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

FILE: B-206333, B-206333.2 DATE: September 14, 1982

MATTER OF: Bell & Howell; Topper Manufacturing Corporation

DIGEST:

1. Protest against small business set-aside of procurement of microreaders is denied, since contracting officer reasonably anticipated receipt of offers from a sufficient number of small businesses so that award would be at reasonable price and record indicates agency actually received adequate competition to meet Government's needs.

2. GAO will not review agency's determination not to renew a contract since the decision whether to exercise contract renewal option is a matter of contract administration outside the ambit of the Bid Protest Procedures.

3. Allegation that set-aside resulted in large business protester being excluded from the procurement without a hearing in violation of its constitutional right to due process is without merit since large business does not have constitutional right to a hearing.

4. Small Business Act, 15 U.S.C. § 631. 644 (1976), and implementing regulations, Federal Procurement Regulations § 1-1.706-5 (1964 ed. amend. 192) grant contracting officers broad discretion to set aside particular procurements for small business. Fact that particular large business firm received contract for many years does not give firm property right to subsequent contracts. Since constitutional protection of procedural due process only applies if a right is being taken away, a hearing was not required prior to the decision to set aside the subsequent year's contract.

5. Protest of agency refusal to consider offer sent by regular mail and received after due date for receipt of offers is denied where circumstances of late delivery do not fall within any of solicitation's late offer clause exceptions.

Bell & Howell (B&H) and Topper Manufacturing Corporation (Topper) protest under solicitation FCGE-B9-75224-N, issued by the General Services Administration (GSA). B&H, a large business, protests the decision by GSA to set aside for small business special items 21-21 and 21-21a, microfilm readers and printers, and accessories and replacement parts under this negotiated multiple-award Federal Supply Schedule (FSS) solicitation. According to the contracting officer, the items set aside represent 3 to 5 percent of the total procurement of various microfilm-related products solicited by GSA under this solicitation. Topper protests the refusal of GSA to consider its late offer.

We deny the protests.

Bell & Howell's Protest

B&H alleges that the exclusion of B&H is a denial of due process, that the set-aside is detrimental to the public interest, that the set-aside is inconsistent with the policies of the Small Business Act because B&H's small business suppliers will be adversely affected, and that the set-aside decision was arbitrary, capricious and not in accordance with applicable regulations.

Federal Procurement Regulations (FPR) § 1-1.706-1(c) (1964 ed. amend. 192) requires that a set-aside be effected when the contracting officer determines it to be in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. For a total set-aside, FPR § 1-1.706-5(a)(2) (1964 ed. amend. 192) requires that there must be a reasonable expectation that offers will be obtained from a sufficient number of small business concerns so that awards will be made at reasonable prices and further provides that past procurement history is an important factor to be considered in determining whether a reasonable expectation exists.

A determination under FPR § 1-1.706-5(a)(2) concerning whether adequate competition may reasonably be ex[illegible]ed

is basically a business judgment within the broad discretion of the contracting officer for which we will not substitute our judgment. We will sustain a determination under the regulation absent a clear showing of abuse of such discretion. Belfort Instrument Company (Belfort), B-202892, July 15, 1981, 81-2 CPD 33; Simpson Electric Company (Simpson), B-190320, February 15, 1978, 78-1 CPD 129.

GSA reports that the contracting officer determined that offers from a sufficient number of responsible small business concerns would be received to assure reasonable prices. This was based on the contracting officer's finding that 9 of 11 companies currently on the FSS covering these items were small business contractors, and the sales volume over the last 2 years was divided fairly equally between small and large businesses. However, GSA now admits that its estimate of the volume of sales by small business under the current contracts was mistaken. GSA reports that small business sales were approximately 20 percent, not the 50-percent figure originally relied upon, but argues that, in any event, 20 percent is a sufficient basis for the set-aside. GSA also indicates that the Small Business Administration (SBA) concurred in the set-aside determination.

GSA further states that it received offers from eight small businesses and is negotiating with six of the offerors. GSA asserts, notwithstanding its downward revision of small business sales volume under the prior procurement, that based on the prior procurement history and the actual offers received in response to the solicitation, GSA had a reasonable basis to conclude that adequate competition would occur under the set-aside and the set-aside was therefore proper.

B&H contends that GSA merely counted small businesses listed on the FSS, but that GSA was required to analyze whether sufficient competition exists among these small businesses for the broad variety of microreaders used by the Government. B&H points to the matrix in the solicitation which provides for the listing of the microfilm readers with a variety of different variations, for example, types of lens, screens and controls. B&H asserts that GSA, by its own admission, made no attempt prior to its set-aside decision, to determine whether the small businesses listed on the schedule could provide the variations indicated by the matrix.

B&H further alleges that there are only two small businesses capable of supplying even a few of the products solicited and these only account for 8 percent, not 20 percent, of last year's Government purchases. According to B&H, the rest of the small businesses listed on the schedule are either large business concerns or small business firms which made no sales to the Government last year. B&H states that a third small business, representing 3 percent of Government sales, offers a unique device and not the variety of products needed. B&H contends that Simpson, supra, and Belfort, supra, support B&H's position that GSA was required to insure that small businesses could meet Government's needs to support the set-aside decision.

B&H points out that in Simpson, for example, GSA conducted a phone survey of primary Government users to determine whether qualifying small businesses could meet the Government's needs, and that only after receiving asssurances that needs would be fulfilled, did GSA set aside the procurement. B&H points out that, here, the set-aside product involves many variations of a product, requiring an even greater need for a user survey than in Simpson, supra. But GSA conducted no user survey and made no determination whether the Government's needs can be satisfied by the small businesses. B&H concludes that GSA did not have a reasonable expectation of small business competition which was capable of meeting Government needs.

In our view, the record supports GSA's decision to set aside the procurement.

Initially, we note that with respect to prior procurement history, under B&H's own analysis of the small business firms on the FSS, which GSA counted to determine the feasibility of the set-aside, two small businesses made 8 percent of the schedule sales.

We reject B&H's argument that GSA improperly counted Northwest Microfilm (Northwest), an alleged large business, which represented another 8 percent of Government sales. B&H reports there was a merger of its parent company, a large business with another large business firm. However, GSA has continued to assert throughout this protest that Northwest is a small business because the merger acquisition is not complete. In any event, the documents submitted by B&H show that public indications of the merger occurred well after GSA's decision to set aside this solicitation and

the closing date for receipt of initial proposals. Therefore, GSA properly considered Northwest as a small business offeror in its review of prior procurement history. Thus, GSA, prior to its set-aside decision, relied on three small businesses, which supplied 16 percent of the Government's needs, which B&H concedes showed capability.

There are also three other small business offerors which were on the schedule, but made no sales to the Government the previous year. However, this did not preclude GSA from considering these as potential suppliers when large businesses were excluded from competition under the set-aside. Because B&H supplied a substantial portion of past Government needs, the record would not necessarily show significant past sales to the Government. One of the stated purposes of a small business set-aside is to increase small business participation in Government procurements. FPR §§ 1-1.706-1(a) (1964 ed. amend. 192). To require agencies, in making a set-aside determination, to eliminate from consideration small businesses with no record of sales to the Government under prior contracts, where one large business has dominated Government sales under these prior contracts, would defeat the purpose of the small business set-aside to encourage and permit these firms to participate in Government procurements.

The set-aside decision is further supported by subsequent events. In prior decisions, we have considered the extent of small business response to a set-aside procurement. See Simpson, supra. Doubt as to the capability of the small business to meet the Government needs can be resolved by opening offers to determine the propriety of the set-aside. See Fermont Division, Dynamics Corporation of America; Cnan Corporation (Fermont), B-195431, June 23, 1980, 80-1 CPD 438; Hein-Werner Corporation, B-195747, May 2, 1980, 80-1 CPD 317.

B&H challenges the capability of small business to provide the full range of models indicated by the solicitation matrix.

Although GSA has requested that we not release information concerning ongoing negotiations with the firms which have submitted offers, the agency has consistently reported that several small businesses have submitted offers, and that based on negotiations conducted thus far, there are an adequate number of types of readers to insure selectivity by using activities.

The matrix indicates that GSA was soliciting readers with a variety of features. GSA did release a document to B&H for comment which is indicative of the small business competition GSA received. The document shows that several small business firms offer a variety of desk and portable models. These firms also offer rear projection models, front projection models, dual and single carrier and lens features. This supports GSA's contention that its needs will be met.

B&H's rebuttal is that, of the firms listed, only one is a viable small business contractor. B&H's conclusion is based on the fact that five of the firms on the original FSS list GSA relied on for its set-aside decision are not listed, and that two of the three small businesses with actual prior contract sales are no longer listed. We note that B&H's analysis rejects from consideration four potential small business offerors listed on the document and the prior FSS because they had no sales to the Government for the contract period. Also, two other small business firms are not considered viable because there is no record of prior contract or sales. B&H continues to consider Northwest a large business and, thus, eliminates that firm from B&H's analysis.

We disagree with this reasoning. As we already pointed out, GSA indicates that proposers, regardless of prior sales history, currently offer a variety of models GSA considers adequate for Government needs. GSA submits this evidence to indicate that viable competition has been received. The prior history of these small businesses is not germane to the question of whether or not the offerors currently can satisfy the Government's needs under this contract.

Since GSA reports that it is currently negotiating with offerors and, further, that it received adequate competition and expects that this competition will meet the Government's needs, we conclude that the subsequent competition supports GSA's initial set-aside decision. To the extent that GSA might be considering an award to Northwest, the agency may investigate the size status of that firm, and any interested party may protect its interests by availing itself of SBA size protest procedures. Finally, on this point, if the awardees cannot provide Government needs during the contract performance period, we expect that appropriate off-schedule procurements will be effected.

With regard to B&H's claim that the set-aside will adversely affect small business suppliers of B&H and, therefore, is not in the interest of small businesses, we implicitly rejected this specific argument in Simpson, supra, where, as here, we found the set-aside proper.

B&H also alleges that its due process rights have been violated. B&H contends that GSA's failure to comply with even the minimal requirements for the set-aside decision is "an abuse of discretion, and an injury of constitutional significance." Since we have determined that GSA's actions were proper and consistent with the applicable regulations, this allegation of a due process violation is without merit.

B&H also argues that GSA's failure to grant it a hearing prior to deciding not to exercise its option to renew B&H's contract under the contract renewal clause was a violation of due process, especially in view of B&H's 18 years of unbroken awards on this FSS item. B&H contends that had it been granted a hearing, GSA would not have decided to set aside this procurement.

To the extent B&H is protesting the failure of GSA to renew the contract under the prior FSS contract renewal clause, this aspect of the protest is dismissed. We have held that the decision whether to exercise an option is a matter of contract administration outside the ambit of our Bid Protest Procedures. Optic-Electronic Corp , B-204402, February 9, 1982, 82-1 CPD 113; Oscar Holmes & Sons Trucking Company, Inc., B-197080, January 15, 1980, 80-1 CPD 47.

To the extent that B&H contends it should have been given a hearing, we rejected the same argument in Fermont Division, Dynamics Corporation, B-199159, July 15, 1981, 81-2 CPD 34, a decision under the Defense Acquisition Regulation concerning small business set-asides, which provisions are essentially the same as those in the FPR applying to civilian agencies. We stated the following:

> "Fermont also asserts, citing Art-Metal U.S.A. v. Solomon, 473 F. Supp. 1 (D.D.C. 1978), that the set-aside policies of DOD have resulted in it being constructively debarred without a hearing in violation of DAR § 1-600 et seq. and in violation of its constitutional right to due process. We do not agree. The specific notice and hearing requirements of DAR § 1-600 et seq. apply only to those situations where

the Government takes action to preclude a bidder from receiving any Government contracts and not to a decision to set aside a given procurement. See DAR § 1-600. The Art-Metal case is clearly distinguishable in that it concerns an agency's actions pending a possible debarment action. Large businesses do not have a constitutional right to notice or a hearing prior to the decision to set aside a procurement for small businesses. Duke City Lumber Co. v. Butz, 382 F. Supp. 362, 375 (D.D.C. 1974)."

B&H attempts to distinguish the Fermont decision on the basis that the unbroken years of renewals support a course of conduct which establishes a "property right" protected by the fifth amendment. We have rejected a similar argument in Navajo Food Products, Inc. (Navajo), B-202433, September 9, 1981, 81-2 CPD 206. In that decision, the protester, which had been continually awarded contracts under Buy Indian Act set-asides for the previous 10 years, argued it had a property right to a subsequent contract which the Department of the Interior had decided to award under an unrestricted procurement. We found that the decision to set aside a particular procurement was discretionary under the act and, thus, no property right had been established by past conduct. Since constitutional protection of procedural due process only applies if a right is being taken away, Interior did not have to afford that firm a hearing before deciding not to set aside future contracts. See Navajo, supra, and cases cited therein.

Similarly, here, the contracting officer has broad discretion under the Small Business Act, 15 U.S.C. §§ 631, 644 (1976), and implementing regulations, FPR § 1-1.705-5 (1964 ed. amend. 192), whether or not to set aside a particular procurement. See also Belfort supra. In our view, therefore, no property right was established and GSA's action did not violate B&H's due process rights.

We deny B&H's protest.

Topper Manufacturing Corporation's Protest

Topper Manufacturing Corporation (Topper) protests GSA's refusal to consider its late offer, which was submitted after the time specified in the solicitation for the receipt of offers. Topper admits that it sent its offer by regular mail

on February 16, 1982, that the date specified in the solicitation as amended for receipt of offers was February 18, 1982, and that Topper's offer arrived late on February 19, 1982. Nevertheless, Topper requests that we allow it to resubmit its offer since it was informed that offers timely submitted had not been opened pending resolution of B&H's protest.

Initially, we note that, contrary to Topper's statement, GSA opened the offers. The general rule is that an offeror has the responsibility for the timely delivery of its proposal to the proper location and personnel. Advance Business Service, Inc., B-204940, October 26, 1981, 81-2 CPD 359. In the circumstances involved here, we are aware of no basis which would permit consideration of Topper's offer sent by regular mail and received after the due date for receipt of offers, since the submission of this late offer does not fall within any of the solicitation's late offer clause exceptions. See Geronimo Service Company, B-199864, October 28, 1980, 80-2 CPD 325.

In view of the above, rejection of the late offer was proper, and we deny Topper's protest.

for Milton J. Socolar
Comptroller General
of the United States