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2. February, 1978

DECISION



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

FILE: B-190905

DATE: July 11, 1978

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

DIGEST:

1. Since Small Business Act provides that fair proportion of total contracts awarded by Government should be placed with small business concerns, fact that small business concerns may receive a significant proportion of Government contracts for a particular category of items does not necessarily mean that they are receiving more than a fair proportion of the total contracts.
2. Agency's use of small business award goals as a management tool is not objectionable since its small business set-asides are made in accordance with applicable law and regulations and not in order to meet established quotas.
3. GAO Bid Protest Procedures request agency to file report on protest as expeditiously as possible, generally within 25 working days, but late receipt of agency report does not provide basis to disregard substantive information therein or to sustain protest by default.

J.H. Rutter Rex Manufacturing Co., Inc. (Rutter Rex), a large business firm, protests invitation for bids (IFB) No. DLA100-78-B-0189, a total small business set-aside, issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania. Rutter Rex contends that DLA's decision to restrict the procurement was improperly based on the determination to comply with quotas which were established for awards to small business firms.

The IFB was issued as a combined small business and labor surplus area (LSA) set-aside for men's trousers. Award on the non LSA-set-aside quantity was made to Statham Garment Corporation, the low bidder, notwithstanding the protest, upon DLA's determination that the price proposed was reasonable and that delay would result in increased costs to the Government and disrupt the agency's mission. DLA has withheld award on the LSA portion of the set-aside pending our decision on the protest.

Specifically, Rutter Rex contends that the agency has established a quota of 85 percent for awards to small business firms in the "Textile, Clothing and Equipage" category for fiscal year 1978 but that, because of the lack of significant small business sources of supply for certain textile and equipage items, virtually 100 percent of clothing requirements will have to be set aside to conform with the agency quota. Rutter Rex maintains that DLA's set-aside program is not authorized by law, unfairly denies it the opportunity to compete, and precludes the Government from obtaining a fair and reasonable price.

DLA states that "quotas" have not been established for awards to small business concerns, but that interim goals have been issued for fiscal year 1978 for awards to small business concerns in the "Textile, Clothing and Equipage" category, as well as in other categories. DLA indicates that its goal is to award about 85 percent of the total purchases in the "Textile, Clothing and Equipage" category to small business. However, the agency states that procurements will not be restricted to small business firms except in accordance with the applicable laws and regulations.

Section 15 of the Small Business Act, 15 U.S.C. 644 (1976), in pertinent part, provides:

"* * * small-business concerns within the meaning of this chapter shall receive any award or contract or any part thereof, * * * as to which it is determined by the [Small Business] Administration and the contracting procurement * * * agency * * * 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 * * *."

In addition, 10 U.S.C. 2301 (1976) 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 statutes reflect a Congressional policy of aiding and protecting small business by requiring the procurement of a fair proportion of Government supplies and services from small business concerns. As Rutter Rex points out, we expressed the view in 41 Comp. Gen. 649 (1962), that the phrase "fair proportion" should not be so construed as to preclude large business from competing for a fair share of Federal contracts in any particular industry. Since the legislative history of the Small Business Act indicated a Congressional intention that small business should obtain a fair share of all types of Government contracts, it seemed logical that the fair proportion standard had to be applied on an industry-by-industry basis. What Congress intended by the phrase "fair proportion," however, is not evident from either the statutory language itself or any legislative history. 41 Comp. Gen. 649, supra; S. Rep. No. 93-760, 93rd Cong., 2nd Sess. What is clear is that the broadly worded statutory language refers to the totality of Government procurement, i.e., small business is to receive a fair proportion of the Government's total procurements. In other words, the fact that small business concerns may receive a significant proportion of Government contracts in a particular industry does not necessarily mean that they are receiving more than a fair proportion of the Government's total contracts. 43 Comp. Gen. 497 (1963); S. Rep. 93-760, supra.

We can appreciate that as a result of efforts of the various contracting agencies to place a fair proportion of contracts with small business concerns, large business concerns occasionally may feel they are

being improperly denied the opportunity to compete. In the eyes of the large business concern, it may appear that the contracting agency is extending the small business share to more than a fair proportion because of small business set-asides.

Nevertheless, we see no evidence that DLA has improperly excluded large business competition for this procurement. While DLA has developed goals for awards to small business, it appears they are to be used solely as a management tool to measure DLA's yearly projections of small business awards in the various categories of items against the results achieved at the end of the year. There is no indication that the DLA contracting officer set aside the instant procurement other than in accordance with Armed Services Procurement Regulation (ASPR) 1-706.5(1)(1) (1976 ed.), which provides that a procurement shall be set aside for exclusive small business participation if the contracting officer determines 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. Thus, in this case the contracting officer determined on the basis of the prior procurement of these items, which was unrestricted, that there was adequate small business competition to assure reasonable prices. In fact, seven bids were received under this set-aside and the prices submitted by the low bidder were lower than those received on the prior procurement.

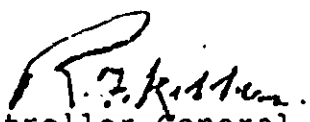
Moreover, nothing in Rutter Rex v. United States, Civil Action No. 77-3018, United States District Court for the Eastern District of Louisiana, decided March 10, 1978, cited by the protester, indicates that the instant set-aside is contrary to law. There, the contracting officer decided not to set aside a 1977 trouser procurement for small business, because of the absence of sufficient competition from small business to assure reasonable prices. This determination, however, was reversed by the contracting officer's superior within the agency. The court found that the superior's action was taken to enable the agency to meet an interim goal for awards to small business, which the court identified as "an arbitrary statistical goal." The court held that the agency abused its discretion by

disregarding the criteria for set-asides as contained in the ASPR. Clearly, the court's holding in that case is not applicable since, here, the agency complied with the ASPR requirement in setting aside the procurement for small business.

Therefore, we find no basis to question the instant set-aside.

Rutter Rex also raises a procedural issue. Rutter Rex argues that the agency's report to this Office "be stricken from the record, not considered, and that the protest be upheld by default," since the report was not filed within the 25 working day period referred to in Section 20.3 of our Bid Protest Procedures. 4 C.F.R. 20.3 (1977). In short, our procedures request that the agency report on the protest "as expeditiously as possible (generally within 25 working days)," but the late receipt of an agency report does not provide a basis to disregard the substantive information therein. See Systems Consultants, Inc., B-187745, August 29, 1977, 77-2 CPD 153.

The protest is denied.


Deputy Comptroller General
of the United States