



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

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B-177498(2)

May 25, 1973

Novelty Products Company
c/o Samuel F. Schwag, Esq.
Suite 1032
1315 Walnut Street
Philadelphia, Pennsylvania 19107

Gentlemen:

We refer to your letter of December 23, 1972, and subsequent correspondence, concerning your protest against an award to Centron Corporation under Invitation for Bids (IFB) No. DAAA25-73-D-0031, dated August 3, 1972, which was issued by the Department of the Army on a partial small business set-aside basis for a requirement of 113 Bandoleers.

You maintain that the "Awards" provision of the IFB did not authorize the Department to exclude you from consideration for the set-aside award; that such exclusion improperly negated the provisions in the "Notice of Partial Small Business Set-Aside" clause; that the "Awards" provision authorized the Department to make separate awards under Item 0001 and Item 0002 of Alternate C, or separate awards under Alternate A, to other than the lowest, responsive, responsible bidders for those items; that the clause did not give the Department the right to award the set-aside portion of Item 0001 without strictly following the procedures set forth in the "Notice of Partial Small Business Set-Aside clause"; and that had the Department strictly followed these procedures you would have received the award instead of Centron. Consequently, you request that Centron's award be cancelled and the requirement awarded to you.

Alternate bids were requested on the requirement, as follows:

Alternate A

Item 0001	Total Quantity	8,000,000 each
	Non Set-Aside Portion	4,000,000 each
	Set-Aside Portion	4,000,000 each
Item 0002	Total Quantity (not subject to set aside under any alternate)	2,000,000 each

Protest of Exclusion From "Consideration for Small Business Set-Aside"

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Alternate B

Item 0001	Total Quantity	6,000,000 each
	Non Set-Aside	3,000,000 each
	Set-Aside Portion	3,000,000 each
Item 0002	Total Quantity	2,000,000 each

Alternate C

Item 0001	Total Quantity	4,000,000 each
	Non Set-Aside Portion	2,000,000 each
	Set-Aside Portion	2,000,000 each
Item 0002	Total Quantity	2,000,000 each

At the end of the above schedule was the following note:

All bidders are invited to bid on either or both items and on any or all alternates. Award(s) will be made on that alternate which most nearly corresponds to the Government requirements and funding at time award is made.

The IFB also contained the following pertinent provisions:

Notice of Partial Small Business Set-Aside

(a) General. A portion of this procurement, as identified elsewhere in the Schedule, has been set aside for award only to one or more small business concerns. Negotiations for award of this set-aside portion will be conducted only with small business concerns who have submitted responsive bids on the non-set-aside portion at a unit price within 130 percent of the highest unit price at which an award is made on the non-set-aside portion. * * * Negotiations shall be conducted with such small business concerns in the following order of priority.

Group 1. Small business concerns which are also certified-eligible concerns with a first preference.

Group 2. Small business concerns which are also certified-eligible concerns with a second preference.

Group 3. Small business concerns which are also persistent or substantial labor surplus area concerns.

Group 4. Small business concerns which are not labor surplus area concerns.

Within each of the above groups, negotiations with such concerns will be in the order of their bids on the non-set-aside portion, beginning with the lowest responsive bid.

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Awards

1. The Government reserves the right to make two (2) or more awards to maintain mobilization base and intense combat readiness and not to award both items to any single bidder.

2. The Government further reserves the right to make awards to individual contractor(s) whose price(s) result in the lowest aggregate evaluated cost to the Government for the number of individual award(s) that will be made or in any such other manner that would be in the best interest of the Government.

The Department reports that the Assistant Secretary of the Army (Installations and Logistics) determined on May 23, 1972, that procurements of the M3 Bandoleer could be negotiated under the authority of 10 U.S.C. 2304(a)(16)(B), since the interest of industrial mobilization in case of a national emergency would otherwise be served. A further review in July 1972 of the projected requirements for the bandoleers supported the continuing need for maintaining an active mobilization base and for establishing one other active base producer for the item in addition to your company. However, the Department subsequently decided that procurement of the subject requirement could be carried out under formal advertising procedures, since it anticipated adequate competition. In the interest of maintaining the mobilization base for the item, the Government therefore reserved the right in the IFB to make multiple awards and not to award both items to any single bidder.

Centron and four other firms submitted bids for the requirement by the date set for bid opening on October 10, 1972. The contracting officer reports that you were the lowest bidder on Alternate C, Item 0001 (the quantity ultimately evaluated and awarded), and that

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he subsequently awarded you contract No. DAM25-73-00246 on December 5, 1972, for 2,000,000 bandoleers at a corrected price of \$.3051 a unit under Item 0001 (the non-set-aside portion of Alternate C).

The contracting officer further reports that he subsequently executed a Determination of Precedence to show the priority of offerors for the set-aside award; that Centron had first priority for the set-aside award under this determination; that you were not eligible for consideration of the set-aside in view of the need for obtaining an additional active base producer of the item; and, that, pursuant to the order of precedence established for the set-aside, the set-aside portion of Item 0001 of Alternate C was awarded to Centron at a unit price of \$.3048 on December 6, 1972.

The Department also reports that, although the language used in the "Awards" provision could have been more explicit with respect to stating the right to award the set-aside portion of Item 0001 to other than the lowest eligible bidder for the item in order to obtain an additional base producer of the bandoleers, it believes the provision gave adequate notice of the right to make multiple awards in the subject procurement; that funds were not available to permit separate awards for the larger quantities under Alternate A; that the only reasonable interpretation of the "Awards" provision and the "Notice of Partial Small Business Set-Aside" clause, accommodating the intent of serving mobilization requirements and accomplishing the small business preference at lowest cost, is that both the non-set-aside and set-aside portions would not be awarded to one company, although the small business procedure for awarding the set-aside would otherwise prevail; and that your argument that the Department lacked authority to make the subject award to Centron is untenable since you also acknowledge the Department's right to have made an award for the same number of units under Item 0002 of Alternate C to Centron at a higher price than the set-aside price.

It seems clear to us that the primary procurement purpose manifested in this solicitation was to maintain the mobilization base requirements at the lowest cost, and at the same time effectuate the preferred policies of using formal advertising and small business set-aside procedures where possible. In an attempt to fulfill this purpose the awards clause (albeit not fully clear) reserved to the Government the right to make two or more awards and thus the non-set-aside and set-aside portions would not be awarded to the same firm although the order of priority and negotiation procedures of the set-aside clause would apply.

It is also obvious that the Government's needs were indefinite since alternate quantities were stated and bidders were on notice that the requirements were necessarily flexible. As it developed, there was a requirement and funds for only 4,000,000 M Bandoliers, and Item 0002 was cancelled and no award was made thereunder. Hence, the awards were made under Alternate C, Item 0001 (2,000,000 set-aside, 2,000,000 not set-aside).

Since the Assistant Secretary authorized negotiation of the procurement under 10 U.S.C. 2304(a)(1)(B), which permits, in effect, multiple awards of a requirement in the interest of serving industrial mobilization, and because this authority necessarily includes the lesser authority to conduct the procurement on a formally advertised basis, we must conclude that the award to Centron cannot be questioned.

In view of the foregoing, your protest must be denied.

Sincerely yours,

Paul G. Hebling

For the Comptroller General
of the United States