

DECISION

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

FILE: B-218554

DATE: May 22, 1985

MATTER OF: Advanced Construction, Inc.

DIGEST:

1. Determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such determination unless it is unreasonable or there is showing of possible fraud or bad faith on the part of contracting official.
2. Fact that a small business bid on a procurement set aside for such concerns is more than a courtesy bid or the government estimate does not mean it must be rejected, since there is a range over and above those amounts that may be considered reasonable in a set-aside situation.
3. Since the basis for setting a procurement aside for small businesses is the reasonable expectation that offers will be obtained from at least two responsible small business concerns and that awards will be made at reasonable prices, the number of firms that actually submitted bids is not relevant to the propriety of the set-aside.

Advanced Construction, Inc. (ACI), low bidder declared ineligible for a construction contract with the Naval Facilities Engineering Command, protests the Navy's intention to award the contract to Powers Construction Co., Inc. (Powers), the only other bidder under invitation for bids (IFB) No. 62467-82-B-0492. ACI argues that the solicitation, a small-business set-aside, should be canceled and readvertised because Powers' bid price is much higher than ACI's, and, with Powers being the only bidder remaining, there has not been adequate competition for the contract.

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

Bids were opened on March 5, 1985. ACI's bid of \$6,386,695, was \$513,305 below the government estimate of \$6,900,000. ACI verified its bid, but its status as a small business concern was challenged. On March 29, the Small

Business Administration (SBA) found that ACI was affiliated with another large business and, therefore, was ineligible for the contract. ACI did not appeal the SBA's decision, and the Navy therefore proposes to award the contract to Powers.

ACI first contends that the procurement should be canceled and readvertised because Powers' bid of \$7,192,000 was \$805,305 higher than ACI's bid. We deny the protest on this issue.

A determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such a determination unless it is unreasonable or there is a showing of fraud or bad faith on the part of the contracting official. Flagg Integrated Systems Technology, B-214153, Aug. 24, 1984, 84-2 C.P.D. ¶ 221. In making such a determination, a contracting officer may consider government estimates, the procurement history for the supplies and services in question, current market conditions or any other relevant factors. Id. The fact that a small business bid is more than a bid by an ineligible large business (a courtesy bid) or a government estimate, however, does not mean that it must be rejected, since there is a range over and above those amounts that may be considered reasonable in a set-aside situation. In view of the congressional policy favoring small businesses, a fair proportion of government contracts may be awarded to such firms even at premium (albeit reasonable) prices. Warren/Dielectric Communications, B-212609, Jan. 26, 1984, 84-1 C.P.D. ¶ 121.

Here, Powers' bid amounts to approximately 4 percent (\$292,000) more than the government's estimate, while ACI's ineligible bid is, as the Navy points out in defending its view that Powers' bid price is reasonable, more than 7 percent (\$513,305) less than the estimate. In these circumstances, we find nothing unreasonable with the contracting officer's determination that Powers' price is acceptable. See Browning-Ferris Industries, B-209234, Mar. 29, 1983, 83-1 C.P.D. ¶ 323 (small business bid 51 percent higher than a courtesy bid and 11 percent higher than the government estimate was not unreasonable per se).

ACI next argues that since Powers is the sole remaining bidder on the solicitation, the Navy has not been able to obtain the benefit of a full competition among many bidders. This argument does not state a valid protest

basis, however, since the results of a set-aside, in terms of the degree of competition obtained, are not relevant to the propriety of setting the procurement aside in the first instance. The basis for a total small business set-aside is the reasonable expectation that offers will be obtained from at least two responsible small business concerns and that awards will be made at reasonable prices. Federal Acquisition Regulation, 48 C.F.R. § 19.502-2 (1984). Thus, the determination to set aside a procurement is prospective, not retrospective.

Moreover, the decision to set aside a procurement is a business judgment within the broad discretion of the contracting officer, which we will sustain, even in a case where only one bid from a small business is received, absent a clear showing of abuse of discretion. Mantech International Corp., B-216505, Feb. 11, 1985, 85-1 C.P.D. ¶ 176. In this regard, the Navy has provided us with a 12-page list of firms that requested the solicitation and which the Navy states are small businesses.

The protest is denied in part and dismissed in part.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel