

**DECISION**



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

60768

FILE: B-185330, B-185331, B-185776 DATE: April 16, 1976

MATTER OF: Park Manufacturing Company  
Century Tool Company

99053

**DIGEST:**

1. Temporary Regulation issued by GSA and published in Federal Register permits agencies to continue existing practices with respect to relative priorities of labor surplus area and total small business set-asides while matter of priority is under review by Executive Branch. Therefore, GAO may not object to procuring agency's failure to give priority to labor surplus set-asides during period of review.
2. Protest concerning reasonableness of contract prices for small business set-asides is denied, even though lower courtesy bids were submitted by large business since price reasonableness is business judgment requiring exercise of broad discretion and clear abuse of discretion is not apparent from record.

Protests have been filed by labor surplus area concerns under three solicitations, issued by the General Services Administration (GSA) as total small business set asides. Essentially the protesters argue that applicable regulations require these procurements to be set aside for labor surplus area concerns.

Protests were filed by Park Manufacturing Company under invitation for bids (IFB) No. FPWP-C3-55751, for tool chests, and by Century Tool Company, Inc., under both IFB No. FPWN-G6-55806, for flat tip screwdrivers and IFB No. FTAN-G8-59975, for cross tip screwdrivers. Both Park and Century are wholly owned subsidiaries of Triangle Corporation.

In addition, Century brought suit in the United States District Court for the District of Columbia (Century Tool Company, Inc.,

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v. Jack M. Eckerd, et al., Civil Action No. 76-0104) regarding IFB 55806. Century's suit raised the same issues presented to this Office and, in addition, sought interlocutory relief pending our decision. The Court refused to enjoin GSA and contract awards were made. The remaining procurements have not been awarded pending our decision. We have been requested by the Court to expedite our decision and, upon its issuance, to file a certified copy of the decision with the Court.

While the Federal Procurement Regulations (FPR) establish a preference for labor surplus set-asides over any partial set-asides for small business concerns, GSA contends there is neither an express nor implied preference for labor surplus area concerns where a total small business set-aside is made. Therefore, GSA states that the instant total set-asides for small business are consistent with applicable regulations.

Under a policy decision by the Acting Administrator, GSA, which was published in the Federal Register as Temporary Regulation 35 (TR 35), contracting officers in civilian agencies will be permitted to effect total small business set-asides irrespective of the labor surplus policies in existing regulations until such time as the Office of Federal Procurement Policy decides what the Government's policy should be. In addition, we have denied Century's protest that bid prices at which awards were made to small business concerns were unreasonable, since it has not been shown that the contracting officer abused the broad discretion permitted in such matters.

The provisions in subparts 1-1.7 and 1-1.8 of the FPR require implementation of socio-economic policies and procedures with respect to aiding small businesses and labor surplus area concerns. The small business policies in § 1-1.702 of the FPR provide, in part, that procurements be set aside for exclusive participation by small business concerns. Under § 1-1.706-5(a) the entire amount of individual procurements must be set aside for exclusive small business participation where there is a reasonable expectation of sufficient competition so that awards will be made at reasonable prices and in the absence of such expectation a partial set-aside for a portion of the procurement must be considered. Concomitantly, section 1-1.802-2 of the FPR requires that best efforts be used to award negotiated contracts to labor surplus area

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concerns pursuant to procedures in section 1-1.804. Set-asides for labor surplus areas, by definition, can and must be made only if a procurement is severable into two or more parts, and therefore the set-aside must be partial. Applicable procedures in FPR 1-1.804 mandate an apportionment of each procurement deemed severable into two or more production runs or reasonable lots if a labor surplus area concern is expected to be able to furnish a severable portion at a reasonable price. There is no exception to this requirement which would permit a total set-aside for small business concerns. In addition, FPR 1-1.802(b)(1)(1964 ed.) provides that where either a set-aside for labor surplus area concerns or a partial set-aside for small business appropriately can be made for any given procurement, the set-aside shall be made for surplus area concerns. In this connection, GSA issued a proposed amendment dated October 1, 1975, clarifying FPR § 1-1.802-2(b)(1) which was to take effect on November 10, 1975. The announcement in the Federal Register (40 Fed. Reg. 48326 (1975)) was made prior to the filing of these protests in this Office, and provided in pertinent part as follows:

This amendment of the Federal Procurement Regulations modifies the text of paragraph (b)(1) of § 1-1.802-2 so that the intent of the section is clarified. The intent of the section when it was issued in the early 1960's was and continues to be that where a set-aside can be made for either small business concerns (total or partial) or labor surplus area concerns (partial), set-asides for labor surplus area concerns shall be preferred. This amendment revises the section so that the long standing intent regarding the preference for partial labor surplus area set-asides is more clearly indicated by means of an explicit statement. However, in view of the time that has elapsed since the original regulation was issued, agencies and other interested parties are invited to comment within 60 days after publication of this amendment in the Federal Register regarding the propriety of continuing the preference for partial labor surplus area set-asides. Comments should be forwarded to the Director, Federal Procurement Regulations Staff, Office of Federal Management Policy, General Services Administration, Washington, D. C. 20405.

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Section 1-1.802-2 is amended to modify the language in paragraph (b)(1) to read as follows:

§ 1-1.802-2 Specific policies.

\* \* \* \* \*

(b) \* \* \*

(1) Where either a partial labor surplus area set-aside, a small business set-aside (total or partial), or other form of set-aside can be appropriately made for any given procurement, the set-aside shall be made for labor surplus area concerns."

\* \* \* \* \*

However, this amendment was suspended by GSA, effective November 10, 1975, by TR 35. In its notice suspending this amendment (40 Fed. Reg. 55350 (1975)), GSA stated that:

"The regulation published in the Federal Register (40 FR 48326, October 14, 1975) was issued to clarify the intent of Subparts 1-1.7 and 1-1.8 regarding the relationship of small business and labor surplus area set-asides. Following publication in the Federal Register, complaints were received from members of Congress, Small Business Committee of the House of Representatives, and the Small Business Administration. In addition, it became apparent that the prior provisions of the subpart were being widely implemented in a manner contrary to the intent of the provisions as they pertain to a preference for labor surplus areas. However, the clarification of the intent could result in a significant change in operations which would result in a substantial dislocation in the current awarding of Government contracts. After the matter was reviewed it was concluded that such a dislocation would be undesirable, pending a study of the related facts to determine what the policy should be regarding the relationship of small business and labor surplus area set-asides. The matter will be

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studied by the Interagency Procurement Policy Committee, and a final decision will be rendered by the Office of Federal Procurement Policy. Accordingly, a suspension of the regulation is desirable." (Emphasis added.)

As of this date, a decision by the Office of Federal Procurement Policy is pending.

We do not think it is necessary to decide whether the October 1, 1975, announcement in the Federal Register correctly reflects the existing rule. However, notwithstanding the intent of existing regulations, we believe that TR 35, in effect, permits agencies to apply total small business set-aside procedures irrespective of labor surplus considerations. It recognizes that strict application of the existing regulation may result in a substantial and undesirable dislocation in the current awarding of Government contracts. While protesters argue that an agency must follow its own regulations and may not bootstrap itself by repeatedly violating those regulations, we think it is significant that the existing preference for labor surplus area concerns is essentially a matter of executive contract policy and that TR 35 temporarily sanctions deviations from the policy expressed in the October 1 announcement. We note that contract matters are not subject to the rule-making requirements of 5 U. S. C. 553(a). In the circumstances, it would be inappropriate for this Office to object to the failure of a procuring agency to give full effect to labor surplus policies while reevaluation and resolution of such policy matters are in process.

#### Reasonableness of Award Prices

Century has protested the awards to small businesses of set-aside Items 3, 8, 9, 11 and 17 under IFB 55806 on the basis that awards were made at unreasonable prices and must be cancelled or terminated for the convenience of the Government. The Protester argues that the contracting officer should have considered the significantly lower prices bid by Century, a large business, should have determined pursuant to FPR 1-1.706-3(b), that awards would be detrimental to the public interest because of the unreasonably high prices of small business, and should have withdrawn the set-asides.

Listed below are the bids received on these items from Century, the bids of the low small business bidder (award price) and the

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prior contract prices for these items, together with the percent of increase or decrease of low small business bids over the prior contract prices and Century's bids:

Item	Award Price (A)	Century Price (B)	Prior Contract (C)	Percentage of Change	
				A to B	A to C
3	.279	.26	.231	7%	17%
8	.292	.17	.237	72%	18.8%
9	.318	.24	.34	32%	-6%
11	.293	.198	.30	48%	-2.4%
17	.30	.25	.22	20%	36.3%

GSA concluded that the prices of the small business bidders were reasonable on the basis of the previous prices paid for the contract period April 1, 1975 through September 30, 1975, and the Wholesale Price Index published in July 1975 by the Department of Labor. GSA considered the percentage of increase or decrease over the prior contract period to be in line with a 12.4% increase in the Wholesale Price Index for hand tools for the period from September 1974 through September 1975. GSA has shown that although the prior contracts were restricted to small business concerns, adequate competition was received for these items from a sufficient number of small business concerns. In addition, GSA notes that transportation, packaging and packing costs increased approximately 12% to 15% and 15%, respectively, and that labor, material and administrative costs also increased. Finally, GSA concludes that Century's prices are questionable in view of the "long history of rejections [of Century's products] because material did not meet the specification requirements of the contract as well as a history of delinquent deliveries."

As to the use by GSA of the increase in the Wholesale Price Index for hand tools, Century argues that GSA should have considered the wholesale price increase under the screwdriver category, which showed an increase of approximately 7.5%, rather than the 12.4% increase under the general category of hand tools. In this connection, we agree with the protester that the more specific category should have been considered; however, we cannot conclude that GSA's reliance on the more general category was unreasonable.

Century also argues that the above price differentials exceed the differentials in prior protests in which set-asides were withdrawn. In the cases cited by the protester, contracting officers

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had concluded that the circumstances justified rejection of the small business bids and removal of the set-asides. Here, however, GSA decided otherwise.

Clearly, procurements may be negotiated with small businesses at a higher price to the Government than that which is otherwise obtainable through unrestricted competition, provided the contract price is reasonable. 53 Comp. Gen. 307 (1973) and 41 Comp. Gen. 306, 315 (1961). Price reasonableness is basically a business judgment requiring the exercise of broad discretion. In our opinion, while GSA's judgment may be open to question, we believe that its acceptance of the small business bid prices in this case is not a clear abuse of the agency's broad discretion in such matters.

Accordingly, the protests are denied.

*R. F. Kettner*  
Deputy Comptroller General  
of the United States