

DECISION



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

Golden

26179

FILE: B-211479.2

DATE: September 2, 1983

MATTER OF: Lavelle Aircraft Company--Reconsideration

DIGEST:

Where request for reconsideration fails to demonstrate any erroneous fact or law, prior decision is affirmed.

Lavelle Aircraft Company (Lavelle) requests reconsideration of our decision in Lavelle Aircraft Company, B-211479, August 2, 1983, 83-2 CPD _____, in which we denied Lavelle's protest that a total small business set-aside, invitation for bids No. DAAA09-83-B-4629, issued by the United States Army Materiel Development and Readiness Command (Army), should be canceled and the requirement resolicited because Lavelle failed to receive a copy of the solicitation prior to bid opening. Lavelle contended that the Army violated section 223(a), Pub. L. No. 95-507, 92 Stat. 1757, and implementing Defense Acquisition Regulation § 1-1002.1 (Defense Acquisition Circular No. 76-24, August 28, 1980), which provide that a small business, upon its request, shall be provided with a copy of bid sets and specifications concerning a particular contract.

We affirm our decision.

We determined that the record did not show evidence of a conscious or deliberate effort to exclude Lavelle from participating in the competition. We noted that under our decisions, specifically citing Scripto, Inc., B-209450, November 9, 1982, 82-2 CPD 431, where there is no evidence of a conscious or deliberate effort to exclude a bidder from participating in the competition, we will not require resolicitation where adequate competition resulted in reasonable prices.

Our conclusion was based on the record which showed reasonable agency conduct under the circumstances. The Army had made a good-faith, although unsuccessful, effort to send timely a copy of the bid package to Lavelle, following an apparent exhaustion of bid sets due to 84 requests received prior to Lavelle's. We also found that Lavelle had

026592

contributed to its inability to compete by waiting until the Friday before a Monday bid opening to contact the agency concerning its failure to receive a bid package after its request almost a month before. We also found that since 84 bid packages were issued and eight bids received, we could not conclude the competition was inadequate.

Lavelle argues that we misconstrued the law and regulation, that the agency is required to honor a request for a bid set from a small business, and that the suggestion in our decision that motivation for the refusal is relevant is not supported by the statutory language. Lavelle states that as we acknowledged in our decision, the statute becomes operative when a small business request for a bid set is refused, Alpha Carpet & Upholstery Cleaners, Inc., B-200944, February 5, 1981, 81-1 CPD 69, and that, here, there was a refusal and, thus, the law and regulation were violated. Finally, Lavelle points out that our reference to the legislative history that the statute was "not intended to allow small businesses routinely to request copies of every single procurement solicitation on agency sales" is not relevant to the protest. Lavelle advises it has never engaged in such activity and such an inference that it has is without foundation. Lavelle reports it was ready, willing and able to compete and was denied an opportunity to bid.

Lavelle has not demonstrated that our decision contained any error in fact or law. Although the statute and regulation require that an agency provide a copy of the bid package to a small business upon its request, it is our view that the statute does not require, nor did the Congress intend, that this law be applied inflexibly in all circumstances without consideration of the agency's conduct or the impact on the particular procurement. In our decision, we referred to the legislative history to indicate Congress' apparent recognition that there were limits to the application of the statutory requirement, and that it should not be rigidly applied to prevent award or require resolicitation in every instance where a small business fails to receive a bid package after requesting a bid package from an agency. The clear purpose of the statute is to afford small business competition opportunities. This was accomplished here as this is a total small business set-aside and presumably the 84 firms sent bids and the eight bidders were small businesses.

In Alpha, supra, we found that there was no agency refusal as contemplated by the statute to provide a bid

package where the agency inadvertently failed to solicit the incumbent contractor. Similarly, here, we found no evidence of a conscious or deliberate effort to exclude Lavelle from bidding and, in fact, found evidence of an attempt by the Army to comply with the statute. Further, as noted above, Lavelle failed to advise the agency of its failure to receive a copy of the solicitation until the Friday before bid opening on Monday.

Based on these circumstances, we affirm our denial of Lavelle's protest.

Narry R. Van Cleve
for Comptroller General
of the United States