

Proc I

**DECISION**



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

9323

FILE: B-192581

DATE: March 6, 1979

MATTER OF: Culligan, Inc. *CNG01800*

DIGEST:

*[Protest Alleging IFB Amendment Made Too Close To Bid Opening Time]*

1. Where protester received amendment to IFB less than 3 hours before bid opening and filed protest within 10 working days of receipt, protest is timely under 4 C.F.R. § 20.2(b)(2) (1978) as protester did not have reasonable opportunity to file protest before bid opening.
2. Bidder on total small business set-aside which certifies it is small and that large business concern will manufacture, inspect, package, and ship supplies indicates that it intends to furnish supplies manufactured or produced by large business without small business making significant contribution to manufacture or production of contract end item. Therefore, bid would be nonresponsive under small business set-aside and bidder is not prejudiced by withdrawal of set-aside by amendment allegedly issued too close to time set for bid opening.
3. While bidders, actual or potential, may have been misled as to competition contemplated by inadvertent set-aside provision in IFB, any possible adverse impact on competition does not require corrective action in view of exposure of prices and inadvertent nature of deficiency.
4. Where contracting officer erroneously and inadvertently fills out small business set-aside determination, small business set-aside withdrawal procedures are not for application. In any event, pre-bid-opening withdrawal of

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small business set-aside by contracting officer was subsequently approved by small business specialist.

Culligan, Inc. (Culligan), protests award of a contract under invitation for bids (IFB) No. NOO104-78-B-0888, issued on July 3, 1978, as a total small business set-aside by the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania. The IFB solicited bids for two items of ion exchange resins used to purify water in nuclear reactors. Bid opening was scheduled for 11:15 a.m. on July 31, 1978. At 8:33 a.m. on that date and after Culligan had already submitted its bid, Culligan received amendment A0002 withdrawing the small business set-aside. AGC00238

When bids were opened as scheduled, Culligan was second low bidder. The bids were as follows:

	<u>Item 1</u>	<u>Item 2</u>	<u>Business size</u>
Diamond Shamrock Corp.	\$67.22	\$79.00	Large
Culligan	69.20	80.30	Small
Rohm & Haas Co.	69.48	79.85	Large
Illinois Water Treatment Co.	74.00	83.50	Small
Ionics, Inc.	81.10	91.40	Large
Bio-Rad Laboratories	99.54	111.22	Small

If the small business set-aside had not been withdrawn, Culligan would have been in line for award, assuming its bid was responsive. As will be discussed, Culligan's bid was nonresponsive.

On August 9, 1978, the procuring activity and this Office received a mailgram from Culligan protesting award to any other company but Culligan, alleging that the "last minute" amendment to the IFB materially altered the pricing consideration as a result of the inclusion of large business in the competitive environment. Further, Culligan contends that amendment A0002 should be null and void since it was issued so late as to deprive Culligan of an opportunity to reassess its bid.

In accordance with Defense Acquisition Regulation (DAR) § 2-407.8(b)(3)(1)(1976 ed.), partial award has already been made to Diamond Shamrock Corp. for the procurement of item 1 because that item is urgently required by the procuring activity.

Amendment A0002 was issued July 24, 1978, and mailed July 27, 1978, after the contracting officer discovered that he had erroneously set aside the procurement for small business. At the time the contracting officer was preparing the solicitation, he was also preparing solicitations for the procurement of 45 other nuclear-type chemicals, all of which are procured under small business set-asides. The contracting officer inadvertently made a unilateral determination to set aside the subject procurement. Nevertheless, having intended that the procurement be unrestricted, the Navy also solicited bids from large businesses. In fact, in past procurements the Navy had never set aside these resins, because the procuring activity believed that only large business concerns manufactured them. Culligan has submitted bids for the resins under prior unrestricted procurements. With the exception of Bio-Rad Laboratories, all of the bidders, including Culligan, proposed in the subject procurement to supply resins produced by a large business concern. We note that Bio-Rad Laboratories, a small business concern, also certified that it is a manufacturer of the resins.

Initially, there is a question as to the timeliness of Culligan's protest. Generally, to be timely, a protest must be filed before bid opening if it is based on alleged improprieties in the solicitation which are apparent prior to bid opening. GAO Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1978). Culligan received amendment A0002 on July 31, 1978, before bid opening, but did not file its protest until 7 working days later. Under the circumstances of this case, where Culligan knew its basis for protest less than 3 hours before bid opening, we believe that § 20.2(b)(1) is inapplicable because Culligan did not have a reasonable opportunity to file its protest before bid opening.

In cases other than those covered by § 20.2(b)(1), bid protests must be filed not later than 10 working days after the basis for the protest is known or should have been known. 4 C.F.R. § 20.2(b)(2) (1978). Since Culligan's protest was filed within 10 working days after receipt of amendment A0002, it is timely under § 20.2(b)(1).

With regard to the effect of the "last minute" issuance of amendment A0002 to the IFB, DAR § 2-208(c) (1976 ed.) requires that if information contained in an amendment is necessary for bidders in submitting bids on the invitation or where the lack of such information would be prejudicial to uninformed bidders, no award shall be made unless the amendment is issued in sufficient time to permit all prospective bidders to consider the information in submitting or modifying their bids. However, no corrective action is required where, as discussed below, a bidder is ineligible for award and, therefore suffers no prejudice by its failure to receive the information. See B-159454, August 17, 1966.

This Office has consistently held that where a bid on a total small business set-aside fails to establish the intention of the bidder to furnish products manufactured or produced by small business concerns, the bid is nonresponsive and the bidder is ineligible for award. Aluminum Alloys Corporation, B-189550, October 20, 1977, 77-2 CPD 310; American Amplifier and Television Corporation, 53 Comp. Gen. 463, 465 (1974), 74-1 CPD 10. A small business may subcontract work to a large business concern as long as the small business makes a significant contribution to the manufacture or production of the contract end item. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. However, if an examination of the bid by a contracting officer indicates that the bidder intends to furnish contract end items manufactured by a large business concern, the bid is properly rejected as nonresponsive. B-175337, January 3, 1973; B-170114, February 24, 1971.

Culligan certified that it was a small business concern and that the resins would be manufactured by a small business concern, but also stated that the resins would be manufactured, inspected, packaged and shipped by Ionac Chemical Company, Division of Sybron Corporation, which, according to the contracting officer, is a large business concern. Culligan has not contested this fact. It is apparent from the bid that Culligan did not intend to make a significant contribution to the manufacture of the contract end item, and rejection of Culligan's bid under the unamended IFB as nonresponsive would have been required. See B-175337, supra; B-170114, supra. Therefore, since Culligan was not prejudiced by the "last minute" issuance of amendment A0002 withdrawing the set-aside, no corrective action is warranted.

While we are not unmindful that bidders, actual or potential, may have been misled as to the competition anticipated, any possible adverse impact on competition must be weighed against the fact that prices have been exposed and the deficiency here resulted from inadvertency. Therefore, we do not believe corrective action would be appropriate.

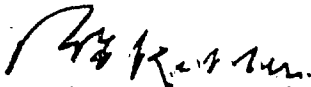
This Office has frequently held that after a small business set-aside has been withdrawn, the proper procedure is to resolicit so that all eligible bidders may have an opportunity to compete. Lawrence W. Rosine Company, 55 Comp. Gen. 1351 (1976), 76-2 CPD 159. However, in this case, bids have been exposed, there has been adequate competition and the bids are considered reasonable. See Culligan, Incorporated, Cincinnati, Ohio, 56 Comp. Gen. 1011, 1013 (1977), 77-2 CPD 242. Therefore, we do not recommend resolicitation of the procurement.

However, in the future, the procuring activity should adhere to DAR § 2-208(b) (1976 ed.), relating to amendments of invitations for bids, which provides that before an amendment is issued, the period of time remaining until bid opening and the need for extending such period by postponing the time set for bid opening must be considered; also, where only a short time remains before the time set for bid opening, consideration

should be given to notifying bidders of an extension of time by telegram or telephone and such notification should be confirmed in an amendment.

With regard to the contention that the amendment should be considered null and void, presumably because withdrawal was not properly effected, the DAR prescribes procedures for the making and withdrawal of small business set-asides. DAR § 1-706.1(b) (1976 ed.) provides in part that a procurement shall be set aside when such action is determined to be in the interest of assuring that a fair proportion of Government procurement is placed with small business concerns. The contracting officer intended no such determination in this case since he believed that only large business concerns manufactured the resins. The fact that large concerns also were solicited further evidences that the contracting officer inadvertently made the procurement a set-aside. Since the set-aside was made through inadvertence and the contracting officer intended the procurement to be unrestricted, the procedures pertaining to the withdrawal of set-asides are not for application. See Groton Piping Corporation and Thames Electric Company, B-185755, April 12, 1976, 76-1 CPD 247. At any rate, we note that after amendment A0002 was issued the contracting officer informally sought and received approval of the withdrawal from the small business specialist. Further, if the amendment was considered null and void, as urged by Culligan, as noted previously, Culligan would not have been eligible for award as a small business.

Accordingly, Culligan's protest is denied.

  
Deputy Comptroller General  
of the United States