29498

DECISION

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

FILE: B-212531.2 **DATE:** October 5, 1984

MATTER OF: Le-Gals, Inc.

DIGEST:

1. Protest alleging that protester should have been given preferential consideration as a woman-owned business is denied. There is no law or regulation which requires an agency to structure its requirements to make award to a woman-owned firm in a particular procurement.

2. Agency is not required to set aside a procurement for onsite word processing services for small businesses where the particular services required were not previously procured as a small business set-aside.

3. Protest alleging that protester was prejudiced because it was not informed until last day of negotiations that it was in competition with another firm for word processing services contract and that usual negotiation procedures were not used is denied. Since agency first attempted to negotiate 1-year extension of protester's previous contract to provide such services under option clause of protester's contract, but negotiations reached an impasse on the day that contract was to expire, protester was informed that a second offeror would be solicited and protester was given an opportunity to provide revised proposal, protester was not prejudiced. Moreover, protester's lowest offer was significantly higher than awardee's offer.

4. Allegation that protester should have been awarded cost-plus-award-fee contract because its offer was approximately $100,000 less than awardee's offer is denied, because record shows that awardee's offer was actually significantly lower than protester's best offer.

030247

5. Protest issues concerning agency actions which took place during discussions and evaluation process are untimely where first raised in supplemental protest letter filed more than 5 weeks after award of contract and more than 4 weeks after protester filed initial protest. Later-raised issues are different from initial protest issues and must independently satisfy timeliness requirement that they be filed within 10 working days after protester knew these bases for protest. 4 C.F.R. § 21.2(b)(2) (1983).

Le-Gals, Inc. (Le-Gals), protests award of a contract for word processing support services to D-K Associates (D-K) by the National Aeronautics and Space Administration (NASA). The protested contract was effected by modification of a contract D-K already had with NASA (contract No. NAS3-22790) under which D-K was performing similar work for NASA at the Lewis Research Center (the Center) in Cleveland, Ohio. In its initial protest letter, filed in our Office on July 29, 1983, Le-Gals alleged that the requirement for these word processing services should have been awarded to Le-Gals under an option clause contained in a contract between Le-Gals and NASA (contract No. NAS3-23550). Le-Gals also alleged that the award to D-K was improper because: (1) NASA failed to consider Le-Gals' status as a woman-owned, small business located in a labor surplus area; (2) the initial contract between NASA and Le-Gals, which included this requirement, was a small business/labor surplus area set-aside and, therefore, this procurement should have been set aside for small businesses and D-K, a large business, rejected as ineligible; (3) negotiations were conducted with D-K after negotiations were completed with Le-Gals, and Le-Gals was not informed that it was in competition with any other firm until just hours before NASA selected D-K; and (4) Le-Gals' offer was almost $100,000 less than the D-K offer. In a supplemental protest letter, filed in our Office on September 2, 1983, Le-Gals raised a number of new issues alleging, among other things, that NASA did not perform a proper cost analysis on either offer, the contracting officer withheld information from Le-Gals and revealed confidential information taken from Le-Gals' proposals to D-K, the contracting officer coerced Le-Gals but not D-K to use an unreasonably high general and administrative expense rate in preparing its offer, and NASA did not take into account the costs of converting from one contractor to another in the evaluation of proposals. Le-Gals also requested that it be reimbursed for the costs incurred in preparing its proposal.

We deny the protest in part and dismiss it in part.

The record shows that on July 22, 1982, Le-Gals was awarded contract No. NAS3-23550, which required Le-Gals to provide offsite (at the contractor's place of business) word processing support for a 1-year period. The contract contained four 1-year option periods, and all work was to be paid for on the basis of fixed unit prices. Due to an increase in the Center's word processing workload, NASA decided to obtain additional contractor support and to have the additional work performed onsite (at the Center). By letter of February 24, 1983, NASA solicited a proposal from Le-Gals for the required onsite word processing work for the base period from May 2 to July 22 and for 1 option year. Le-Gals' initial proposal addressed only the basic base period requirement. Negotiations--conducted on a sole-source basis with Le-Gals--were justified, in NASA's view, because of the urgency of the requirement and because Le-Gals was already performing similar work for NASA and was, therefore, familiar with the work and NASA's word processing equipment. NASA added the onsite word processing work to Le-Gals' contract for offsite word processing work by modification executed on April 29.

The modification to Le-Gals' contract required additional onsite work to be performed during the basic contract period on a cost-plus-fixed-fee basis. The modification contained unpriced option clauses which gave NASA the option to require additional onsite performance in 1-year increments to coincide with the option years of Le-Gals' original contract for offsite word processing services. In other words, after modification, Le-Gals and NASA had a contract which had two distinct work requirements--offsite and onsite services--and each work requirement could be extended by exercise of that particular contract requirement's option clause. The unpriced option clause for the onsite work requirement indicated that all work performed in option years would be paid on a cost-plus-award-fee basis and stated that costs and fees for such work would be negotiated prior to the start of each option period.

On May 26, the contracting officer gave Le-Gals preliminary notice that NASA intended to exercise its options for the first 1-year period. Because the option prices for the offsite work were stated in the contract, no negotiations were necessary for that portion of the contract. However, because the options for onsite work were unpriced, NASA and Le-Gals began negotiations preliminary to exercise of the first option for onsite work.

On June 20, Le-Gals submitted a proposal for the onsite work for the first 1-year option period. After certain errors were discovered and corrected, Le-Gals' initial proposal price, including estimated costs and fee, was calculated to be $463,137. The contracting officer evaluated the proposal and developed the government's estimate, or negotiating position, of $361,016 for the required services. The contracting officer was concerned with several aspects of Le-Gals' proposal. In particular, the contracting officer was concerned with Le-Gals' proposed General and Administrative (G&A) expense rate of 79 percent, which was the same rate Le-Gals had used for the 3-month basic performance period of the contract. NASA sought a G&A ceiling rate of no more than 60 percent, a lower labor rate, and also sought to break the 1-year option period into two 6-month periods in order to allow NASA time to work towards lowering the G&A rate during the second 6-month period. In general, NASA concluded that Le-Gals' proposed costs would have to be reduced substantially in order to be accepted. NASA held discussions with Le-Gals between July 20 and July 22, the final day of the base contract period. Among other things, Le-Gals rejected the government's proposed 6-month extension, Le-Gals orally lowered its offer to $383,208, and NASA raised its negotiating position to $371,133.

Early on the afternoon of July 22, Le-Gals submitted a written final offer of $391,416. The contracting officer told Le-Gals that its proposed costs were still too high, that the option would not be exercised at that price, and that the requirement would be competed and final proposals would be accepted up until 4:30 p.m. Sometime during the morning of July 22, the contracting officer had contacted D-K and solicited a proposal for this requirement for 1 year. D-K was performing similar type work for the Center and was believed by NASA to be the only other contractor which could provide the onsite services without an interruption in services. D-K assured NASA that it could take over immediately if awarded the contract and offered to perform at a proposed cost plus fee of $268,895. Le-Gals telephoned the contracting officer and revised its final offer downward to $338,000. The contracting officer told Le-Gals that award would be made to D-K. However, Le-Gals again revised its final offer downward to $290,000. This last revision was not considered by the contracting officer because negotiations had already closed. Award was made to D-K under its already existing contract with NASA.

Le-Gals contends that NASA should have considered the fact that Le-Gals is a woman-owned, small business and, therefore, should have accorded Le-Gals some kind of preferential treatment in this procurement. We disagree. We are aware that Executive Order No. 12138, 3 C.F.R. § 393 (1980), which sets out the government's policy regarding woman-owned businesses, requires, among other things, that federal executive agencies take affirmative action in support of women's business enterprises in the procurement area. However, neither Executive Order No. 12138 nor any federal procurement regulations of which we are aware mandate that women-owned, small businesses receive special consideration in any particular procurement. Such decisions are matters which are essentially within the discretion of the contracting agencies. See, for example, Inlingua Schools of Languages, B-210937, Mar. 22, 1983, 83-1 C.P.D. ¶ 293, in which we denied a protest contending that a particular procurement should have been set aside for small businesses; see also Navajo Food Products, Inc., B-203201, Jan. 27, 1982, 82-1 C.P.D. ¶ 60, wherein we stated that there is no law or regulation which requires an agency to structure its requirements to make awards to preferred firms such as Indian-owned firms, small businesses, and other minority-owned firms. Accordingly, this point of the protest is without merit.

Le-Gals next contends that, because its original contract with NASA was procured as a small business/labor surplus area set-aide, the present requirement for onsite word processing services should also have been procured as a small business set-aside pursuant to Defense Acquisition Regulation (DAR) § 1-706.1(f), reprinted in 32 C.F.R. pts. 1-39 (1983), and corresponding NASA regulations.

DAR § 1-706.1(f) provides in pertinent part:

> "Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall be acquired on the basis of a repetitive set-aside." (Emphasis added.)

While the DAR does not apply to NASA, this exact same provision has been incorporated into section 1.706-1 of the NASA Procurement Regulation, reprinted in 41 C.F.R. ch. 18, pts. 1-52, vol. 1 (1983), as amended.

Under the express terms of the above-quoted regulations, repetitive set-asides are mandated only where the same contracting office has previously procured the particular service by set-aside. Here, NASA had originally set aside a procurement which called for offsite word processing services only, which resulted in award of contract No. NAS3-23550 to Le-Gals. The onsite services were added to Le-Gals' contract on a sole-source basis. Therefore, even though the onsite services were added by amendment to a contract which had been a small business set-aside, the onsite services themselves had not been the subject of a prior set-aside. Furthermore, the prior set-aside for offsite services resulted in a firm, fixed-price contract with Le-Gals which was initially worth only $14,954 for the basic 1-year period while the modification for onsite services for the last 3 months of the 1-year base contract period amounted to $93,517. Thus, the particular services required under the set-aside differed from the services which were added by modification because: (1) the set-aside required offsite services and the modification required onsite services, and (2) the onsite requirement was approximately 25 times greater in magnitude than the offsite requirement. In these circumstances, we conclude that NASA was not required to set aside the instant requirement for onsite word processing services to small businesses under the above regulations. See Eastern Trans-Waste Corp., B-214805, July 30, 1984, 63 Comp. Gen. ____, 84-2 C.P.D. ¶ 126. Therefore, we deny the protest on this issue.

The third issue raised by Le-Gals concerns the allegation that NASA did not inform Le-Gals that it was in competition with D-K until July 22, the very day Le-Gals' contract for onsite word processing was to expire. Le-Gals argues that it should have been given prior notice of NASA's intent to negotiate with another firm and that NASA's negotiations with D-K after completion of negotiations with Le-Gals amounted to an improper auction. Le-Gals contends that it was not given an opportunity to revise its proposal to respond to the negotiations due to the unreasonably short time between notice of competition and the time set for submission of final proposals later that same day.

The chronology set out above clearly shows that Le-Gals was given notice of NASA's requirement for onsite word processing for the period from July 22, 1983, to July 21, 1984, by letter of February 24. Because Le-Gals did not adequately respond to the February 24 solicitation for a proposal for the option period, it was necessary for Le-Gals and NASA to negotiate estimated costs plus fee before the option could be awarded. These negotiations began at the latest on June 20 when Le-Gals submitted its proposal for the option period. Discussions were held between NASA and Le-Gals between July 20 and 22 when the participants reached an impasse generally concerning the total proposed cost plus fee to be paid by the government. At that point, the contracting officer told Le-Gals that a proposal would be solicited from D-K and that final proposals would be accepted up until 4:30 p.m. that same day. When final proposals were submitted, D-K was lower in total costs plus fee by over $69,000. After negotiations were closed, Le-Gals attempted to revise its proposal downward to

$290,000, but even this offer was still higher than D-K's offer by over $21,000. Accordingly, award was made to D-K on the next business day on the basis of its lower total costs plus fee.

We do not agree with the protester's characterization of the contracting officer's actions in this procurement as a prohibited auction. In reality, it appears that NASA negotiated in good faith with Le-Gals in an attempt to extend performance for 1 year under the option clause of the original contract. Once negotiations between NASA and Le-Gals broke down under the original contract, the contracting officer told Le-Gals that it had a final opportunity to submit a proposal in competition with D-K. There is no evidence that NASA told D-K what price would have to be offered to be considered or what price had been offered by Le-Gals. Furthermore, the contracting officer made only one request for a best and final offer once it was determined that both Le-Gals and D-K would compete for award. It was Le-Gals which attempted to make another lower offer after the time set for receipt of final offers. See System Development Corporation and International Business Machines, B-204672, Mar. 9, 1982, 82-1 C.P.D. ¶ 218, and cases cited, for discussion of prohibited auction techniques.

When the contracting officer realized that negotiations with Le-Gals had reached an impasse, the contracting officer decided to try to place the onsite word processing requirement with D-K as a modification to an existing contract D-K already had with NASA for similar services. The contracting officer determined that a noncompetitive award to D-K was justified on the basis of urgency because Le-Gals' contract for these services was going to expire within 1 day, there was a "pressing need" for such services, and because the time constraints would not allow a full competitive procurement to be conducted. We note that a contract may be negotiated on the basis of public exigency whenever urgency requires an immediate purchase regardless of whether the urgent situation should have been foreseen by the contracting agency. Alton Iron Works, Inc., B-179212, Mar. 6, 1974, 74-1 C.P.D. ¶ 121; see also International Business Services, Inc., B-209279.2, Feb. 8, 1983, 83-1 C.P.D. ¶ 142, and cases cited therein.

Due to the extremely short period of time left before performance was necessary, we find that a negotiated procurement on an accelerated basis was appropriate. See International Business Services, Inc., B-209279.2, supra. The contracting officer conducted thorough negotiations with Le-Gals under the option clause of its original contract, notified Le-Gals that a limited competition would be held and that it could make a final offer, and solicited an offer from D-K. We fail to see how Le-Gals was prejudiced by these actions since Le-Gals had had several discussions with NASA and the deficiencies in its proposals had been pointed out even before D-K was allowed a chance to compete. Moreover, Le-Gals knew before it submitted a final proposal that its estimated costs were the main thing which had prevented NASA from exercising the option under Le-Gals' original contract. See Canon U.S.A., Inc., B-213554, Aug. 20, 1984, 84-2 C.P.D. ¶ ____ at 5; Swintec Corporation, Canon U.S.A., Inc., Olympia USA, Inc., Guernsey Office Products, B-212395.2 et al., Apr. 24, 1984, 84-1 C.P.D. ¶ 466 at 11; International Business Services, Inc., B-209279.2, supra. Notwithstanding the short proposal preparation time, D-K offered an acceptable proposal at a substantially lower estimated cost plus fee than did Le-Gals. In view of the much lower offer made by D-K and the unusual circumstances presented above, we find no prejudice to Le-Gals and we do not object to the award of this 1-year requirement to D-K under its already existing contract. Accordingly, the protest is denied on this point.

Concerning Le-Gals' contention that its offer was approximately $100,000 less than D-K's offer, thus entitling Le-Gals to the award, the facts as shown above do not support this argument. Therefore, because D-K's offer was significantly lower than Le-Gals' offer, we deny the protest on this issue.

Finally, Le-Gals raised a number of new issues (enumerated above) in a second protest letter it filed in our Office on September 2, 1983. Because these issues are entirely new rather than merely supporting arguments for the issues raised in Le-Gals' initial protest filed on July 29, these later-raised bases for protest must independently satisfy our timeliness requirements. See Compucorp, B-212533, May 22, 1984, 84-1 C.P.D. ¶ 536 at 6. Our Bid Protest Procedures require that a protest be filed within

027740

10 working days after the basis for protest is known. 4 C.F.R. § 21.2(b)(2) (1983). All of these later-raised issues concern allegedly improper actions on the part of NASA which took place during the negotiations between NASA and both offerors or in the evaluation process. However, Le-Gals did not raise these issues until more than 5 weeks after the contract was awarded to D-K and more than 4 weeks after it filed its initial protest letter. Moreover, Le-Gals has not shown that any intervening event (for example, a debriefing conference) occurred between its initial protest filing and its subsequent supplemental protest which revealed these bases for protest for the first time. Therefore, we dismiss these issues as untimely. See Compucorp, B-212533, supra at 6; Transiac Corporation, B-210168, May 23, 1983, 83-1 C.P.D. ¶ 554 at 6.

In view of the above, we need not consider Le-Gals' claim for proposal preparation costs.

Accordingly, we deny the protest in part and dismiss it in part.

for Milton J. Socolar
Comptroller General
of the United States