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P. W. Linnick

DECISION



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

FILE: B-190945,
B-190970, B-190992

DATE: August 25, 1978

MATTER OF: Technical Services Corporation; Artech Corporation, and Sachs/Freeman Associates, Inc.

DIGEST:

1. Protest alleges that extensions of contract with incumbent contractor beyond end of contract option period should have been competitively procured. Where protester received copies of modifications extending incumbent's contract on or about May 2, 1977, but did not file protest until December 20, 1977, protest is untimely filed under section 20.2(b)(2) of GAO Bid Protest Procedures.
2. Where basis of protest (allegedly illegal sole-source extensions of contract with incumbent contractor) was published in Commerce Business Daily, protesters were on constructive notice of basis of protest and protest filed more than 10 working days after date of publication is untimely filed under section 20.2(b)(2) of GAO Bid Protest Procedures.
3. Protest alleging that sole-source extensions of contract with incumbent contractor beyond end of option period should have been competitively procured is untimely filed under section 20.2(a) of GAO Bid Protest Procedures since protest was not filed within 10 working days of oral notification of initial adverse agency action on protest filed with contracting agency. Fact that protester continued to pursue protest with contracting agency after initial adverse agency action does not affect 10-day requirement for timeliness of protest filed with our Office.
4. Protest against allegedly duplicative laboratory facilities requirements of three solicitations is untimely filed under section 20.2(b)(1) of GAO Bid Protest Procedures where protest on this issue was filed after latest closing date for receipt of quotations specified in requests for quotations.

5. Since issues raised in present protest were considered in previous decisions, they are not "significant" within meaning of section 20.2(c) of GAO Bid Protest Procedures which permits consideration of protest notwithstanding protest's untimeliness when significant issue is raised.
6. No impropriety is found under procurement law or regulations in contracting agency's use of identical language in more than one solicitation to describe work and services to be performed, especially where work statements clearly indicate that similar services may be required but under different circumstances.
7. Protesters' allegation, without documentary evidence to support contention that contract awarded under unrestricted solicitation may be used to take work away from small business contracts awarded under 100-percent small business set-asides, is speculative and, therefore, protesters have not met burden of proof necessary to sustain protest.
8. Nothing in Small Business Act mandates that there be set-aside for small business as to any particular procurement. Consequently, protesters' contention that procurement should be small business set-aside is rejected.
9. Protest alleging that procurement should have been set aside for small business is denied since contracting officer's decision not to set-aside procurement was made after survey of potential small business contractors and was concurred in by SBA representative. Decision as to whether procurement should be set aside is within discretionary authority of contracting officer and GAO is reluctant to substitute its judgment absent a clear showing of abuse of discretion.
10. Protest against use of incorrect standard industrial classification (SIC) in solicitation is denied since procurement was unrestricted and use of incorrect SIC made no practical difference in eventual award.

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11. Protesters' allegation, without documentary evidence to support contention that large business might obtain subcontract under 100-percent small business set-aside and use small business prime contractor to funnel the funds to itself, is speculative and, therefore, protesters have not met burden of proof necessary to sustain the protest.
12. Award of contracts while protests were pending was not improper where contracting officer determined that awards were necessary due to urgency and GAO was notified of intent to make awards in accordance with ASPR § 2-407.8(b). Moreover, any deficiencies in notification are regarded as procedural irregularities which do not affect the validity of the award.

Technical Services Corporation, Sachs/Freeman Associates, Inc., and Artech Corporation have protested several procurement actions taken by the United States Army Mobility Equipment Research and Development Command (MERADCOM), Fort Belvoir, Virginia, relating to the acquisition of drafting, production engineering, prototype manufacturing, engineering design/evaluation and testing services. Specifically solicitations Nos. DAAK70-78-Q-0005, -0006, -0007 and multiple extensions of contract No. DAAK02-75-D-0078 are the subject of the protests. The relevant background in this matter is set forth below.

Background

Contract No. DAAK02-75-D-0078, a 100-percent small business set-aside with a standard industrial classification (SIC) of 3621, for the procurement of various engineering services, was awarded to Value Engineering Company on November 21, 1974. The contract term was for 12 months with an option, which was exercised by the Government, to extend the term through November 20, 1976. According to the Army report on this matter, several reorganizations within MERADCOM caused delay in issuing a solicitation for the follow-on contract. Therefore, the contract was modified on November 19, 1976, and again on February 18, 1977, to extend the period of performance by Value Engineering, through May 20, 1977. On April 6, 1977, solicitation No. DAAK70-77-Q-0010 for the follow-on

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engineering services procurement was issued. This solicitation was a 100-percent small business set-aside with a SIC of 3621 just as the previous contract had been. The SIC of 3621, referring to the manufacture of electric motors and power generators, limited the size of firms eligible for award under this solicitation to those firms with 1,000 employees or less.

On April 18, 1977, MERADCOM received a Freedom of Information Act request from Technical Services for all modifications to the -0078 contract with Value Engineering. The processing of solicitation -0010 for the follow-on contract was halted on April 21, 1977, when Artech and Technical Services both protested the SIC code selected to the Size Appeals Board of the Small Business Administration (SAB/SBA). Artech and Technical Services argued that solicitation -0010 should carry a SIC of 8911 which related to engineering services and which would limit award under the 100-percent small business set-aside to firms with average annual receipts for the preceding 3 fiscal years of not more than \$7.5 million. On May 2, 1977, MERADCOM furnished copies of the first and second extensions of contract -0078 to Technical Services in response to its Freedom of Information Act request. The SAB/SBA decided on May 12, 1977, that the 3621 SIC code, permitting businesses employing up to 1,000 persons to compete, was incorrect for solicitation No. -0010 and that the correct SIC code was 8911 which limited competition to much smaller businesses under the \$7.5 million annual receipts limitation. The contracting officer was of the opinion that no SIC 8911 firm could meet MERADCOM's requirements and that competition could not be expected if a SIC code of 8911 were used. Therefore, on May 20, 1977, the -0078 contract with Value Engineering was modified a third time extending the contract through September 30, 1977, while MERADCOM filed a petition for reconsideration with the SAB/SBA. Value Engineering also petitioned the SAB/SBA for reconsideration during this period. MERADCOM filed its petition for reconsideration with the SAB/SBA on June 17, 1977. MERADCOM's request for reconsideration of the May 12, 1977, decision was denied by the SAB/SBA on August 15, 1977, although the written opinion was not issued until September 26, 1977.

MERADCOM next decided to rewrite the statement of work under solicitation -0010 to break-out the requirement

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into three separate solicitations in order to set aside part of the requirement for small businesses while permitting unrestricted competition for those tasks which MERADCOM believed were beyond the capability of small businesses within the \$7.5 million annual receipts limitation of SIC 8911. As a result, preparation of solicitations Nos. DAAK70-78-Q-0005, -0006, and -0007 was begun by MERADCOM. On September 19, 1977, MERADCOM extended contract -0078 with Value Engineering a fourth time, until March 30, 1978, in order to allow time to separate the requirements of solicitation -0010 into the three new solicitations.

On December 1, 1977, solicitations -0005, -0006, and -0007, for the procurement of various engineering services which had previously been covered by solicitation -0010, were issued. Solicitation -0007 was a 100-percent small business set-aside for the procurement of "Drafting Services." The SIC selected was 7399 which limited the eligible firms to those having average annual receipts for the 3 preceding fiscal years not in excess of \$2 million. The closing date for receipt of initial quotations was January 9, 1978. Solicitation No. -0006 was a 100-percent small business set-aside for the procurement of "Production Engineering Services." Its SIC was 8911 which limited eligibility to firms with average annual receipts for the 3 preceding fiscal years not in excess of \$7.5 million, and it also had a closing date of January 9, 1978. Solicitation No. -0005 was an unrestricted procurement for the procurement of "Prototype Manufacturing, Engineering Design/Evaluation and Testing," although it indicated a SIC of 3731 (1,000 employees or less). Its closing date was January 16, 1978. Artech appealed the SIC of 3731 used in this unrestricted procurement to the SAB/SBA, and the SAB/SBA decided on March 16, 1978, that the correct SIC for this procurement should have been 8911 (average annual receipts not in excess of \$7.5 million).

Timeliness

Technical Services' December 20, 1977, protest letter was the first protest filed regarding the present matter, and presents two bases for the protest. The first basis for the protest is that all modifications extending contract DAAK02-75-D-0078 with Value Engineering beyond November 20, 1976 (the end of the option period)

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were improper because they were sole-source extensions which should have been competitively procured. The second basis is that solicitations -0005, -0006, and -0007, for the follow-on contracts, contain duplicative requirements (Actech and Sachs/Freeman have also protested the duplicative nature of the solicitations.). Additionally, Sachs/Freeman filed a protest on December 28, 1977, concerning the fact that solicitations -0006 and -0007 are small business set-asides but do not restrict subcontracting to small businesses. The Army has contested the timeliness of each of the above grounds for protest.

Regarding Technical Services' protest of extensions of contract -0078, the modifications which extended contract -0078 with Value Engineering were issued on November 19, 1976; February 18, 1977; May 20, 1977; and September 17, 1977. The administrative report indicated that notification of task orders awarded Value Engineering under the last of these modifications was published in the Commerce Business Daily on October 27, 1977, and that notices of task orders under earlier modifications were similarly published in January, April, May, July, September and October 1977. Technical Services stated in its initial protest letter that it first learned of these procurement actions through the October 27, 1977, notice in the Commerce Business Daily. However, the record shows that on May 2, 1977, Technical Services was furnished copies of the modifications issued on November 19, 1976, and February 18, 1977, pursuant to its Freedom of Information Act request. Thus, Technical Services had actual knowledge of the first two extensions on or about May 2, 1977. Moreover, our Office has held that publication in the Commerce Business Daily is constructive notice of the basis for protest. Rescom Incorporated, B-184634, September 10, 1975, 75-2 CPD 142. Since Technical Services as well as the other protesters must be charged with either actual or constructive knowledge that contract -0078 had been extended beyond November 20, 1976, the end of the option period, the protest relating to the first three contract -0078 extensions was filed in our Office many months after the basis for the protest was known or should have been known. It is, therefore, untimely filed and not for consideration on the merits. 4 C.F.R. § 20.2(b)(2) (1977).

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The last extension of contract -0078 was effected by modification issued September 19, 1977, and notification of task orders awarded Value Engineering under it was published in the Commerce Business Daily on October 27, 1977. Technical Services orally protested this and all other contract -0078 extensions to the Army Materiel Development and Readiness Command (DARCOM) on November 9, 1977. In its letter to our Office dated April 24, 1978, the protester stated that on November 23, 1977, the Associate Director of Procurement, DARCOM, orally responded to the protest and advised Technical Services that "he would do nothing to correct the procurement deficiencies." Technical Services also referred to this oral response to its protest in its letter dated November 15, 1977 (the correct date should probably be November 25, 1977), to the Deputy for Materiel Acquisition, wherein it was stated that, "Rather than execute the necessary, proper, and available remedies to eliminate the illegal arrangement while still providing mission support, DARCOM bestowed its blessings upon the arrangement and stated to the undersigned that no further action would be taken." Technical Services explains that it pursued the matter with the Department of Materiel Acquisition and, since it had not received a written reply by December 20, 1977, it assumed that no reply would be received and filed its protest with our Office on that day.

It is clear that Technical Services had actual knowledge on November 23, 1977, that DARCOM would not sustain its protest. Even though Technical Services continued to pursue the matter with the Army, DARCOM's oral denial of the protest on November 23, 1977, constituted the initial adverse agency action. National Flooring Company, B-188019, February 24, 1977, 77-1 CPD 138. Since our Bid Protest Procedures (see 4 C.F.R. § 20.2(a) (1977)) provide that a timely protest filed initially with the contracting agency must be filed with our Office within 10 working days of the protester's receipt of the initial adverse agency action in order to be considered by our Office, this issue was untimely filed. Technics, B-190984, March 9, 1978, 78-1 CPD 188. The fact that Technical Services continued to pursue the protest with the Department of the Army after receiving a negative response from DARCOM does not affect the 10-day requirement for a timely filing with our Office. See Westwood Pharmaceuticals, Inc. - reconsideration, B-191443, May 23, 1978, 78-1 CPD 392; National Flooring Company, supra. Accordingly, this issue will not be considered further on the merits.

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Regarding the allegedly duplicative nature of solicitations -0005, -0006, and -0007, two specific areas of the solicitations have been singled out as the areas of protest. The first area was initially protested by Technical Services on December 20, 1977, and involves the fact that the statements of work in all three solicitations call for the contractor to perform drafting services and that solicitations -0005 and -0006 both call for production engineering services. Artech and Sachs/Fraeman have also protested this matter. The second area of alleged duplication was first protested by Artech in its letter of January 16, 1978, which was filed in our Office on January 18, 1978, and concerns the fact that the laboratory facilities required of a contractor under solicitation -0005 are very similar to the laboratory facilities required under solicitation -0006. The Army has contested the timeliness of these protests.

Under section 20.2(b)(1) of our Bid Protest Procedures, alleged improprieties in any solicitation which are apparent prior to the closing date for receipt of initial proposals must be filed before the closing date for receipt of initial proposals if the protest is to be considered. The closing date for solicitation -0005 was January 16, 1978. Therefore, the protest of the allegedly duplicative work statements was received in a timely manner, while the protest of the allegedly duplicative laboratory facilities requirements filed on January 18, 1978, is untimely and will not be considered on the merits.

The protesters also state that if any of the protest issues are untimely, such issues should still be considered because they are "significant" issues and therefore are appropriate for consideration under section 20.2(c) of our Bid Protest Procedures. We have held that this exception to our timeliness rules has reference to a principle of widespread procurement interest and must be exercised sparingly so that the timeliness standards do not become meaningless. D. A. Cruciani and Frank A. Agnone, B-187958, December 21, 1976, 76-2 CPD 518. We have also indicated that where the merits of a protest involve issues which have been considered in previous decisions, such issues are not "significant" within the meaning of section 20.2(c) of our Bid Protest Procedures, Delta Scientific Corporation, B-184401, August 3, 1976, 76-2 CPD 113. Since this Office has previously issued decisions concerning extensions of contracts beyond the end of the original contract term

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under circumstances substantially similar to those involved here, we cannot conclude that the present issues are "significant" under our Bid Protest Procedures. See, for example, Intermem Corporation; B-187607, April 15, 1977, 77-1 CPD 263.

Regarding Sachs/Freeman's protest that solicitations -0006 and -0007 should contain clauses restricting subcontracting to small businesses since these solicitations are 100-percent small business set-asides, we find this issue to have been timely filed since it was received in our Office on December 28, 1977, well before the closing dates of January 9, 1978, set for those solicitations.

DISCUSSION

All three protesters have protested the alleged duplication of the work statements in solicitations Nos. -0005, -0006, and -0007. The issue was succinctly summarized by Sachs/Freeman in its letter of January 13, 1978, wherein it was stated, in pertinent part:

"* * * Inspection of all three RFP's, specifically Section F, will point out one very apparent fact. The Statement of Work for each RFP is identical except that one additional item is added in each one, to wit;

DAAK70-78-Q-0007 - Drafting,

DAAK70-78-Q-0006 - Production Engineering
plus Drafting,

DAAK70-78-Q-0005 - Fabrication plus Pro-
duction Engineering plus Drafting.

"It is readily apparent that judicious use of a contract resulting from RFP DAAK70-78-Q-0006 negates the requirement of a contract resulting from RFP DAAK70-78-Q-0007. Expanding this one step further: judicious use of a contract resulting from RFP's DAAK70-78-Q-0005 negates the requirement of a contract resulting from RFP's DAAK70-78-Q-0006 and DAAK70-78-Q-0007.

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"* * * It is, however, recognized that contract work resulting from award of either contract [-0006 and -0007] could, at best, be minimal because of the all-encompassing nature of the work of DAAK70-78-Q-0005 which is not restricted to small business."

Artech also expressed a fear that the duplication could provide a vehicle by which MERADCOM could evade the intent of the small business set-asides in solicitations -0006 and -0007. The protesters desire a ruling that the alleged duplication of the services being procured under solicitation -0005 (the unrestricted solicitation) be eliminated from that solicitation and added to the work statements of solicitation -0006 and -0007 (the small business set-asides).

The Army has responded in pertinent part:

"[The] allegation to the effect that RFQs [Requests for Proposals] -0005, -0006, and -0007 call for identical work, permitting most or the majority of drafting and production engineering to be placed under RFQ -0005, is also considered not supportable. [The protesters are] apparently arguing that portions of the work statement must stand alone; and thus the portions of the three solicitations describing drafting constitute three identical contracts for the same requirement, and the portions of the work statements in the RFQs -0005 and -0006 describing production engineering constitute two identical contracts for the same requirements. While the wording in the work statements describing drafting and production engineering appears similar, the circumstances under which task orders are to be issued are not overlapping. As indicated in RFQ -0005, production engineering and drafting work under that solicitation is to be performed only when associated with the engineering analysis/redesign/fabrication work required by the solicitation. In other words, the basic purpose of RFQ -0005 is to cover tasks under which the basic design equipment will be redesigned or modified, including the engineering analysis/redesign effort

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required prior to or in conjunction with manufacturing, and the production engineering and drafting contemplated by the work statement is to be performed only in support of the effort resulting in redesign or modification of the equipment to incorporate the improved design into a technical data package. RFQ -0006, on the other hand, calls for production engineering efforts on equipment for which the basic design has been finalized. The primary effort will be directed to determining the producibility of the item and alternate or improved manufacturing methods, and drafting work as indicated on the solicitation will be performed only as a direct result of the producibility evaluations. RFQ -0007 is strictly for drafting only, and does not require engineering or engineering evaluation/redesign/fabrication effort, or production engineering. The contractor under the contract resulting from RFQ -0007 will be tasked to provide final or revised drawings resulting from Government in-house redesign effort or engineering changes which are the result of configuration management actions." [Underscoring supplied.]

The Army has also pointed out that the subject solicitations contain the Government estimate of the total number of man-hours of contract performance under each solicitation. Section C.21 of each solicitation reveals a Government estimate of 60,000 man-hours under -0005; 120,000 man-hours under -0006; and 20,000 man-hours under -0007. The Army argues that the protesters' contention that a minimum amount of work will be tasked under -0006 and -0007 and that most of the work will be performed under -0005 is premature and groundless in view of the estimates contained in each solicitation.

We have examined the subject solicitations and agree with the Army that, although the work statements are nearly identical in part, when the work statements are read in their entirety it is obvious that different circumstances are contemplated. Solicitation -0007 calls for drafting services in Section F. Solicitation -0006 also calls for drafting services, but only when required as a result of production engineering services described in Section F-1. Solicitation -0005 also requires drafting services, but

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only in conjunction with prototype manufacturing, engineering evaluation/redesign, documentation and production engineering services described in Section F. Similarly, both -0006 and -0005 require production engineering services of the contractor. However, production engineering required under -0005 is only to be performed as a result of prototype manufacturing and engineering evaluation/redesign, documentation services described in Section F of the solicitation.

We are unaware of any procurement laws or regulations which prohibit a contracting activity from using similar or even identical language in more than one solicitation to describe the services required. It is especially unobjectionable in the present case because the work statements quite clearly indicate that similar services may be required but under different circumstances. See, for example, University of New Orleans, B-184194, January 14, 1976, 76-1 CPD 22. The drafting services called for in solicitations -0005 and -0006 are required only in connection with the other services (production engineering, prototype manufacturing, engineering evaluation/redesign, documentation and production engineering) specified in those solicitations. Solicitation -0007, however, requires the contractor to perform drafting services generally and makes no reference to drafting services associated with production engineering, prototype manufacturing, engineering evaluation/redesign, documentation and production engineering. Likewise, the production engineering services called for by solicitation -0005 are required only in connection with prototype manufacturing, engineering evaluation/redesign, documentation and production engineering services, while solicitation -0006 requires production engineering services generally and makes no reference to production engineering associated with prototype manufacturing, engineering evaluation/redesign, documentation and production engineering services. Accordingly, the drafting and production engineering services which are indicated in the solicitations are separate and distinct although the solicitations may at first appear to be duplicative. We assume that the contracts will be properly administered by the contracting activity and that task orders will be issued to the proper contractors in accordance with the provisions of and under the circumstances enumerated in the contracts. Moreover, we have no reason to question

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the estimate of man-hours stated in each solicitation since no evidence of bad faith or fraud has been presented by the protesters. Central Brace Company, B-179788, January 29, 1974, 74-1 CPD 38. Additionally, all of the protested solicitations indicated that a minimum of \$5,000 of supplies and services will be ordered by the contracting activity, but none of the solicitations obligate the contracting activity to purchase all of its required supplies and services from any particular contractor during the contract periods. As long as the Government purchases the required minimum, it will have fulfilled its contractual obligations. The protesters' allegation that solicitation -0005 may be used to take work from contracts awarded under solicitations -0006 and -0007, thereby circumventing the small business set-asides of solicitations -0006 and -0007, has not been supported by any documentary evidence and is purely speculative. Accordingly, the protesters have not met their burden of proof on this element of the protest and it is, therefore, denied. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415.

In the alternative, the protesters contend that solicitation -0005, as well as -0006 and -0007, should be set aside exclusively for participation by small businesses. They argue that, because the services required under solicitations -0005, -0006, and -0007 were originally covered by solicitation -0010, a 100-percent small business set-aside, all 3 of the present solicitations should also be 100-percent set-asides.

The administrative reports note that the SAB/SBA decided that the 3621 SIC Code permitting businesses with up to 1,000 employees to compete, originally used in solicitation -0010, was incorrect and that the correct SIC should have been 8911, limiting competition to much smaller firms with average annual receipts of \$7.5 million or less. The reports state that the contracting officer and the MERADCOM small business specialist made an extensive survey to determine if there was a reasonable expectation that offers would be obtained from a sufficient number of responsible small businesses in accordance with Armed Services Procurement Regulation (ASPR) § 1-706.5 (1976 ed.). The contracting officer consulted with MERADCOM engineers and determined that not a single 8911 small business company could meet the requirements and MERADCOM petitioned the SAB/SBA for reconsideration. The SAB/SBA affirmed its earlier

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decision on August 15, 1977. The opinion was issued on September 26, 1977, and the Army points out that the SAB/SBA indicated that if inadequate competition from 8911 firms would be obtained, then the contract would be a poor choice for the set-aside program. MERADCOM proceeded to break-out the requirements covered by solicitation -0010 into solicitations -0005, -0006, and -0007 since the contracting officer still remained convinced that no 8911 company could fulfill all of the requirements.

On October 18, 1977, the Small Business Administration Region III representative met with MERADCOM's Director of Procurement and Production and the contracting officer. It was agreed at that meeting that solicitations -0006 and -0007 should be 100-percent small business set-asides, while solicitation -0005 should be unrestricted because of anticipated lack of competition from known qualified small businesses. It was also agreed that solicitation -0005 should carry a SIC code of 3731 "Shipbuilding and Repairing."

We have held that while it is the policy of the Government to award a fair proportion of supplies and services to small business concerns, there is nothing in the Small Business Act which mandates that there be a set-aside for small business as to any particular procurement. Such decision is within the authority and discretion of the contracting officer. McCotter Motors, Inc., B-188761, B-188839, B-188975, January 12, 1978, 78-1 CPD 29 at p. 7. Even where we may not agree with a set-aside determination, we are reluctant to substitute our judgment for that of the contracting officer in the absence of a clear showing of abuse of discretion. Par-Metal Products, Inc., B-190016, September 26, 1977, 77-2 CPD 227.

In the present case, we note that the contracting officer's determination was arrived at after an extensive survey and was concurred in by the Small Business Administration Region III representative. We believe that the Department of Defense policy of placing a fair proportion of contracts with small business concerns (ASPR § 1-702(a) (1976 ed.)) has been complied with in the present procurement. See B-150887, April 25, 1963. Moreover, the fact that the original solicitation -0010 was a 100-percent set-aside is not controlling, since

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under ASPR § 1-706.5(a)(1) the contracting officer must make a determination that there is a reasonable expectation that offers will be obtained from a sufficient number of responsible small business concerns before setting aside any particular procurement. See, for example, 46 Comp. Gen. 102 (1966). Accordingly, this element of the protest is denied.

The protesters also contend that the SIC stated in solicitation -0005 was erroneous. Solicitation -0005 indicated a SIC of 3731 which refers to the manufacture and repair of ships and which, in the case of a set-aside, would allow a firm with up to 1000 employees to compete. Artech appealed the SIC to the SAB/SBA, and on March 16, 1978, the SAB/SBA determined that the correct SIC should be 8911 which refers to engineering and architectural firms and which would, in the case of a set-aside, allow firms with up to \$7.5 million average annual receipts to compete. The protesters allege that, if the correct SIC had been applied, Value Engineering the eventual awardee, would not have been eligible for award.

At a conference on April 17, 1978, on these protests, a Small Business Administration representative indicated that since solicitation -0005 was unrestricted, the SIC indicated did not make any practical difference. All interested parties were given an opportunity to address this point both at the conference and in their written comments on the conference, but none gave any indication that the correct SIC code would have made any practical change in this unrestricted procurement. We are unaware of any law or regulation which would have changed the outcome of this procurement regardless of the SIC utilized. Since solicitation -0005 was not restricted to small business participation, Value Engineering would have been eligible for award even if the SIC of 8911 had been used. Accordingly, there has been no prejudice to the protesters or other offerors and the protest on this point is denied.

Sachs/Freeman also protested the fact that solicitations -0006 and -0007, both 100-percent small business set-asides, contained no clauses restricting subcontracting to small business. Sachs/Freeman contends that a small business might be awarded the prime contract under either solicitation and then subcontract to a firm which is not a small business. Sachs/Freeman fears that, in

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this manner, a large business might obtain the majority of the work while using a small business to funnel the funds to itself.

The only subcontracting clause of which we are aware that was required to be included in the solicitations is the Utilization of Small Business Concerns clause set forth in ASPR § 7-104.14(a) (1976 ed.), which was incorporated by reference in both solicitations. This clause requires the contractor to accomplish the maximum amount of subcontracting with small business concerns that is consistent with efficient performance of the contract. Furthermore, Sachs/Freeman's contention that a large business might obtain the subcontract and use a small business prime contractor to funnel the funds to itself is not supported by probative evidence and appears to be purely speculative. The protester has not met its burden of proof and this element of the protest is therefore, denied. Fire & Technical Equipment Corp., supra.

In its comments relating to the April 17, 1977, conference on these protests, Artech protested that MERADCOM did not notify our Office of its intent to make award under the protested solicitations prior to resolution of the protests as required by ASPR § 2-407.8 (b)(2).

On March 29, 1978, we were informally notified that award would be made due to urgency on solicitation -0005 prior to resolution of the protest, and on May 2, 1978, we were given informal notification that awards under solicitations -0006 and -0007 would be made on grounds of urgency prior to resolution of the protests. Moreover, we have held that any deficiencies in the notification are regarded as procedural irregularities which do not affect the validity of the award. LaBarge, Incorporated, B-190051, January 5, 1978, 78-1 CPD 7.

For the above-stated reasons, the protests are dismissed in part and denied in part.


Deputy Comptroller General
of the United States



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

A. Sannicelli
P.L.F.

IN REPLY
REFER TO
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August 25, 1978

The Honorable Peter H. Kostmayer
House of Representatives

Dear Mr. Kostmayer:

We refer to your letter to our Office dated March 9, 1978, regarding the protest of Technical Services Corporation against the award of contracts under solicitations Nos. DAA70-78-Q-0005, -0006, -0007, and contract No. DAAK02-75-D-0078, issued by the United States Army Mobility Equipment Research and Development Command, Fort Belvoir, Virginia.

By decision of today, copy enclosed, we have denied the protest.

Sincerely yours,

T. G. Keller
Deputy Comptroller General
of the United States

Enclosure