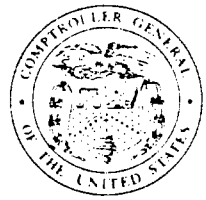
DECISION



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

66183

FILE: B-184822 DATE: November 18, 1975

MATTER OF: Joe R. Stafford

97715

DIGEST:

1. Where significant portion of SBA solicitation for 188 nationwide audits involved revision of "Audit Guide" and SBA desired only one revised version thereof, protester's contention that solicitation is unduly restrictive and should be revised to include regional audit is without merit. Record further indicates that SBA requirement for one revised version of "Audit Guide" is reasonable and could not be fulfilled by multiple regional audits.

2. Protester's allegation that SBA erred in not making either total or partial small business set-aside is without merit since severability of procurement is required for partial small business set-asides and record indicates impossibility of this here. For total set-aside FPR requires reasonable expectation of sufficient number of bids to insure award at reasonable price. SBA's determination that such expectation did not exist here is supported by record and GAO will not question agency judgment absent clear showing of abuse of discretion.

Mr. Joe R. Stafford, a Certified Public Accountant, has protested the provisions of request for proposals (RFP) No. 76-1, issued by the Small Business Administration (SBA) on July 23, 1975. The solicitation is for 188 compliance audits of SBA borrowers on a nationwide basis in accordance with SBA "Compliance Audit Guide for 7(a) Business Loans" ("Audit Guide"). Additionally, the solicitation provides for revision of the "Audit Guide" based on the contractor's experience in performing the contemplated compliance audits.

Mr. Stafford has two principal grounds for his protest: (1) there is no provision in the solicitation for state or regional awards, thereby effectively eliminating "the 10,000 CPA firms that do not have nationwide offices from participating in this procurement" and (2) the SBA erred in its determination not to make the solicitation a 100-percent or partial small business set-aside.

In effect, Mr. Stafford in his first allegation has charged that the solicitation is unduly restrictive; that the Government's needs can be satisfied equally well with state or regional awards, as with one national award for compliance audits.

The SBA takes the position that state or regional awards could not be made here because "[a] significant part of the work to be performed * * *" was the above-noted "Audit Guide" revision, and state or regional awards would result in numerous versions of the "Audit Guide" rather than the one version desired by the SBA.

In Galion Manufacturing Company, et al., B-181227, December 10, 1974, 74-2 CPD 319, we summarized our position on unduly restrictive solicitations as follows:

> "* * * The procurement officials involved with this solicitation have determined what they believe to be the requirements that are sufficient to meet the Government's minimum needs. In this regard, our Office has consistently taken the position that the preparation and establishment of specifications to reflect the minimum needs of the Government are matters primarily within the jurisdiction of the procurement agency, to be questioned by our Office only when not supported by substantial evidence. Matter of East Bay Auto Supply, Inc., B-180434, 53 Comp. Gen. 771, (1974). Specifications should be drafted to maximize competition, B-172006, June 30, 1972; however, we will not substitute our judgment for that of the contracting agency '* * * unless there is clear and convincing evidence that the agency opinion is in error and that a contract awarded on the basis of such specifications would, by unduly restricting competition * * * be a violation of law.' 40 Comp. Gen. 294, 297 (1960). Moreover, while our Office will determine whether specifications as written are unduly restrictive of competition, the fact that a particular prospective contractor may be unable or unwilling to meet the minimum requirements for supplying the Government's needs is not sufficient to warrant a conclusion that the specifications are unduly restrictive. 49 Comp. Gen 857, 862 (1970). * * *"

Based on the record before us we find that the SBA has reasonably supported its use of its solicitation for nationwide audits as opposed to regional audits. As noted supra, the SBA contends that the "Audit Guide" revision was a significant part of the work to be performed and that such revision had to be done on a nationwide basis in order to produce only one version of the revision. Although Mr. Stafford contends that the revision was not a major portion of the work to be performed, there is nothing in the record to substantiate this allegation. The current SBA "Audit Guide" is 144 pages, including appendices. It is our opinion that revision of such a document would constitute a substantial undertaking. Further, we agree with the SBA that only a solicitation national in scope could produce the desired result, i.e., one version of a revised "Audit Guide." Therefore, we conclude that the SBA has reasonably supported its use of a nationwide procurement under the facts and circumstances of the record before us. We presume in this regard that once the current version is accomplished the SBA will consider whether future procurements for compliance audits are suitable for solicitation on a state or regional basis.

With regard to the SBA's alleged failure to set aside the instant procurement in whole or in part for small business participation, Mr. Stafford alleges violations of the Small Business Act (15 U.S.C. § 644 (1970)) and the Federal Procurement Regulations (FPR) (1964 ed.).

Section 2 of the Small Business Act, 15 U.S.C. § 644 (1970), supra, provides that small business concerns shall receive any award or contract or any part thereof when it is determined to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government is placed with small business concerns.

Sections 1-1.706-5 (1964 ed. amend. 101) and 1-1.706-6 (1964 ed. amend. 77) of the FPR, which implements the Small Business Act, provide for total and partial set-asides for small business concerns under appropriate circumstances.

In this regard, FPR § 1-1.706-6, supra, (partial set-asides) provides inter alia for partial set-asides where "[t]he procurement is severable into two or more economic production runs or reasonable lots (emphasis supplied)." In the instant situation

a partial set-aside was not feasible due to SBA's reasonable requirement for only one revised version of its audit guide, as discussed, supra. Therefore, under the circumstances present here, a partial small busines set-aside was not appropriate.

Additionally, FPR § 1-1.706-5, supra, (total set-aside) provides that the entire amount of an individual procurement shall be set aside for exclusive small business participation "where there is a reasonable expectation that bids or proposals will be obtained from a sufficent number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists * * *."

The SBA informs us that this is their initial procurement of such services; that all such audits have previously been conducted by SBA personnel. Consequently, the SBA argues that it could not be determined that a reasonable expectation existed that proposals would be received from a sufficient number of small business concerns, to insure awards at reasonable prices.

More importantly, however, Mr. Stafford in effect concedes in his protest letter that CPA firms which qualify as small business concerns do not have the capacity to conduct nationwide audits. Implicitly at least, Mr. Stafford therefore agrees with the SBA that few if any small business CPA concerns could be expected to submit proposals for the instant procurement. Yet as noted above, pursuant to FPR § 1-1.706-5, supra, a reasonable expectation must exist that proposals will be received from a sufficient number of small business concerns to insure awards at reasonable prices. Therefore, a total small business set-aside was not justified by the facts before us.

With regard to the administrative determination of whether a reasonable expectation for adequate competition exists, we have held that:

> "* * * the determination as to whether a reasonable expectation exists for adequate competition from small business firms is within the ambit of sound administrative discretion [of the agency] and we will not substitute our judgment for that of the contracting officer in the absence

of a clear showing of abuse of the discretion permitted him. B-171693, April 22, 1971; B-168534 (1) and (2), January 16, 1970; 45 Comp. Gen. 228 (1965)." Dewitt Transfer and Storage Company, B-182635, March 26, 1975, 75-1 CPD 180.

Therefore, we believe that the SBA properly exercised its discretion in drafting the instant solicitation and was justified in not setting the procurement aside for small business participation.

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States