

DOCUMENT RESUME

04458 - [B3414664]

[Protest against Agency Decision To Set Aside Procurement for Small Business]. B-190067. December 6, 1977. 3 pp.

Decision re: Abbott Power Corp.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Center for Disease Control.

Authority: Davis-Bacon Act (40 U.S.C. 276a). F.P.R.

1-18.701.2(a)(1). 13 C.F.R. 121.50 Comp. Gen. 807. 44 Comp. Gen. 498.

The protester objected to the agency's decision to issue an invitation as a construction contract rather than as a supply contract because the protester could not meet the small business set-aside size standard applicable to construction contracts. The protest was denied since the determination that the procurement involved substantial construction was within the contracting officer's discretion. (Author/SC)

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DECISION



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

04458

FILE: B-190067

DATE: December 6, 1977

MATTER OF: Abbott Power Corporation

DIGEST:

Small business manufacturer of electrical substations protests contracting officer's decision to issue IFB for substation as construction contract rather than supply contract because protester cannot meet small business set-aside size standard applicable to construction contract. Protest is denied because determination that procurement involves substantial construction requiring inclusion of Davis-Bacon Act provisions is within contracting officer's discretion and must be upheld absent bad faith or violation of procurement regulations.

By letter dated September 6, 1977, Abbott Power Corporation (Abbott), Buena Park, California, protests invitation for bids (IFB) No. 77-72 issued by the Center for Disease Control (CDC), Atlanta, Georgia, for an electrical substation which would service the CDC facility at Chamblee, Georgia.

Due to the construction of new buildings at the Chamblee facility, as well as the renovation and modernization of existing buildings, it was determined that the electric power supplied by the existing substation was no longer adequate to meet the load. The installation of a second substation was proposed and IFB No. 77-72 was issued on August 12, 1977, calling for the furnishing, setting in place and assembling of an electrical substation on the Chamblee grounds. The requirement was classified as construction, special trade contractors, and pursuant to the Federal Procurement Regulations, was set aside for small business, using a "\$5 million dollar average annual receipts size standard."

Abbott makes its protest as a small business manufacturer of electrical substations that does not qualify under the \$5 million average annual receipts standard--a standard established

by the Small Business Administration for small business set-aside construction contracts. See 13 C.F.R. part 121 (1977). Abbott contends that the IFB, as presently drafted, virtually eliminates all small business manufacturers of electrical substations, since most do a volume of business in excess of \$5 million, and leaves the bidding to construction contractors who in the end will prove more expensive for the Government.

Abbott argues that a construction contract is inappropriate in this particular situation because the construction required only represents about 5 percent of the contract price. It maintains that the IFB should be in the form of a supply contract because then the size standard for the small business set-aside would be set by "the Employment Size Standard for Concerns Primarily Engaged in Manufacturing." 13 C.F.R., supra. Under this size standard, Abbott contends that it and other small business manufacturers would qualify as small businesses and could then bid on the contract.

In response, CDC states that prior to the release of IFB 77-72, the contracting officer evaluated the needs of the situation and concluded that the entire procurement should be a construction requirement. The reasons for his decision were: (1) the construction work required by the specifications was considered to be substantial (because of the type of work and because it will represent approximately 20 percent of the total price) enough to require inclusion of the Davis-Bacon Act provisions, 40 U.S.C. § 276a (1970), in the contract (Federal Procurement Regulations § 1-18.701.2(a)(1) (1964 ed. amend. 115); (2) two major manufacturers of the electrical equipment (General Electric Company and Westinghouse Corporation) volunteered the information that a manufacturer's normal practice of selling this type of equipment to the public is by direct sale to electrical or general construction contractors who in turn act as prime contractors for the supply and installation; and (3) adequate competition was deemed available to submit bids for a construction contract. In addition, the contracting officer believed that it would be in the best interests of the Government from a time, expense and administrative standpoint if the total requirement was procured under a single contract rather than under both a construction and a supply contract.

Abbott challenges the validity of all of the contracting officer's reasons and argues that a manufacturer such as itself

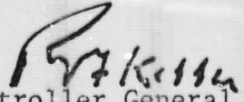
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can fulfill all the Government's needs and more competitively as well.

Our Office has generally recognized that the responsibility for determining whether a contract should be considered as one principally for construction, requiring inclusion of the Davis-Bacon Act provisions, or as one for supplies rests primarily with the contracting agency which must award, administer and enforce the contract. 50 Comp. Gen. 807 (1971). Consequently, our Office will not disturb a good faith determination by a contracting officer that a contract should be either for construction or supply. 44 Comp. Gen. 498 (1965).

In the present case, there is no evidence to suggest that the contracting officer did not act in good faith in reaching his determination. In the absence of any abuse of discretion or violation of procurement regulations, we find no basis to disagree with the contracting officer's decision.

Accordingly, Abbott's protest is denied.


Deputy, Comptroller General
of the United States