

7. Protest against a small business set-aside is denied when a review of the proposals received under the set-aside reveals that substantial number of qualified firms have offered a variety of technically acceptable equipment at reasonable prices.

Datametrics, Dresser Industries, Inc. (Datametrics), protests the total small business set-aside for various transducers in request for proposals (RFP) No. YGS-F-36406-N-2-11-83 issued by the General Services Administration (GSA) for multiple-award Federal Supply Schedule (FSS) contracts. Hughes Aircraft Co. (Hughes) and Linear Laboratories (Linear) protest the total set-aside for "Systems that Measure Heat Energy" on the same RFP.

Federal Procurement Regulations (FPR) § 1-1.706-5(a) (1964 ed., amend. 192) provides that agencies may use a total small business set-aside on items for which the agency can reasonably expect a sufficient number of competitively priced proposals from responsible small business firms. All three protests have been evaluated against this standard, and we find the set-asides were proper.

We dismiss the protests in part and deny the protests in part.

The Datametrics Protest

Datametrics claims that the five categories of transducers used in the RFP are overly broad and do not reflect the needs of the Government, that Datametrics should be considered a small business, that MKS, a competitor of Datametrics, should be classified as a large business, that a set-aside will injure Datametrics' small business suppliers, that the small business set-aside will create a sole-source procurement for MKS which is dominant in the field with regard to certain types of transducers, and that Datametrics' products are unique and cannot be matched by small business products.

This Office has received comments concerning this protest from several firms, including five small businesses. One of these interested parties, Rosemount, Inc. (Rosemount), initially raised the issue, which the protester later adopted, that the categories of transducers were too

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broad. Inasmuch as this alleged apparent solicitation impropriety was not raised in Datametrics' initial protest, Rosemount's letter was not addressed to this Office as a protest, and the supplemental Datametrics letter which raised the issue was received after the closing date for proposals, the issue is untimely. 4 C.F.R. § 21.2(b)(1) (1983).

As for the small business status of Datametrics and MKS and small business size standards, the Small Business Administration (SBA) determines these matters, not GAO. Therefore, we dismiss this aspect of the protest. Telex Communications, Inc., B-208382, August 17, 1982, 82-2 CPD 142; Pacific Diving Industries, Inc., B-195405, August 1, 1979, 79-2 CPD 72.

With respect to the Datametrics claim that the set-aside will result in a sole-source procurement because only the protester and MKS offer the unique transducers required, a number of factors can be evaluated to determine whether the agency had a reasonable expectation of adequate competition, including the number and dollar-value percentage of small business contracts awarded in prior years and the number of small business comments received concerning the protest. Bell & Howell; Topper Manufacturing Corporation, 61 Comp. Gen. 596 (1982), 82-2 CPD 224; Republic Steel Corporation; Penco Products, Inc. B-205951; B-205951.2, April 29, 1982, 82-1 CPD 399. Only the protester claims that MKS is dominant in the field and will enjoy sole-source status for certain types of transducers. The protester has also failed to show that its and MKS's products are so unique that no other firm can fulfill the Government's needs with respect to those products. In this regard, the small business percentage of total sales under contracts awarded pursuant to the prior, unrestricted solicitation for the five types of transducers ranged from 35 percent to 82 percent, and the actual number of small business firms awarded contracts ranged from 5 to 17. Furthermore, five small businesses responded to the Datametrics protest in defense of the set-aside. Under these circumstances, we cannot find that the agency acted without reasonable expectation of competition for all varieties of transducers and, therefore, the set-aside was proper.

Finally, since the agency set these items aside properly, the Datametrics claim that the set-aside will adversely affect its small business suppliers is without

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legal merit. Bell & Howell, supra; Simpson Electric Company, B-190320, February 15, 1978, 78-1 CPD 129.

The Hughes Protest

In this RFP, GSA combined two former Special Item Numbers (SIN), 66-64(c) "Infrared Detectors" and 66-66 "Optical and Infrared Pyrometers," to create a new SIN 66-66 "Systems that Measure that Energy." The new SIN had three subcategories: 66-66(a) "Systems with a Thermal Imaging Readout," 66-66(b) "Systems with a Digital Readout," and 66-66(c) "Accessories and Options." Under prior solicitations, SIN 66-66 had been set aside for small businesses and SIN 66-64(c) had been unrestricted. GSA evaluated its procurement history by classifying its prior contracts according to its new system and concluded that a sufficient number of small business offerors would be reasonably expected and that a total set-aside would be proper.

Hughes protests that the decision to combine was erroneous, that any set-aside should have been made according to the number of small business contracts under the prior classifications, that small business prices in this field are excessive, and that small business products are not technically equal to large business products.

The protest against the realignment of SIN's was not raised in Hughes' initial protest. Rather, it was first raised in a letter filed in this Office long after the February 18 closing date for proposals. Since it was clear from the solicitation that the SIN's at issue were being combined, this ground of the protest was known prior to closing and must have been filed prior to closing to be timely. 4 C.F.R. § 21.2(b)(1) (1983). Since the issue was not raised timely, the protest to that extent is dismissed.

The allegation that insufficient competition will be created by a set-aside can be readily evaluated by reviewing the offers received under the set-aside. Bell & Howell, supra. In this case, GSA received 7 offers under SIN 66-66(a), 13 offers for 66-66(b), and 6 offers for 66-66(c), clearly establishing sufficient competition.

The claim that small business prices are unreasonable is also refuted by the proposals received. The prices

ranged from \$8,600 for a basic system to \$69,900 for an advanced system with a substantial number of options. This compares favorably with Hughes' own prices which start at \$9,500 and rise according to the number of options needed.

The Hughes contention that small businesses cannot meet the Government's technical needs was supported by two user agencies. After testing three small business products, one agency decided that small businesses would not meet its needs and informed GSA of this determination. The other agency based its objection to the set-aside on its satisfaction with previously acquired large business products. GSA considered those agency concerns and investigated the products made by small businesses to insure that the shortcomings in certain small business products would not be repeated in every offerors' products. GSA found that all agency needs could be met by small businesses. Therefore, we cannot find that GSA set these SIN's aside without a reasonable expectation of technically acceptable offers which would meet the Government's needs.

Hughes has called our attention to alleged similarities between this case and another recent case, DISA Electronics (DISA), 62 Comp. Gen. ____ (B-206798, March 25, 1983), 83-1 CPD 306. This case differs substantially from DISA. Here, we do not have a third consecutive year of set-asides where the agency knows that the most popular type of a broad category of products is produced by only one small business firm and only that firm is receiving the lion's share of the contracts. This is a first attempt at a set-aside in a field with a substantial number of small businesses capable of producing all varieties of the solicited items.

The Linear Protest

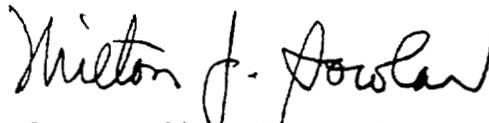
Linear protests that it is unjustifiably being excluded from competition for SIN 66-66 because it has only 160 more employees than the established small business limit. Further, Linear claims that SIN 66-66 covers a category of products which is overly broad and that the Government cannot fulfill its needs for highly specialized products such as those Linear produces with restricted competition.

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As we noted earlier with respect to the Datametrics protest, small business size standards are not reviewed by GAO. Pacific Diving Industries, Inc., supra.

Linear's claim that the Government cannot fulfill its needs without Linear's participation in the solicitation is not borne out by the facts surrounding this case. The purpose of the FSS is to provide agencies with offers for a wide variety of similar items. DISA Electronics, supra. At the closing date for proposals, GSA had received 6, 7, and 13 offers for the three subcategories of SIN 66-66. These offers covered a variety of products ranging from the basic to the highly complex. In light of this, the Government reasonably expected and apparently received adequate competition under the set-aside. Bell & Howell, supra.

for 
Comptroller General
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