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DECISION

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

FILE: B-202698.2**DATE:** January 22, 1982**MATTER OF:** Saratoga Industries--Reconsideration**DIGEST:**

Request for reconsideration by unsuccessful offeror who contests the contracting officer's decision to withdraw a small business set-aside because of unreasonable price is denied. Based on other bid received and prior procurement history, we do not find contracting officer's decision unreasonable.

Saratoga Industries has requested reconsideration of our decision of September 21, 1981, B-202698, 81-2 CPD 229, in which we held that the Department of the Navy's withdrawal of a small business set-aside without notifying the Small Business Administration (SBA) was contrary to regulation. We recommended that the matter be referred to SBA to allow it the opportunity to appeal the withdrawal. SBA did appeal and its appeal was denied by the Director, Navy Aviation Supply Office Purchase Division. Saratoga now protests the refusal of the SBA to further appeal the Navy's denial. It also protests the contracting officer's refusal to make the award to Saratoga and requests cancellation of the contract award. For the reasons that follow, we deny the request for reconsideration.

Request for proposals No. N00383-80-R-2825, issued by the Navy Aviation Supply Office, Philadelphia, Pennsylvania, as a total small business set-aside, solicited offers for a number of "module switches." The Navy received two offers--one from Saratoga and one from Rodale Electronics Corporation (Rodale). Saratoga, upon receiving notice that award was to be made to Rodale as the low offeror, protested Rodale's small business status.

On November 19, 1980, the SBA ruled that Rodale did not meet the procurement's size standard and was

therefore "other than small business for the procurement in question." As a result of this determination, Saratoga was the only offeror remaining for consideration.

After comparing Saratoga's price with that of Rodale and with prior procurement history, the contracting officer determined that Saratoga's price was unreasonable. On February 26, 1981, he issued amendment No. 0001 withdrawing the small business set-aside, establishing a new closing date, and requesting a best and final offer from Saratoga and Rodale. It was this action that Saratoga first protested to us.

Following our decision, the Navy notified the SBA, on October 19, 1981, of its intent to withdraw the small business set-aside and on October 20, SBA appealed to the Director, Navy Aviation Supply Office, who denied the appeal. On October 29, the SBA advised the Navy that it would not take a further appeal. On November 25, 1981, by a written determination of exigency pursuant to Defense Acquisition Regulation (DAR) § 2-407.8(b) (1976 ed.), the contracting officer awarded the contract to Rodale for 120 "module switches" at a unit price of \$260. Saratoga filed its request for reconsideration with us on November 25, 1981.

Because our first decision was confined to a procedural point, we will now consider the reasonableness of the contracting officer's actions. We conclude that there was no error in his decision to withdraw the small business set-aside.

DAR § 1-706.3 (Defense Acquisition Circular (DAC) No. 76-25, October 31, 1980) authorizes the withdrawal of a small business set-aside based upon a proper determination that the bids received from small business concerns are unreasonable. Lipps, Inc., B-196588, February 15, 1980, 80-1 CPD 137. In the absence of a showing of arbitrary or capricious conduct, there is no basis for our Office to disagree with the contracting officer's judgment on this issue. North American Signal Company--Reconsideration, B-190972, August 4, 1978, 78-2 CPD 87.

Saratoga has argued that its bid price, \$285 per unit, is lower than the Government's estimate of \$310 per unit and, therefore, is reasonable, even though it is \$25 higher

per unit than that of Rodale. We have held in the past that whether a particular price is unreasonable depends upon the circumstances of each case. Canadian Commercial Corporation, B-196111, May 29, 1980, 80-1 CPD 369; Triple "A" South, B-193721, May 9, 1979, 79-1 CPD 324. Although usually those circumstances involve a comparison with the Government estimate or with a prior contract price, see, e.g., Otis Elevator Company, B-196076, February 1, 1980, 80-1 CPD 86, a Government estimate may be faulty. See Canadian Commercial Corporation, *supra*. Here, the Government estimate of 78 units at \$24,180 breaks down to \$310 per unit. The Government estimate clearly appears high, as \$310 was the cost in 1979 for only 22 units. As the unit price varies with the quantity ordered, the Government should be able to obtain 78 or more units for a lower unit cost than 22 units.

A "courtesy" bid from a concern ineligible to bid on a small business set-aside, while nonresponsive, may also be considered as part of the comparison. Tufco Industries, Inc., B-189323, July 13, 1977, 77-2 CPD 21; McNamera-Lunz Vans & Warehouses, Inc., B-198259, August 11, 1980, 80-2 CPD 107. Even considering Rodale's offer as a courtesy bid due to the SBA determination of its status, Rodale's price, \$3,000 less than Saratoga's, may be considered in the comparison.

Finally, we have upheld the rejection of an offer as unreasonable where the lowest eligible offeror under a small business set-aside exceeded the basis for comparison by as little as 7.2 percent. Coil Company Inc., B-193185, March 16, 1979, 79-1 CPD 165. Here, Saratoga's offer is 9.6 percent above Rodale's price and we cannot say the contracting officer's action in finding Saratoga's price unreasonable was arbitrary or capricious.

Saratoga has also protested the SBA's refusal to appeal the withdrawal of the small business set-aside. While SBA is permitted by DAR § 1-706.3(e) (DAC No. 76-24, August 28, 1980) to appeal to the Secretary of the procuring agency, SBA is not required to so appeal and, therefore, this allegation is without merit.

Since we find the withdrawal of the set-aside not to have been unreasonable, the award to Rodale is not objectionable and we deny the request for reconsideration.

Shilton J. Fowler
for Comptroller General
of the United States