

01396

L. Kozlakowski
Proc. I

DECISION



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

FILE: B-187137

DATE: December 21, 1976

MATTER OF: Tenco Construction Company

DIGEST:

1. Protest after bid opening against decision to set aside procurement for small business on basis that there was not sufficient number of small business competitors is untimely under Bid Protest Procedures.
2. Although small business bid on total set-aside exceeded bid of firm determined to be other than small business, Small Business Act has been interpreted to mean that Government may pay premium price to small business firms on small business restricted procurements.
3. Engineer Regulation ECI 2-404.2(a) which provides that awards of military construction contracts in excess of 15 percent of Government estimate (including profit) must be submitted to Division Engineer for determination as to reasonableness of price does not mean that bid which is within 15 percent of Government estimate is reasonable per se.
4. There is support for determination that small business bid exceeding Government estimate by 11.8 percent was reasonable where current situation of mildly fluctuating prices in construction industry would substantiate that 15-percent deviation from Government estimate is reasonable.
5. Determination dealing with bid price reasonableness will be sustained barring bad faith or fraud.
6. Award can be made under total set-aside where there is only one responsive bid.

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Invitation for bids (IFB) No. DACAO1-76-B-0064 was issued on May 17, 1976, by the Army Corps of Engineers, Mobile, Alabama, as a 100-percent set-aside for small business for the construction of barracks support facilities at Fort Campbell, Kentucky.

The IFB was issued to 25 prospective bidders. On May 26, 1976, a telephonic survey of the prospective bidders revealed that nine firms anticipated submitting bids. Two bids were received by the bid opening date of June 18, 1976. The bids received were as follows:

Tenco Construction Co. (Tenco)	\$3,599,680
Fortec Constructors (Fortec)	4,261,000

The Government estimate, including profit, for the project was \$3,810,165.

Fortec protested the small business size status of Tenco on June 18, 1976. The protest was forwarded to the Small Business Administration for a determination as to Tenco's size/status. Tenco was subsequently determined to be other than a small business. On August 4, 1976, award was made to Fortec. Tenco filed a protest with our Office on August 9, 1976.

Tenco first alleges "that there is not a reasonable expectation that offers would be obtained from a sufficient number of responsible small business concerns to insure that award would be made at reasonable prices in violation of ASPR § 1-706.5(a)(1) [1975 ed.]." However, a protest after bid opening against a decision to set aside a procurement for small business on the basis that there was not a sufficient number of small business competitors is untimely under the Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1976). Earlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350.

Alternatively, Tenco contends that the small business price received under the IFB was unreasonable requiring cancellation and resolicitation on an unrestricted basis. The basis for the conclusion that the Fortec price was unreasonable is that it was \$661,320 more than the Tenco bid and \$450,835 more than the Government estimate.

Although the Fortec bid exceeded the fence bid as alleged, our Office has interpreted the Small Business Act, 15 U.S.C. § 631, et seq. (1970), 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, Incorporated, Waldman Manufacturing Co., Inc.; 55 Comp. Gen. 372 (1975), 75-2 CPD 525; J. E. Rutter Rex Manufacturing Co., Inc., 55 Comp. Gen. 902 (1976), 76-1 CPD 182.

Further, with respect to the fact that the Fortec bid exceeded the Government estimate, ECI 2-404.2(a), "Unreasonable Bids," Engineer Regulation 1180-1-1 (December 1, 1969), as pertinent, provides:

"(1) Military Construction. Award of a contract for military construction must be personally approved by the Division Engineer where the bid is more than 15 percent in excess of the Government estimate of cost (including in the Government estimate allowance for contractor's profit), provided that:

* * * * *

(ii) he examines the low bid in relation to the Government estimate, as well as the range of other bids received and determines whether the low bid is sound and reasonable and its acceptance is in the best interests of the Government: * * *."
(Emphasis supplied.)

From this the contracting officer has concluded that any bid within 15 percent of the Government estimate is reasonable.

We do not agree that the conclusion follows from the regulation. We believe that the regulation indicates merely that if an award is proposed at a price more than 15 percent above the Government estimate it is subject to review for reasonableness and approval by the Division Engineer. That does not mean that a bid which is within 15 percent of the Government estimate is reasonable per se. The contracting officer's responsibility with respect to making determinations within that percentage level is not affected by the regulation. However, regardless of the interpretation of the regulation, the Fortec bid was only 11.8 percent above the Government estimate and the contracting officer's counsel has stated:

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"* * * the current situation of wildly fluctuating prices in the construction industry would substantiate this position [that a 13 percent deviation from the Government estimate is reasonable]."

In any event, with regard to the determination of whether a price is reasonable, 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, supra, J. H. Rutter Rex Manufacturing Co., Inc., supra.

Moreover, simply because a bid exceeds other bids or the Government estimate does not necessarily mean that the bid is unreasonable. There can be a range over and above the low bid and the Government estimate which is a reasonable price range. The determination of price reasonableness requires a degree of discretion. Therefore, determinations dealing with price reasonableness will be sustained barring bad faith or fraud. See B-161797, September 6, 1967; B-164931, September 5, 1968 (both dealing with the opposite situation considered here--bids rejected as unreasonable).

Finally, Tenco has contended that since there was only one bidder under the IFB that qualified as a small business, the procurement was not competitive and was tantamount to a sole-source award. However, our Office has recognized the right of the contracting activity to make an award under a total small business set-aside where there is only one responsive bid. Berlitz School of Languages, supra.

In the circumstances, we find no basis for any legal objection to the award made in this case. Therefore, the protest is denied.


Deputy Comptroller General
of the United States