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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20540**

**FILE: B-190211 DATE: November 23, 1977**  
**MATTER OF: Hawthorn Melody, Inc.**

**DIGEST:**

1. Protest after bid opening of propriety of total small business set-aside is untimely and not for consideration. See 4 C.F.R. § 20.2(b)(1) (1976).
2. Agency may properly award to small business even though only one eligible small business bid is received and price is higher than might be obtained through unrestricted competition, provided price is reasonable.
3. Determination on small business set-aside of reasonableness of price will not be disturbed absent bad faith or fraud.
4. Protest is summarily denied where protester's initial submission establishes affirmatively that protester is not entitled to relief.

Hawthorn Melody, Inc. (Hawthorn), has protested through counsel the total set-aside for small business of a procurement for the purchase of dairy products for the Veterans Administration Hospital (VAH), Brecksville, Ohio.

The solicitation in question, No. 541-7-78, was issued by the Chief, Supply Service, VAH, Cleveland, Ohio, as a total small business set-aside. The solicitation advised that bids from firms not meeting the small business standards of the Small Business Administration (SBA) would be considered nonconforming. Only two bidders responded to the invitation, Hawthorn and Oberlin Farms Dairy, Inc. (Oberlin). At bid opening on September 1, 1977, Hawthorn was the low bidder. Oberlin filed a size protest with the SBA which alleged that Hawthorn was not a small business; Hawthorn filed a counter-protest to the SBA regarding the size status of Oberlin. Hawthorn states that if Oberlin's size protest to the SBA succeeds, then only one bidder will be left and that bidder is asking a higher price. Hawthorn asserts that the total set-aside for small business was improper in the first instance and objects to the refusal of the VAH to withdraw the set-aside.

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With respect to Hawthorn's protest of the set-aside, the Bid Protest Procedures of this Office require in part that:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of initial proposals shall be filed prior to bid opening or the closing date for receipt of initial proposals. \* \* \*" 4 C.F.R. § 20.2(b)(1) (1976).

Since the total set-aside for small business was apparent from the solicitation, Hawthorn's objection to the set-aside is untimely and not for consideration. See Tenco Construction Company, R-187137, December 21, 1976, 76-2 CPD 512.

Hawthorn also protests the refusal by the VAH to withdraw the small business set-aside and asks this Office to direct that the solicitation be canceled and resolicited without the small business restriction or, alternatively, that the VAH be directed to process the procurement on an unrestricted basis under 41 C.F.R. § 8-1.706-5 (1976). This argument is premised on the assertion that the small business set-aside was unduly restrictive of competition, as evidenced by the fact that only one eligible firm elected to bid.

We note at the outset that the provisions of 41 C.F.R. § 8-1.706-5 (1976), cited by Hawthorn's counsel as requiring the VAH to process this procurement on an unrestricted basis, apply only to construction and repair contracts within specified dollar limits. It is not germane to this procurement.

The protester also contends the refusal by the VAH to withdraw the total set-aside is contrary to the Veterans Administration's own regulations which provide "\* \* \* that where only one bid is received in response to a bid invitation, that bid may not be considered and accepted if the specifications used in the invitation were restrictive." The regulation to which reference is made, 41 C.F.R. § 8-2.407-50 (1976), provides as follows:

"When only one bid is received in response to an invitation for bids, such bid may be considered and accepted if (a) the specifications used in the invitation were not restrictive, (b) adequate competition was solicited, (c) the price is reasonable, and (d) the bid is otherwise in accordance with the invitation for bids. Such determination will be made in writing and included on or attached to the abstract of bids."

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We think it clear that this regulation relates to the specifications of the product being purchased and not to withdrawal of a small business restriction which is governed by 41 C.F.R. § 8-1.706-3 (1976).

In support of the argument opposing the refusal of the VAH to withdraw the set-aside, counsel for Hawthorn has cited a number of our prior decisions as supporting the proposition that the small business set-aside should be withdrawn in the circumstances of this case. While in the decisions cited in support of Hawthorn's contention we upheld the contracting officials' exercise of discretion to cancel a solicitation and resolicit without the small business restriction, we believe the decisions discussed below control in this case.

We have long recognized that section 15 of the Small Business Act, 15 U.S.C. § 644 (1970), and its implementing regulations authorize contracting with small business at higher prices to the Government than might be obtained through unrestricted competition. See Kinnett Dairies, Inc., B-187501, March 24, 1977, 77-1 CPD 209; 53 Comp. Gen. 307 (1973); 41 Comp. Gen. 306 (1961). Such prices must, however, be reasonable. Berlitz School of Languages, B-184296, November 28, 1975, 75-2 CPD 350. Furthermore, we recognize that determinations concerning whether adequate competition is to be expected and the reasonableness of prices are basically business judgments requiring the exercise of broad discretion by the contracting officer. See Kinnett Dairies, Inc., supra.

In Tencó Construction Company, supra, a case analogous to the present protest, we stated the following:

"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).

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"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."

We consider Tenco Construction Company, supra, to be dispositive of the issues in the present case. Although only one responsive bid was received and that bid was approximately 8 percent higher than the protester's, the contracting officer has refused to withdraw the set-aside apparently on the basis that the bid price is reasonable. Reading the protester's initial submission in the light most favorable to the protester, we find it demonstrates affirmatively that the protester is not entitled to the relief requested as no evidence has been presented to refute the contracting officer's apparent determination of price reasonableness. Accordingly, the protest is summarily denied. See Alaska Industrial Coating, B-190295, October 12, 1977.

In view thereof, the protester's request for a conference is denied.

  
Deputy Comptroller General  
of the United States