



set-asides, should be amended, or canceled and the requirements resolicited, to allow competition by all small businesses since the services being procured previously have been successfully performed under small business set-aside contracts for these same requirements, and as such are covered by new interim regulations promulgated by the Department of Defense. These new interim regulations prohibit SDB set-asides for a product or service which has been previously acquired under a small business set-aside.

We dismiss the protests without obtaining reports from the agencies, since it is clear from the protests that they are without legal merit. 4 C.F.R. § 21.3(f) (1987).

All six solicitations were issued as total set-asides for SDB's pursuant to Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.501-70 and 219.502-72, 52 Fed. Reg. 16,263, 16,266 (1987). This special category of set-aside was authorized by section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986), which establishes a Department of Defense (DOD) goal of awards to SDBs of 5 percent of the dollar value of total contracts to be awarded by DOD for fiscal years 1987, 1988, and 1989. Section 1207(e) directs the Secretary of Defense to "exercise his utmost authority, resourcefulness and diligence" to attain the 5 percent goal and permits the use of less than full and open competitive procedures to do so, provided that contract prices do not exceed fair market value by more than 10 percent.

To implement this statutory mandate, DOD's Defense Acquisition Regulatory (DAR) Council drafted an interim rule which amended various DFARS provisions and established the procedures for conducting SDB procurements. The interim rule was published on May 4, 1987, and was made effective for all DOD solicitations issued on or after June 1, 1987. 52 Fed. Reg. 16,263. All six solicitations at issue here were issued after June 1, 1987, but before March 21, 1988.

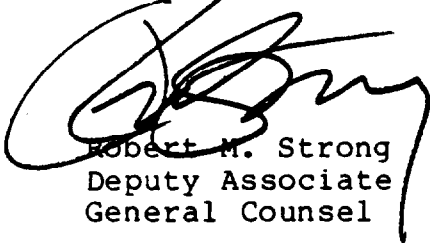
After issuing the interim rule and reviewing public comments, the DAR Council prepared draft revisions to the rule. On February 19, 1988, the DAR Council published a second interim rule. See 53 Fed. Reg. 5,114 (1988). This rule became effective on March 21, and carries a 30-day comment period. Among other changes, the February 19 rule provides that SDB set-asides will not be conducted when a product or service has been previously acquired successfully by the contracting office on the basis of a small business set-aside under Federal Acquisition Regulation (FAR) § 19.501(g). 53 Fed. Reg. 5,123.

The protesters object to the inclusion of the subject solicitations within the SDB set-aside program as embodied in the initial SDB set-aside rule effective for solicitations issued on or after June 1, 1987. While the protesters concede that the initial rule was in effect when the solicitations were issued, they argue that the solicitations are now covered by the second interim rule, published February 19 and which prohibits SDB set-asides for a product or service which has been previously acquired successfully under a small business set-aside.

We do not agree. As we pointed out in a recent decision, Techplan Corp., American Maintenance Co., B-228396.3, B-229608, Mar. 28, 1988, 88-1 CPD ¶ \_\_\_\_\_, the February 19 Federal Register notice for the second interim rule indicates that the new rule was to be effective on March 21. We ruled in Techplan that the February 19 Federal Register notice did not specifically require application of the new rule to previously issued solicitations, and, in our view, the reasonable interpretation of the rule was that it applied only to solicitations issued on or after March 21. Consistent with this view, in a February 17 memorandum submitted to our Office by the Navy, the DAR Council indicated that the February 19 rule was effective only for solicitations issued on or after March 21.

Since all six of the solicitations at issue here were issued before March 21, they are covered by the first interim rule, which does not contain an exclusion for procurements which have been previously set aside for small businesses and which we have found to have been a legally permissible implementation of the 1987 Defense Authorization Act requirements. See Techplan Corp., American Maintenance Co., B-228396.3, B-229608, supra.

The protests are dismissed.



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