

4054

03897

J. Note for Law
Pinc. II

DECISION



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

FILE: B-183522

DATE: October 4, 1977

MATTER OF: Allied Maintenance Corporation

DIGEST:

1. Statutory provision that fair proportion of Government contracts be awarded to small business concerns refers to proportion of total awards for all goods and services; therefore, "class" set-aside of all contracts of particular type is not inconsistent with statute.
2. Decision to make 100 percent small business set-aside is not objectionable where it appears contracting officer viewed procurement as within capability of small business concerns and had reasonable expectation of receiving adequate competition.
3. Use of conventional negotiation procedures in lieu of small business restricted advertising is not subject to legal objection where agency negotiates small business set-aside under "exception one" authority (41 U.S.C. 252(c)(1)) and FPR 1-3.201 (c)(2)(iii) and Administrator of General Services Administration has waived regulatory preference for small business restricted advertising.

Allied Maintenance Corporation (Allied) has protested the award of a contract by the General Services Administration (GSA) under request for proposals (RFP) No. 03C6143901, which was issued as a negotiated 100 percent small business set-aside under the authority of 41 U.S.C. 252(c)(1) (1970), which authorizes the use of negotiation in lieu of formal advertising when in the public interest during a period of national emergency. The RFP contemplated award of a cost-plus-award-fee incentive type contract (ITC) for custodial services at the State Department Building, Washington, D. C.

B-188522

While the protester concedes the legal authority of GSA to insure that small business concerns receive a "fair proportion" of contracts, it states that the setting aside of this procurement stemmed from GSA's policy of setting aside all or most janitorial services procurements and contends that this goes beyond permissible limits since it precludes large business from any participation whatsoever.

Allied also alleges various procedural defects in the issuance of the set-aside, including noncompliance with Federal Procurement Regulations (FPR) 1-1.706-2(b) because the alleged existence of at least two factors listed thereunder arguably compels withdrawal of the set-aside; and with FPR 1-1.706-2(c) and with FPR 1-1.706-3 for failure to make the reviews contemplated by those sections. Allied further contends that the prerequisites of FPR 1-1.706-5(a) for exclusive small business set-asides were not met because there was no reasonable expectation that proposals would be received from a sufficient number of responsible small business concerns.

Finally, Allied questions the authority of GSA to negotiate to secure desired levels of performance and quality for janitorial services in light of a statutory and regulatory preference for formal advertising, citing our decision in the matter of Nationwide Building Maintenance, Inc., 55 Comp. Gen. 693 (1976), 76-1 CPD 71. Moreover, Allied questions the existence of a national emergency that would justify a small business class set-aside.

With regard to the protester's first point, FPR 1-1.706-5(a) provides that the entire amount of an individual procurement or class of procurements shall be set aside for exclusive small business participation where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of small business concerns to permit awards at reasonable prices. (Emphasis added.) Thus, it is clear that under appropriate circumstances entire classes, i.e., janitorial services, of procurements may be restricted to small business participation exclusively. We find nothing in the record which indicates that more than a fair proportion "of the total purchases and contracts for property and services," see 15 U.S.C. 644, is being set aside

B-188522

for small business exclusively. See J.H. Rutter Rex Manufacturing Co., Inc., 55 Comp. Gen. 902 (1976), 76-1 CPD 192.

Concerning the various procedural defects alleged, we find FPR 1-1.706-2(b) and 1-1.706-2(c) inapplicable to the instant circumstances since FPR 1-1.705-2 pertains to situations in which a Small Business Administration (SBA) representative submits a recommendation for a set-aside to the contracting officer for the latter's approval, whereas the instant case involves a unilateral set-aside determination by the contracting officer as provided for by FPR 1-1.706-1(d). FPR 1-1.706-3 permits the contracting officer to withdraw a set-aside, prior to award, if his review of a class set-aside indicates that any changes in the anticipated requirements, specifications or competitive market conditions are so material as to result in the probable payment of an unreasonable price by the Government or in a change in small business capability. The provision is clearly for the protection of the Government rather than for the benefit of potential large business competitors, and the record indicates that GSA did not view the set-aside as one beyond small business capability or one which would result in an unreasonable price. Accordingly, and since the FPR does not require a formal written documentation of the review, we cannot conclude that there has been a violation of FPR 1-1.706-3(a). Moreover, the ultimate decision as to whether a procurement should be set aside for small business is a matter for the judgment of the procuring activity (in consultation with the SBA) and is not subject to legal objection by this Office. The Small Business Administration; Najol, Inc., B-188141, February 11, 1977, 77-1 CPD 104.

With regard to whether there was a reasonable expectation of receiving a sufficient number of responses under a total set-aside to assure reasonable prices, Allied asserts that there was not and argues that receipt of offers from a large number of small business firms does not necessarily constitute effective or actual competition since only a few could possess the financial resources, management qualifications or experience to satisfactorily perform the contemplated effort.

B-188522

Determinations regarding such expectations are within the ambit of sound administrative discretion and this Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of abuse of that discretion. See Development Associates, Incorporated, et al., B-183773, August 18, 1975, 75-2 CPD 112; KDI Electro-Tec Corporation, B-185714, June 8, 1976, 76-1 CPD 364, and cases cited therein.

The record shows that there was such a reasonable expectation. When the RFP was issued, it was sent to 79 firms obtained from the initial mailing list and subsequent additions from advertising in the Commerce Business Daily. A pre-proposal conference was attended by representatives of 23 firms, and offers were received from 15 firms, all of which were found "responsive" except one. The evaluation summary shows that six of these were rated either "good" or "excellent" as well as satisfactory in terms of financial resources. In view thereof, we are unable to conclude that the contracting agency abused its discretion in setting the procurement aside for small business participation only or that "actual" or "real" competition was not achieved. It should be noted, parenthetically, that we have acquiesced in an agency's determination to permit a 100 percent small business set-aside where the procurement history revealed that only two competitive bids had been received from small business under the most recent procurement. KDI Electro-Tec Corporation, supra.

With regard to the cited Nationwide decision, it is true that this Office held therein that GSA's use of "exception 10" negotiating authority--that is, 41 U.S.C. 252(c)(10) (1970)--to negotiate procurements for janitorial services was not rationally justified under existing law and regulation, and that that particular authority did not permit negotiation to secure a desired level of quality of supplies or services. In a subsequent decision involving the same concern, however, this Office did not interpose legal objection to the negotiation by GSA of ITC's

B-188522

for janitorial services under four separate small business set-aside solicitations under the authority of 41 U.S.C. 252(c)(1) as implemented by FPR 1-3.201. See Nationwide Building Maintenance, Inc., 56 Comp. Gen. 556 (1977), 77-1 CPD 281.

41 U.S.C. 252(c)(1) permits the negotiation of contracts if determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress. FPR 1-3.201 states that at present, a state of national emergency exists by reason of a Presidential Proclamation of December 1950, and permits the negotiation of set-aside contracts with small business concerns when determined by the contracting officer to be in the interest of, inter alia, assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small business concerns. FPR 1-3.201(c)(2)(iii).


It is true that FPR 1-1.706-5(b), although permitting the award of small business set-aside contracts through either conventional negotiation or small business restricted advertising, specifies a preference for small business restricted advertising. However, in our latter Nationwide decision, we noted that the Administrator of GSA had signed a waiver of the FPR preference and that in "view of the waiver, and in the absence of any limit on the negotiation procedures that can be used in 'exception one' procurements," we concluded that GSA's "use of conventional negotiation procedures [was] lawful and not in violation of our prior Nationwide decision." 56 Comp. Gen. at 561. This procurement was negotiated pursuant to that waiver and therefore is also not subject to legal objection.

We note that Allied asserts that GSA's purpose in setting aside janitorial service contracts for small business "is not to benefit small business concerns" but is to be able "to use incentive-type contracts for such procurements." In this regard, the request for waiver that was signed by the GSA Administrator did point out that our 1976 Nationwide decision precluded GSA from negotiating for janitorial services and "that the only feasible method to reinstate the ITC program is to unilaterally set-aside custodial contracts for

B-188522

small business concerns." Be that as it may, as pointed out above, the decision to set-aside a procurement is one vested in the procuring activity, and it cannot be denied that these set-asides are beneficial to small business and are consistent with the statutory mandate for placing contracts with small business concerns.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States