905.1(d) indicates that information necessary to make responsibility determinations shall be obtained only concerning contractors within range for contract award; section 1-905.2 indicates that information regarding the responsibility of a prospective contractor shall be obtained "after bid opening" and should be on "as current basis as feasible with relation to the date of contract award." We think these provisions give no support to the argument that responsibility determinations or anything close to such determinations are to be made

prior to determining that a particular procurement be totally set aside for small business participation under DAR § 1-706.5(a)(1).

We also believe that it would be impractical to require contracting officers to make responsibility determinations or anything close thereto prior to setting aside procurements. The present procurement illustrates this point. The solicitation was sent to 47 small businesses. Every one of those firms could potentially have been in line for award if all had bid. To require responsibility evaluations on all 47 prospective contractors or even those which were considered most likely to receive award would be an unnecessary, extremely time consuming, and expensive task, which would require the contracting officer to speculate as to which firms would bid, whether their bids would be responsive, and whether the bids would be low enough to be in line for award.

While we are holding that contracting officers are not required to make responsibility determinations on prospective small business bidders before determining to set aside procurements for exclusive small business participation, we do not think that our holding reads out of DAR § 1-706.5(a)(1) the word "responsible." We believe that DAR § 1-706.5(a)(1) clearly imposes an obligation on a contracting officer to make an informed business judgment that there is a "reasonable expectation" of offers from a sufficient number of responsible small businesses so that award can be made at reasonable prices. The standards of responsibility enunciated in DAR § 1-903 are certainly relevant to deciding whether such a "reasonable expectation" exists. However, the contracting officer may exercise broad discretion in making this determination.

The extent of this discretion is evidenced by a review of our decisions in the area. There is no requirement that the contracting activity perform an in-depth survey prior to initiating a small business set-aside. See U.S. Divers Company, B-192867, February 26, 1979, 79-1 CPD 132. The past procurement

history of the item or similar items is always an important factor. DAR § 1-706.5(a)(1); Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD 21. In this regard, we have upheld a set-aside determination where the basis was the fact that competitive bids were received from two small businesses on the previous procurement. See, for example, KDI Electro-Tec Corporation, B-185714, June 8, 1976, 76-1 CPD 364. We have approved a contracting officer's decision to set-aside a procurement where the contracting officer relied solely upon a commodity source list to determine that there were a sufficient number of responsible small businesses which could be expected to bid so that award could be made at a reasonable price. Wyle Laboratories, B-186526, September 7, 1976, 76-2 CPD 223. We have even upheld a contracting officer's determination in this regard where only one bid from a small business concern was received in response to the solicitation. See U.S. Divers Company, *supra*. Since the circumstances of each procurement are unique, there can be no simple formula for making such business judgments. In any event, if after receipt of bids a contracting officer determines that there is not sufficient small business participation or that awards cannot be made at reasonable prices, a contracting officer may properly withdraw the set-aside in accord with DAR § 1-706.3(a). See Hein-Werner Corporation, B-195747, May 2, 1980, 80-1 CPD _____, where we indicated that doubt as to the number of responsible small businesses expected to compete could be resolved by opening bids to determine the propriety of the set-aside.

Onan alleges that it is an unwritten Department of Defense/Department of the Army policy to issue total small business set-asides whenever two or more small business concerns are expected to bid without considering whether such small businesses ultimately will be found responsible. Onan has supplied numerous depositions and Army correspondence in support of this allegation. We have examined these documents and cannot conclude that any such policy exists. It appears to us that Onan has taken quotations out of context from these documents. Onan has made much out of the fact that, on several

occasions, the word "responsible" was not used when a procurement official was describing the process of making a set-aside determination. We think the failure to use the word "responsible" when describing potential bidders was mere oversight on the part of the procurement officials involved. Certainly, these out-of-context statements do not amount to a policy which overrides the policies stated in the DAR, and we find no evidence that the present procurement was set aside because of any alleged unwritten policy.

Therefore, the protests are denied on this issue. The propriety of this particular determination will be discussed under Issue 3, below.

ISSUE 2

Both Fermont and Onan (in Count II of its September 12, 1979, Complaint) contend that the Department of Defense and the Department of the Army policies go beyond the congressional policy of awarding a "fair proportion" of all Government contracts to small businesses. Essentially, the protesters believe that small business set-asides in the generator field are being made more and more frequently and that large businesses are being driven out of the generator field. Both protesters cite the "shrinking industrial base" in the generator field as being directly attributable to set-aside policies of the Department of Defense and the Department of the Army in giving small businesses more than a "fair proportion" of generator contracts. Fermont contends that frequent set-asides erode the industrial base and violate congressional policy of maintaining the defense capabilities of our nation. The protesters also point out that once an item has been successfully produced under a small business set-aside, that item will always be procured through the use of set-asides under DAR § 1-706.1(f), as amended by Defense Acquisition Circular No. 76-19, July 27, 1979.

As previously shown, it is a congressional policy that small businesses be awarded a "fair proportion" of all Government contracts. However, we know of no precise definition for the phrase "fair proportion." What Congress

intended by this phrase is not evident from either the statutory language or the legislative history. We have held that the broadly worded statutory language refers to the totality of Government procurement. That is, small businesses are to be awarded a fair proportion of the Government's total procurements. The fact that small businesses may receive a significant proportion of Government contracts in a particular industry does not necessarily mean that more than a fair proportion of the Government's total contracts have been awarded to small businesses. See J. H. Rutter Rex Manufacturing Co., Inc., B-190905, July 11, 1978, 78-2 CPD 29.

Section 1-706.5(a)(1) specifically provides that classes of procurements may be set aside so long as the relevant determinations are made by the contracting officer. Thus, it is clear that, under appropriate circumstances, entire classes of procurements can properly be set-aside without violating the "fair proportion" policy. See, for example, Allied Maintenance Corporation, B-188522, October 4, 1977, 77-2 CPD 259. We are not here conceding that large businesses have been systematically precluded from competing for generator contracts. In fact, the evidence shows that large businesses have been fairly successful in obtaining contracts for the supply of similar generators in the past.

The argument that repeated issuance of set-aside solicitations will erode the industrial base and have an adverse impact on our nation's industrial preparedness is not a matter for our Office to consider. Even if true, this contention does not affect the validity of the contracting officer's determination to set aside this procurement for small business concerns since it is irrelevant to the determinations which must be made under DAR § 1-706.5(a)(1). See U.S. Divers Company, *supra*. Moreover, the DAR amendment dealing with repetitive set-asides (now DAR § 1-706.1(f)) is irrelevant to the contracting officer's determination to set aside the present procurement since the amendment was issued on July 27, 1979, or more than 3 months after the contracting officer decided to set aside the present procurement. We note, however, that the provision now provides that once an item has been successfully acquired through a small business set-aside, all future requirements of the

contracting office are to be set aside unless the contracting officer determines there is not a reasonable expectation that offers from two responsible small businesses will be received and award will be made at a reasonable price. In other words, the contracting officer will have to examine potential competition in much the same manner as is now required under DAR § 1-706.5(a)(1) to set aside the procurement initially. Therefore, this new provision appears to be consistent with the present set-aside policy as set forth in the DAR.

Accordingly, this portion of the protest is denied.

ISSUE 3

Fermont and Onan (in Count III of its September 12, 1979, Complaint) contend that, if the contracting officer made the determinations required by DAR § 1-706.5(a)(1) before deciding to set aside this procurement for exclusive small business participation, then the contracting officer's determinations were arbitrary and capricious.

Fermont believes that the contracts awarded are too big for small businesses to successfully produce the generator sets in accord with required delivery schedules at reasonable prices without financial assistance from the Government. Fermont expresses fear that the small business awardees may have to be defaulted by the Department of the Army or that they may be driven into bankruptcy in attempts to expand their production capabilities for these contracts. Onan argues that the contracting officer must have made the DAR § 1-706.5(a)(1) determination without having taken into account the prior procurement history of these generators. Such history allegedly shows a pattern of "buy-ins" by small businesses and financial assistance by the Government in the form of contract modifications after award; more specifically, a contract awarded to Bogue, the last small business contractor for these generator sets, is referred to where

the Government had to delete a large portion of the requirement in order to prevent Bogue from being defaulted. Onan also argues that Libby and Hollingsworth will be unable to successfully perform this large requirement because of inadequate production capabilities and inadequate financial resources. Onan also alleges that no small business bidders could possibly have been expected to meet the standards for responsibility set forth in DAR § 1-903, especially with regard to financial capability and ability to comply with proposed delivery schedules.

Onan has placed heavy reliance on the case of J. H. Rutter Rex Manufacturing Co. v. United States, Civil Action No. 77-3018, United States District Court for the Eastern District of Louisiana, decided March 10, 1978, as support for its contention that the contracting officer's determination was arbitrary, and, therefore, should be overruled by our Office. Onan also cites statements made in the Department of the Army's supplemental report dated March 5, 1980, which allegedly show that the contracting officer's decision to make a total set-aside rather than a partial set-aside was arbitrary. Onan contends that these statements, to the effect that if the contracting officer deemed portions of the instant requirement to be within the potential capabilities of Libby and Hollingsworth he could properly have determined to make a total set-aside, clearly show the contracting officer's determination to have been deficient. Onan argues that only if the potential offerors were believed to have the capabilities to perform the entire minimum requirement set forth in the solicitation could the DAR § 1-706.5(a)(1) determination properly have been made. Otherwise, Onan argues that, if small businesses were to be given any preference, it should have been in the form of, at most, a partial set-aside.

As mentioned above, determinations regarding the reasonable expectation of bids from a sufficient number of responsible small business concerns are necessarily within broad administrative discretion, and this Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of

abuse of that discretion. Allied Maintenance Corporation, supra. Both protesters have charged that the contracting officer's determinations are arbitrary and capricious. We do not agree.

Prior to making awards, TSARCOM made an affirmative determination that the awardees were responsible. The charge that the awardees will not be able to adequately perform is essentially a challenge to the contracting activity's affirmative determinations of responsibility. This Office no longer reviews affirmative determinations of responsibility, unless fraud is alleged on the part of the contracting officer or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Louisville Billiard Supply Company, B-190413, October 31, 1977, 77-2 CPD 336. Our standard is much the same as that followed by the courts, which have taken the view that responsibility is a matter of discretion not subject to judicial review absent fraud or bad faith. See Bell Helicopter Textron, B-195268(1), 59 Comp. Gen. ____ (1979), 79-2 CPD 431 (at p. 31) and cases cited. Since neither fraud nor failure to apply definitive responsibility criteria have been charged, the protesters have failed to meet the standard for review by our Office or the courts. Accordingly, notwithstanding the Court's involvement in this case, we find it unnecessary to engage in any further consideration of the responsibility matter because of the limited judicial standard of review.

Generally, protests against acceptance of allegedly unreasonable, below-cost proposals for fixed-price contracts imply that the allegedly too-low bidder is attempting to "buy-in" to a contract with the expectation of either (1) increasing the contract price or estimated cost during the performance period through change orders or other means or (2) receiving future follow-on contracts at prices high enough to recover any losses on the original "buy-in" contract. Acceptance of unreasonably low or even below-cost offers by the Government is not illegal and, therefore, the possibility of a "buy-in" does not provide a basis upon which an award may be challenged if the procuring activity has not made a determination of nonresponsibility. It

is, however, the contracting officer's duty to see that amounts excluded in the development of the original contract price are not recovered in the pricing of change orders or of follow-on contracts. KET, Inc., B-190983, December 21, 1979, 79-2 CPD 429. There is no evidence that either Libby or Hollingsworth have offered below-cost bids on these contracts.

Moreover, nothing in Rutter Rex v. United States, cited by Onan, indicates that the instant set-aside is contrary to law. There, the contracting officer decided not to set aside a procurement for small business because of the absence of sufficient competition from small business to assure reasonable prices. This determination, however, was reversed by the contracting officer's superior within the agency. The court found that the superior's action was taken to enable the agency to meet an interim goal for awards to small business, which the court identified as "an arbitrary statistical goal." The court held that the agency abused its discretion by disregarding the criteria for set-asides contained in the Armed Services Procurement Regulations (now called the DAR). Since we find, infra, that the criteria of DAR § 1-706.5(a)(1) were followed, the holding of Rutter Rex v. United States is distinguishable. See J. H. Rutter Rex Manufacturing Co., Inc., supra.

We believe the contracting officer reasonably determined within his discretion that bids from a sufficient number of responsible small business concerns would be received so that awards could be made at reasonable prices. The contracting officer and other TSARCOM officials examined the prior procurement history for similar generator sets. The previous procurement for generator sets was an unrestricted competition which was awarded to Bogue, a small business. The April 16, 1979, determinations and finding made by the contracting officer cited this fact and the fact that Hollingsworth, another small business, was close behind in the bidding for that contract. The contracting officer also expected Libby, a small business, to bid. Since all three of these small businesses had previously produced generator sets comparable in size to the 5 and

10 kilowatt sets required under the present procurement, the contracting officer believed that at least these small businesses would be able to perform successfully under the present contract if they received the award.

Onan's allegations regarding Libby and Hollingsworth are mere speculation on Onan's part. In fact, the matters raised by Onan and Fermont were investigated by the Army during the preaward survey, and both firms were found to have adequate financial resources and any necessary capability to expand to meet new production demands. Regarding the problems which arose with Bogue under the prior contract, we note that these problems were partially caused by Onan's demand for \$500,000 in escrow or an irrevocable letter of credit in that amount before Onan would supply Bogue with engines. Bogue was unable to meet this demand. Therefore, the Army deleted the engines from the contract, and the Army purchased the engines directly from Onan to be assembled as part of the generator sets.

The possibility of Onan demanding "up-front" financing from Libby or Hollingsworth was raised by the project manager after the contracting officer had decided to set aside this procurement. Contracting officials at TSARCOM considered this issue and determined that either Libby or Hollingsworth would be able to comply with such a demand if made by Onan. Furthermore, TSARCOM believed that it was unlikely that a demand for financial guarantees would be made by Onan on either of these companies because of their sound financial conditions. The record shows that TSARCOM felt that the price of the generator sets would be reasonable even if Libby and Hollingsworth were the only two bidders since past experiences had shown these two firms to be very competitive. Moreover, TSARCOM procurement officials believed that small businesses would be able to meet the production schedules since those schedules had been drawn up with a total small business set-aside in mind. Since the small businesses in the generator field are generally packagers or assemblers of parts supplied to them by other firms, TSARCOM believed that small businesses would be able to meet production schedules without any significant problems.

Moreover, due to the fact that small business packagers generally do not have a large capital investment in engineering and plant expansion and because these firms often operate at a lower profit margin, the project manager indicated that small businesses are able to offer the end-products at competitive prices. Due to the project manager's objection that adequate competition might not be obtained if only small businesses were allowed to compete, the SBA representative was consulted and a meeting was held on May 1, 1979, to reconsider the matter. After reconsideration by TSARCOM, the determination to set aside was affirmed.

Regarding Onan's charge that this procurement should have been, at most, a partial set-aside, the contemporaneous records show that the ability of potential small businesses to produce the minimum requirement of the contract was carefully considered. Even though the Army indicated in its supplemental report that a potential bidder might be considered even if capable of producing less than the entire contract minimum, there is no contemporaneous evidence that the contracting officer considered the capabilities of potential small business bidders to perform less than the entire minimum requirement. In fact, the record shows that the contracting officer considered but rejected the possibility of making only a partial set-aside, on the bases of (1) duplicative solicitation and contract administration expenses, (2) the SBA representative's steadfast refusal to agree to a partial set-aside, and (3) the small quantity of the 10 kilowatt generator sets required. Regarding the small quantity of 10 kilowatt generator sets required, we note that DAR § 1-706.6(a)(ii) provides that the requirement must be severable into two or more economic production runs before the procurement may be partially set-aside.

In sum, the solicitation was sent to 47 small business concerns and three bids were received (excluding the withdrawn bid). Two of these firms were selected for award and were subjected to careful scrutiny by the Army to determine if they were responsible. The responsibility factors enumerated in DAR § 1-903 were carefully

considered and an affirmative determination was reached on each firm. This determination was based on the ability to successfully produce the entire minimum requirement, and not on the ability of the awardees to produce only a part of the requirement as alleged by Onan. Thus, not only did the contracting officer's decision to set aside appear to be reasonable at the time it was made but the reasonableness of this decision was confirmed by the detailed preaward surveys which were available to the contracting officer before the award was made. In view of the above, we cannot find the decision to set aside to have been unreasonable.

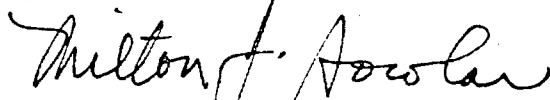
Therefore, this protest issue is dismissed in part and denied in part.

ISSUE 4

Fermont protests that the Department of the Army failed to notify our Office in a timely manner that awards were being made pending resolution of the protests, as required under DAR § 2-407.8(b)(2), and, therefore, the awards were improperly made and a new solicitation is required.

The last issue, raised by Fermont, is a procedural one. Section 2-407.8(b)(2) of the DAR provides that when a protest has been filed in our Office prior to award of the contract, an award may properly be made if it is approved at an appropriate level above the contracting officer and notice of intent to make award is furnished to our Office. See Price Waterhouse & Co., B-186779, November 15, 1976, 76-2 CPD 412. The present awards were approved by the Office of the Assistant Secretary, Department of the Army, on September 28, 1979. Our Office was notified by telephone on that same day that awards were being made. We received written notification of the awards to Libby and Hollingsworth on October 24, 1979.

Accordingly, this protest issue is denied.



Acting Comptroller General
of the United States