

DECISION



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

60646

98478

FILE: B-184062

DATE: March 17, 1976

MATTER OF: J. H. Rutter Rex Manufacturing Co., Inc.

DIGEST:

1. Although original determination to set aside procurements for shirts and trousers for small business was not in accordance with ASPR § 1-706.5(a)(1) (1974 ed.) in that it was based upon expediency rather than required reasons, since there was small business competition for procurements and prices were determined to be reasonable, there is no basis to conclude that there was not proper basis for ultimate awards.
2. Large business bids on small business set-aside procurements are nonresponsive and contracting officer is not required to consider bids. Moreover, 15 U.S.C. § 631, et seq., has been interpreted to mean that Government may pay premium price to small business firms on restrictive procurements to implement policy of Congress.
3. Time of preparing justification that set-aside is necessary to assure that fair proportion of Government procurement is placed with small business does not affect validity of award if proper basis for award exists.
4. Where contracting officer has noted that in past year number of solicitations for shirts and trousers have been issued on unrestricted basis with number of awards going to large business protester, contention of protester that set-aside in instant case comprises more than "fair proportion" of Government procurement to small business does not provide basis to conclude that there was not proper basis for ultimate awards to small business.

The subject bid protest concerns invitations for bids (IFB) Nos. DSA100-75-B-1114 (hereinafter 1114) and DSA100-75-B-1121 (hereinafter 1121) issued by the Defense Personnel Support Center (DPSC), Defense Supply Agency, May 19, 1975, and May 23, 1975, respectively. The issues presented are identical for both IFB's and will be treated synonymously.

J. H. Rutter Rex Manufacturing Co., Inc. (Rutter Rex), protested the award of contracts to PRB Uniforms, Inc. (PRB), and Doyle Shirt Manufacturing Corporation (Doyle) under IFB 1114 and to Statham Garment Corporation (Statham) and Tennessee Overall Co. (Tennessee) under IFB 1121. IFB 1114, opened May 29, 1975, was a small business/labor surplus area set-aside for 900,000 men's short sleeve durable press shirts. Of the 900,000 shirts, 630,000 were set aside for small business and 270,000 set aside for small business in designated labor surplus areas. Doyle received an award of 168,000 out of the 630,000 and PRB was awarded 462,000. PRB also received the 270,000 award designated for labor surplus areas. IFB 1121, opened June 6, 1975, was a small business/labor surplus area set-aside for 900,000 pairs of durable press men's trousers. Of the 900,000 trousers, 630,000 were set aside for small business and 270,000 were set aside for small business in designated labor surplus areas. A partial award of 270,000 items has been made under IFB 1121 to Statham under the small business set-aside portion. The remaining 360,000 items of this portion of the IFB were cancelled and resolicited on an unrestricted basis. The 270,000 item small business/labor set-aside portion of the solicitation was awarded to Tennessee. Although Rutter Rex was the apparent low bidder on both solicitations, its bids were determined to be nonresponsive, Rutter Rex having certified itself as being other than a small business.

Rutter Rex raises two principal arguments: (1) the small business set-asides are in violation of 10 U.S.C. § 2301 (1970) in that they comprise more than a "fair proportion" of Government procurement within the meaning of the statute in view of the size of the instant procurements, the "newness" of the items and the totality of the small business set-asides; and (2) award of contracts to the lowest small business bidders in the instant situation is detrimental to the public interest because the lowest price possible has not been obtained and the prices at which the contracts were awarded are unreasonable. Rutter Rex requests that the procurements be resolicited on an unrestricted basis.

In support of its first argument, Rutter Rex alleges DPSC had no prior experience in either manufacturing or ordering the items involved, and therefore could not make a reasonable judgment as to the degree of small business interest in the IFB's. In support of its second argument, Rutter Rex alleges that 10 U.S.C. § 2305(c) (1970) is violated by award to the lowest small business bidders because it is possible to obtain a lower bid on the basis of an unrestricted IFB.

B-184062

Section 15 of the Small Business Act, 15 U.S.C. § 644 (1970), in pertinent part, provides:

"* * * small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns; * * *."

Further, 10 U.S.C. § 2301 (1970) states:

"It is the policy of Congress that a fair proportion of the purchases and contracts made under this chapter [defense procurement, generally] be placed with small business concerns."

These two statutes reflect a congressional policy of aiding and protecting small business by requiring the procurement of a "fair" portion of Government supplies and services from it.

By way of implementation of this congressional policy, ASPR § 1-706.1(b) (1974 ed.), in pertinent part, provided:

"* * * any individual procurement or class of procurements regardless of dollar value or any appropriate part thereof, shall be set aside for the exclusive participation of small business concerns when such action is determined to be in the interest of (i) maintaining or mobilizing the Nations's full productive capacity, (ii) war or national defense programs, or (iii) assuring that a fair proportion of Government procurement is placed with small business concerns. * * *"

B-184062

Additionally, ASPR § 1-706.5(a)(1) (1974 ed.) provided:

"* * * the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, shall be set aside for exclusive small business participation (see 1-701.1) if the contracting officer determines that there is reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. * * *"

As noted previously, Rutter Rex contends that DPSC was unable to determine if there was a reasonable expectation of obtaining reasonable prices because of (1) the inexperience of potential small business bidders in manufacturing durable press garments and (2) the inexperience of DPSC in manufacturing or ordering durable press garments.

The DPSC contracting officer has reported that the determination to set aside the procurements for small business was based upon the fact that there were enough small businesses interested in bidding on these items to secure adequate competition at reasonable prices; that the small businesses solicited (22 on IFB 1121 and 31 on IFB 1114) had previously submitted bids on similar items or expressed interest in the instant procurements; that reasonable prices were received from small businesses in the past; that market conditions at the time of the IFB's were highly competitive; and that the only different or new factor in the subject IFB's was the requirement for durable press treatment. However, the record indicates that the decision to set aside the IFB's actually was based upon expediency rather than the reported reasons. In that connection, the contracting officer's indorsements of the SBA representative's recommendations on SBA Form 70 that the procurements be limited to small business stated:

"It is the undersigned's position that this procurement should be solicited on an unrestricted basis in view of the following:

"a. This buy constitutes a specification test of a new item and it cannot be determined at this point that small business has the capacity and ability to produce this item at a fair and reasonable price.

* * * * *

"However, due to the necessity for prompt processing of this procurement and to preclude further delays involved with pursuing this matter to a decision, the procurement will be solicited on a 100% Small Business Restricted basis. * * *"

The indorsement for the trouser procurement contained an additional statement:

"* * * The prior buy on the Trs, Army Shade 1 resulted in two awards to large business firms. In addition, only one small business (Tennessee Overall) submitted a bid price which was within the competitive range."

The determination of the contracting officer, as reflected in the indorsements to set aside the procurements for small business, was contrary to ASPR § 1-706.5(a)(1), supra, which provides for a set-aside if the contracting officer determines prior to the set-aside "that there is [a] reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices." However, ASPR § 1-706.3(a) (1974 ed.) is a check against any determination to set aside a procurement for small business. That section provides for the withdrawal of a set-aside "If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price)."

In this case, of the 22 concerns solicited on IFB 1121, 8 submitted bids and of the 31 solicited on IFB 1114, 11 submitted bids. Additionally, under both IFB's, price analyses were performed by DPSC as an aid in determining the reasonableness of bids received from small business bidders. Under IFB 1114, the contracting officer found that bids of both PRB and Doyle fell within the reasonable "should cost" range. Under IFB 1121, the contracting officer found that Statham's bid price was 6.6 percent higher than the "should cost" estimate. Nonetheless, the contracting officer believed that this minor increase did not necessitate a finding of price unreasonableness. This was based on a fact that was not considered in the price analyses. Both solicitations were for expanded first article contracts under which the contractor warrants that when the first article portion of the contract is complete, the specification is free of defects. Since this was

different from the supply contract wherein the Government supplies and warrants the adequacy of the specifications, the contracting officer believed this added an economic risk to that ordinarily assumed by contractors. Based on these facts, the contracting officer concluded that the low bids received from the successful bidders were reasonable.

With regard to this determination, we have stated: "* * * our review in these [set-aside] protest situations is confined to whether the contracting officer acted reasonably in the circumstances and not to second-guessing the contracting officer's determination * * *." Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350. See also Society Brand, Inc., et al., B-183963, B-184058, B-184065, B-184102, B-184102(2), B-184117, November 19, 1975, 75-2 CPD 327. We do not find that the contracting officer acted unreasonably in determining that the bids upon which awards were made were reasonable.

With regard to Rutter Rex's second argument, 10 U.S.C. § 2305(c)(1970), in pertinent part, provides: "* * * awards shall be made * * * to the responsible bidder whose bid conforms to the invitation and will be most advantageous to the United States, price and other factors considered. * * *" Rutter Rex contends that in light of its low "courtesy" bids DFSC violated 10 U.S.C. § 2305(c), supra, since the Government did not obtain the lowest price possible.

As other than a small business, however, Rutter Rex was ineligible to receive an award for the subject procurements. Large business bids on small business set-aside procurements are non-responsive and the contracting officer is therefore not required to consider such bids. Berlitz School of Languages, supra, and Society Brand, Inc., et al., supra. Moreover, our Office has interpreted 15 U.S.C. § 631, et seq., to mean that the Government may pay a premium price to small business firms on restricted procurements to implement the policy of Congress. Society Brand, Inc., et al., supra.

Rutter Rex also contends that the contracting officer did not make a determination before setting aside the procurements that it was necessary to assure that a fair proportion of Government procurement is placed with small business. Further, it contends

the set-asides constituted more than a "fair proportion" of Government procurement. The SBA representative's recommendation that the procurements be set aside stated the determination was in accordance with section 15 of the Small Business Act (15 U.S.C. § 644, supra). As indicated above, section 15 includes the "fair proportion" basis for set-aside. Since the contracting officer's indorsement of the SBA recommendation did not take exception to the section 15 determination, it is reasonable to conclude that he was in agreement with that aspect. In any event, the time of preparing a justification does not affect the validity of an award if a proper basis for award existed. Automated Systems Corporation, B-184835, February 23, 1976. In this case, the contracting officer has reported that the decision to set aside the procurements pursuant to ASPR § 1-706.1(b)(iii) (1974. ed.) was based upon the fact that the majority of procurement dollars spent by the Department of Defense goes to large business. Further, the contracting officer noted that "in the past year a number of solicitations for shirts and trousers have been issued on an unrestricted basis with a number of awards going to Rutter Rex on these items."

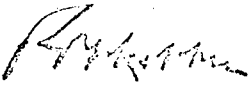
In 41 Comp. Gen. 649 (1962), a case involving a protest against the 100-percent set-aside for small business of certain IFB's issued by the General Services Administration for wooden household furniture, we reviewed the history of legislation designed to broaden the base and increase the share of small business participation in the total Government procurement program. We found that the phrase "fair proportion" or similar language appeared in several congressional enactments prior to the Small Business Act of 1953, but that it was not defined in these prior acts. We held that in determining the "fair proportion" of Government contracts to be placed with small business concerns, all contracts received by small business, whether under set-aside procurements or in unrestricted competition, should be taken into consideration and set-aside procurements may not be considered improper unless their effect is to increase awards to small business, both on set-asides and otherwise, beyond a fair proportion. We went on to find that since 99 percent of all plants in the wooden household furniture industry were small businesses, the placement of some 90 percent of Federal wooden household furniture procurements with small business did not result in giving an unfair proportion of the procurements to small business.

B-184062

In B-154161, June 23, 1964, we considered a similar issue with regard to the protest against a 100-percent small business set-aside by the Veterans Administration for laundry equipment. In that case, the Veterans Administration reported to us that for laundry equipment procurements for Fiscal Year 1963, no procurements were set aside for small business and that 124 line items valued at \$335,506 were awarded to large business and 43 line items valued at \$183,405 were awarded to small business; for Fiscal Year 1964, 2 laundry equipment procurements were set aside for small business, 143 line items valued at \$649,870 were awarded to large business and 95 line items valued at \$287,358 were awarded to small business. We held that in view of the intent of the Small Business Act to broaden the base and increase the share of small business participation in the total Government procurement program, and the above data, we could not conclude that more than a fair proportion of the Veterans Administration procurements of laundry equipment was being placed with small business.

Finally, in B-151419, June 25, 1963, we again considered the "fair proportion" issue in connection with a protest against a 100-percent small business set-aside of globe valves by the Navy. We held that although the particular invitation in question was totally restricted to small business, since there was no indication that the entire Government procurement of globe valves was permanently closed to large business we could not question the propriety of the total small business set-aside.

Accordingly, although the original determination to set aside the procurements was not in accordance with ASPR § 1-706.5(a) (1), supra, we are unable to conclude that there was not a proper basis for the ultimate awards. Therefore, the protest is denied.


Deputy Comptroller General
of the United States