

088003

DECISION



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

40346

FILE: B-177587

DATE: January 15, 1974

MATTER OF: Sealtest Foods

**DIGEST:** Protest by large business concern against the determination to procure through total small business set-aside denied since contracting officer properly determined pursuant to ASPR 1-706.5(a)(1) that there was a reasonable expectation of submission of bids by sufficient number of responsible small business concerns to permit award at reasonable prices. Fact that predecessor contract, held by small business, was terminated was not evidence of inability to perform since cancellation was made at contractor's request under contractual provision providing remedy to contractor when its costs are increased by certain governmental action.

Protest filed against the re-advertisement on a total small business set-aside basis of the remaining requirements of contract No. DSA136-73-D-W-391 which was cancelled August 3, 1973.

That contract was awarded to Meadowbrook Dairy, Trenton, New Jersey, on January 31, 1973, pursuant to invitation for bids (IFB) No. DSA136-73-B-0052, issued October 26, 1972, by the Defense Supply Agency, Subsistence Regional Headquarters, New York (SRHNY), Defense Personnel Support Center (DPSC), New York, New York.

The contract was a requirements type contract for the supply of indefinite quantities of milk, orange juice, and assorted dairy products to Headquarters, USATC Infantry and Attached Activities, Fort Dix, New Jersey, and McGuire Air Force Base, New Jersey, and Base Exchanges located at those installations, for the period of February 1, 1973 through December 31, 1973.

At the contractor's request, dated July 5, 1973, and pursuant to a contractual provision, the subject contract was cancelled in its entirety, effective August 4, 1973.

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The requirements for the remainder of the period, August 4 - December 31, 1973, were readvertised under IFB DSA136-74-B-0006, issued July 11, 1973, by SRHNY. Like the original procurement, this IFB was also issued as a total small business set-aside. Bids were received from three small business concerns, and contract No. DSA136-74-D-W-135 was awarded on July 30, 1973, to the low bidder, Johanna Farms, Incorporated, Flemington, New Jersey.

Notwithstanding that the award was made while a protest by Sealtest Foods (Sealtest) was being processed by our Office, such action was made pursuant to Armed Services Procurement Regulation (ASPR) 2-407.8(b)(3) which authorizes an award prior to protest resolution where the items are urgently required or delivery will be unduly delayed by failure to make a prompt award. It was determined that failure to make a prompt award would possibly result in a supply failure, and permission to make a prompt award pursuant to ASPR 2-407.8(b)(3) was granted by DSA Headquarters.

It has been contended by Sealtest that the cancellation of Meadowbrook's contract constituted a default termination due to that firm's inability to perform the contract and, as such, is vindication of a previous protest by Sealtest against the procurement of these items on the basis of a total small business set-aside. Accordingly, it is contended that neither the IFB for the original contract nor the IFB for the subject award should have been issued as set-asides, but should properly have been issued on a competitive basis without regard to size.

The record reveals that Meadowbrook's contract was cancelled at its request pursuant to a contractual provision (DPSC Clause 30) which enables a contractor to submit and have considered a request for cancellation of its contract when action by the United States Secretary of Agriculture "causes an increase in the contractor's direct costs of fluid milk used or to be used to furnish items of fluid milk for beverage purposes or milk products under this contract." Meadowbrook's letter of July 5 alleged that action taken by the Secretary of Agriculture in disposing of large surpluses of Non-Fat Dry Milk through foreign donations and export sales had influenced the Minnesota-Wisconsin price of milk, and that his increase in the support price had caused the Minnesota-Wisconsin milk price to rise each month. It was determined that Meadowbrook's request for cancellation met the criteria of the subject clause, and the contract was cancelled accordingly.

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Therefore, we are unable to conclude that Meadowbrook was unable to perform its contract because of a default in performance or that the requirements thereunder could not be performed by small businesses in general.

With regard to the request that the procurement on a total small business set-aside basis be resolicited on an "open market" basis, the circumstantial context of the instant case appears legally identical to that of the original procurement on a total set-aside basis, which was protested by Sealtest and which our Office denied by our decision B-177587, April 3, 1973.

That decision cited ASPR 1-706.5(a)(1) as authorizing a total small business set-aside upon a determination that there is a reasonable expectation that bids will be obtained from a sufficient number of responsible small business concerns to permit awards at reasonable prices. In considering this provision, we stated that such a determination is within the purview of sound administrative discretion and will not ordinarily be questioned by our Office.

With regard to the determination in the instant case to resolicit the remainder of the contract as a total small business set-aside, the contracting officer states that the prior bidding history by small business concerns for milk and dairy requirements contracts presented a reasonable expectation that bids would be obtained from a sufficient number of responsible small business concerns to permit awards at reasonable prices. It was determined that the prior procurement history proved that the requirements for these items posed no problem in terms of performance by small business suppliers, and that the submission of bids at reasonable prices by three small business concerns for the original contract warranted a similar expectation with regard to the instant IFB. Inasmuch as bids were likewise received from three small business concerns in the instant case, and the award was made to the low bidder at a price which the contracting officer determined to be reasonable, we are without a basis upon which to conclude that the determination to utilize such a set-aside was improper. In this connection, we have been advised that the contract was satisfactorily completed by the small business contractor.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States