



**Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Ideal Services, Inc.; JL Associates, Inc.

**File:** B-238927.2; B-238927.3; B-238927.4

**Date:** October 26, 1990

Scott Arnold, Esq., Howrey & Simon, for Ideal Services, Inc., and David R. Gleason, Esq., for JL Associates, Inc., the protesters.

Jesse W. Rigby, Esq., Clark, Partington, Hart, Larry, Bond, Stackhouse and Stone, for Crown Support Services, Inc., an interested party.

Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.

Christina Sklarew, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where Small Business Administration regional office determines that no small business offers were received under a small business set-aside, the proper procedure is for the agency to withdraw the set-aside and resolicit on an unrestricted basis rather than award to large business offeror.

### DECISION

Ideal Services, Inc. and JL Associates, Inc. (JLA) protest the Army's award of a contract to Crown Support Services, Inc. under request for proposals (RFP) No. DAEA18-89-R-0008, which was issued as a total small business set-aside for multifunctional base operation services at Fort Huachuca, Arizona. Ideal, a small business, contends that the award was improper because the Small Business Administration (SBA) determined that Crown was not a small business. JLA, which also was found to be other than small by the SBA, protests that its own proposal offered the best value and that the Army's evaluation of proposals was arbitrary and unreasonable. JLA contends that if the award is to be made on an unrestricted basis, JLA is entitled to the award because its proposal, if properly evaluated, is better than Crown's.

We sustain Ideal's protest and dismiss JLA's protest.

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## BACKGROUND

The RFP was issued on May 18, 1989, as a total small business set-aside. It contemplated the award of a cost-plus-fixed-fee contract for a base period of 1 year plus 4 option years. The solicitation advised offerors that award would be made to the offeror whose proposal represented the best value to the government.

The Army received seven timely proposals. One of these was withdrawn when the firm discovered during an internal audit that it could not meet the RFP's size standard. The Source Selection Evaluation Board (SSEB) reviewed the remaining proposals and determined that Crown, Ideal, and JLA were within the competitive range. The agency held discussions with these three firms. Best and final offers were requested and received. The Source Selection Authority found that Crown's offer represented the best overall value to the government and recommended award to Crown. The award was made on March 5, 1990. Citing urgency in proceeding with the procurement, the agency did not send a pre-award notice to the other offerors.

JLA protested Crown's size status to the agency on March 8, and the contracting officer forwarded the matter to the SBA's regional office in Atlanta. JLA then filed a bid protest with our Office on March 14, protesting the evaluation of proposals. The Army stayed contract performance pursuant to the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(d) (1988), pending the resolution of the protest.<sup>1/</sup>

On April 18, the SBA found Crown was other than small, based on its joint-venture relationship with a firm it had presented as its subcontractor, Nero. This determination was subsequently appealed to the SBA Office of Hearings & Appeals (OHA), and was affirmed on June 13.

On April 23, the contracting officer challenged JLA's size status. On April 30, the Army notified our Office that it agreed to award the contract to JLA provided JLA was found to be small, and that it also agreed to continue suspension of Crown's contract performance until SBA ruled on JLA's size status. We found that JLA's protest was rendered academic by this agreement, and we dismissed it on May 1. The contracting officer, on May 1, also challenged Ideal's size status.

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<sup>1/</sup> Although the contracting officer submitted a request to her commander to override the CICA stay on the basis of urgent and compelling circumstances, the request was denied.

On May 23, the SBA regional office determined that JLA was other than small; this determination was subsequently affirmed by the SBA OHA on appeal by decision dated June 28.

On June 12, the SBA regional office found that Ideal was other than small. Although this determination was overturned on appeal, this did not occur until August 2.

Thus, as of June 18, all offerors had been determined to be other than small by the SBA regional office. On June 18, the contracting officer issued a determination that Ideal's price was unreasonable, based on comparing Ideal's price with Crown's price. The contracting officer also withdrew the small business set-aside, and, on June 19, the agency lifted the stay of performance, effectively reinstating the award to Crown and allowing Crown to begin its phase-in performance.

On June 20, JLA filed this protest, seeking to reinstate its original protest challenging the evaluation of the proposals. On June 29, Ideal filed its protest, contending that award to Crown was improper because Crown, as a large business concern, was ineligible to receive an award under a small business set-aside.

#### IDEAL'S PROTEST

Ideal contends that award to Crown was improper because the SBA had found Crown to be other than small under a timely size protest.<sup>2/</sup> The Army argues that the effect of the SBA's ruling was only to make the contract to Crown voidable, at the agency's discretion.

Since all offerors were found to be other than small prior to the reinstatement of Crown's contract performance, the issue before us is whether a contracting agency may make award under a small business set-aside procurement to a business that is other than small without resoliciting the

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<sup>2/</sup> There is much argument in the record as to whether the agency had a bona fide urgency justifying waiver of the pre-award notice (identifying the successful offeror) to permit a pre-award size protest. The issue of the waiver of the pre-award notice is academic because the agency subsequently stayed contract performance and obtained size status rulings of all offerors before proceeding with contract performance.

requirement.<sup>3/</sup> We find that it may not, and sustain the protest on this basis.

Generally, offers received from concerns that are other than small business concerns must be considered nonresponsive and must be rejected under procurements restricted to small business concerns. Federal Acquisition Regulation § 19.502-4(b) (FAC 84-48). Where no small business bids or proposals are received in response to a set-aside procurement, the proper procedure is for the agency to withdraw the set-aside and resolicit, so that all eligible firms may have an opportunity to compete. Otis Elevator Co., B-195104, Sept. 20, 1979, 79-2 CPD ¶ 206. Even where the only bidder under a small business set-aside was a large business, we have found that an award to that bidder would be improper because the solicitation required that award be made to a small business concern and the competition was not open to all potential offerors. See Lawrence W. Rosine Co., 55 Comp. Gen. 1351 (1976), 76-2 CPD ¶ 159.

The Army argues that no harm resulted from its failure to resolicit and that no purpose would be served by reissuing the solicitation. We disagree. In this case, one offeror withdrew its offer when it discovered that it could not meet the size standard. In addition, at least one other potential offeror--the incumbent large business contractor, Pan Am World Services--was excluded. Some of the offerors under the original solicitation also might have chosen large business subcontractors or joint venturers--i.e., different from those they chose when subject to the small business size standard--which might well have affected their ability to lower their prices. Also, the firms that were involved in subcontracting arrangements under the original offers might have chosen to submit offers on their own. We do not conclude, as the Army urges, that the competition and award decision would have been the same whether the solicitation had been issued on a restricted or an unrestricted basis.

Since the basic period of the contract that was awarded to Crown expired on September 30, 1990, we are unable to

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<sup>3/</sup> The decision to lift the stay on June 19, after the agency knew that all offerors were other than small, was essentially a new award of the contract to Crown at that time. Stated differently, the immediate stay of Crown's contract performance after JLA protested to our Office on March 14, along with the agency's agreement to abide by any subsequent size ruling, maintained the situation in essentially a pre-award state until June 19.

recommend that it be terminated.<sup>4/</sup> However, we do recommend that none of the options under that contract be exercised. The Army has agreed to comply with this recommendation, and agrees, in principle, to resolicit the requirement on an unrestricted basis. The agency states that Crown has agreed to continue performance on a monthly basis pending the resolicitation.

We recommend that the new solicitation be issued as soon as possible and that the procurement be expeditiously completed. In addition, we find that Ideal is entitled to recover the costs of filing and pursuing its protest, including attorneys' fees.<sup>5/</sup> Ideal should submit its claims for these costs directly to the Army. 4 C.F.R. § 21.6(e).

Ideal's protest is sustained.

#### JLA'S PROTEST

Because we have determined that award could not be made to a large business under this small business set-aside procurement, and since the SBA has determined that JLA did not meet the size standard under this procurement, JLA is not an interested party to protest the Army's evaluation of


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4/ Ideal also protests that Crown, after being found other than small by the SBA, has bought out the portion of the work that was to be performed by its subcontractor, Nero. Ideal raises this issue to further support its protest against the award and continued performance by Crown. Since we have found the award improper for other reasons, we need not address this supplemental protest basis.

5/ Ideal has also requested proposal preparation costs. The record shows that Ideal was the lowest technically rated offeror and proposed the highest cost. We agree with the agency that Ideal thus offered the "worst value" and that the agency was not required to award the contract to the firm even if it had been determined to be small by the Small Business Administration regional office prior to reinstatement of Crown's contract. We therefore see no basis to award proposal preparation costs since we find no violation of statute or regulation by the agency's failure to award the contract for the basic period to Ideal. 4 C.F.R. § 21.6(d) (1990).

proposals, 4 C.F.R. §§ 21.0(a) and 21.1(a), and this matter is, in any event, academic.

JLA's protest is dismissed.

*for*   
Comptroller General  
of the United States