

ARSENOR



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: XMCO, Inc.
File: B-228357
Date: January 26, 1988

DIGEST

1. Protester's allegation that, based on a prior procurement, request for proposal should have been a repetitive set-aside for small business is untimely raised after closing date for receipt of proposals because information which formed the grounds of protest was publicly available at the time the protested solicitation was issued and could have been discovered if it had been diligently pursued prior to closing date for receipt of proposals.
2. Request for proposal was not issued as a partial set-aside for small business where RFP clearly indicated that two awards were to be "100 percent" set-aside for small business, it did not contain required partial set-aside clauses, and it contained terms which were inconsistent with the conduct of a partial set-aside.
3. General Accounting Office does not consider protest issues which are essentially made on behalf of other potential offerors who themselves may properly protest as interested parties.
4. Although the record does not disclose that the contracting officer executed a determination of urgency prior to award which would have been necessary in order to waive pre-award notice to unsuccessful offerors on a small business set-aside, this deficiency does not affect the validity of the award since the protester was not the next small business in line for award under the set-aside.
5. Protester initially raised issues concerning an alleged failure of the agency to conduct a cost and price analysis which was contested in the agency report. Since the protester did not pursue the issue in its subsequent comments, the matter is considered abandoned and will not be considered.

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6. Protest issues concerning alleged solicitation deficiencies, such as challenges to restrictive specifications, must be raised prior to the closing date for receipt of proposals.

DECISION

XMCO, Inc. protests the manner in which the Army conducted small business set-asides in connection with request for proposals (RFP) No. DAAA21-87-R-0061 for fixed-price indefinite quantity contracts for integrated logistics support (ILS) services.

We dismiss the protest in part and deny it in part.

The RFP was issued on June 19, 1987, with a closing date of July 21. By its terms, three parallel awards were contemplated; the Army reports that this arrangement was required to insure that the awardees had the capacity to perform these services as the need for them arose. The Army and the Small Business Administration (SBA) jointly agreed to set aside two of the three awards exclusively for small business. Thus, the solicitation provided that:

"Upon conclusion of negotiations and receipt of Best and Final Offers, three awards will be made as follows: Two awards will be made to the TWO lowest priced 'acceptable' responsible offerors who are classified as Small Business. A THIRD award will be made to the remaining lowest 'acceptable' responsible offeror whether large or small business."

The RFP expressly stated that two of the contracts were "100 percent" set aside for small business.

Seven firms submitted initial offers; at the conclusion of discussions, five firms submitted best and final offers. Of these five, two, including XMCO, offered prices considered to be unreasonably high by the agency. XMCO, which is a small business, submitted the highest of the five offers received at \$6,491,411. Remaining within the range of prices considered reasonable by the agency were the offers of one small business, American Power Jet Company, at \$4,736,516.52, and two large businesses, Diversified Data Corp., at \$3,681,829, and Analytics, Inc., at \$4,961,013.30.

As a result of receiving what he considered unreasonably high prices from two of the small businesses, the contracting officer decided to withdraw one of the two

small business set-asides on August 25, and sought the concurrence of SBA as required by Federal Acquisition Regulation (FAR) § 19.506(a). SBA concurred on September 4. On September 21, three awards were made: two were made to large businesses, Diversified Data and Analytics, and one to a small business, American Power Jet.

XMCO first argues that the Army erred in not setting aside the entire procurement for small business pursuant to FAR § 19.501(g) because the agency had previously procured the same services under a procurement set aside for small business. Generally, protests concerning the nature of a procurement as a set-aside are considered protests of alleged defects which are apparent from the face of the solicitation. Detroit Armor Corp.--Request for Reconsideration, B-227432.2, July 9, 1987, 87-2 CPD ¶ 25. Under our Bid Protest Regulations such defects must be protested prior to the closing date for the receipt of initial proposals. 4 C.F.R. § 21.2(a)(1) (1987).

XMCO maintains, however, that this argument, which was raised long after the July 21 closing date, is timely because it first learned of the prior award to a small business as a result of its receipt of the agency's protest report on November 6. However, the fact that there was a prior award of these services made to a small business under a set-aside was information that was available to the public well before the protested RFP was issued. At the time this solicitation was issued its nature as a set-aside for only two of the three possible awards was evident. Since the information which formed the grounds of protest was publicly available at the time the solicitation was issued and could have been discovered if it had been diligently pursued prior to the closing date for receipt of proposal, we dismiss this argument as untimely raised. Alpha Parts & Supply, B-225401, Jan. 15, 1987, 87-1 CPD ¶ 62.

Next, XMCO argues that the RFP was actually a partial set-aside for small business and that the Army failed to conduct the procurement in accordance with FAR § 19.502, which governs such procurements. In partial set-asides, the non-set-aside portion of the procurement is awarded first, and then further negotiations are conducted with small business offerors with respect to the award of the set-aside portion. See FAR § 19.502-3. XMCO contends that here the Army failed to follow the regulations because it did not negotiate an award price with it for the set-aside portion after the Army made award on the unrestricted portion of the procurement.

We think it is clear from the solicitation that it was not issued as a partial small business set-aside. The RFP stated that the first two contracts were "100 percent" set

aside for small business. They were to be awarded to the lowest small business offerors; only after those awards were made was the unrestricted portion to be awarded. This scheme is inconsistent with the order of award under a partial set-aside where the initial award is to be made to the lowest offeror on the unrestricted portion. Further, the solicitation made no mention of a partial set-aside and did not include the "Notice of Partial Small Business Set-Aside" clause set forth at FAR § 52.219-7. Consequently, the Army was not required to follow the procedures set forth in FAR § 19.502. If XMCO had an objection to the award scheme, which was clearly set forth in the RFP, it should have raised it prior to the closing date for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

XMCO further argues that, even if we view the procurement as consisting of two total small business set-asides, "practicality" demands that the requirements represented by the withdrawn set-aside must be resolicited on an unrestricted basis. The protester's position is based on its speculation that some large businesses which may have declined to participate in the procurement which was two-thirds set-aside may now wish to compete on an unrestricted basis. First, we do not think that XMCO, a small business which would presumably benefit from a restricted solicitation, is the appropriate party to raise this issue on behalf of large business bidders, a class to which it does not belong. See Westinghouse Electric Corp., B-224449, Oct. 27, 1986, 86-2 CPD ¶ 479. Moreover, XMCO was given the opportunity to compete against large and small businesses and ended up being the highest-priced offeror. In fact, had the agency made award of all three contracts on the basis as announced in the solicitation, the protester, as the highest of the three small business offerors, would not have received an award. In view of the fact that both large and small businesses were given a fair opportunity to compete for the requirements, we do not believe that the agency acted unreasonably in withdrawing one of the set-asides and making award under it on an unrestricted basis to an offeror under the original solicitation.

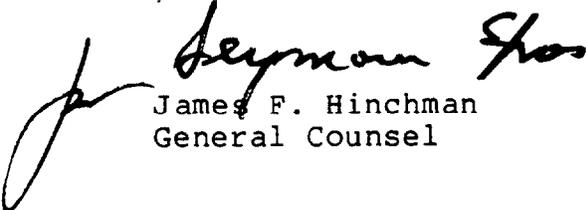
The protester also contends that the agency failed to comply with the requirement in FAR § 15.1001(b)(2) that it notify unsuccessful offerors of the identity of the apparent successful offeror prior to the award of the set-aside contract to American Power Jet. The agency responds that because of the urgency of the requirements it did not issue the notice. While the regulations do provide for a waiver

of the notice if the contracting officer determines in writing that urgency necessitates award without delay, FAR § 15.1001(b)(2), there is no indication in the record that the required written determination was prepared prior to the award. Nevertheless, we do not think that, in the circumstances here present where the protester was not the next small business in line for award, this deficiency affects the validity of the award. See Le Don Computer Services, Inc., B-225451, Jan. 9, 1987, 87-1 CPD ¶ 46.

Also, in its initial protest submission, XMCO argued that the agency acted improperly because it did not conduct a cost and price analysis of the proposals. The agency has contested this issue in its report and the protester has not mentioned the matter in its subsequent comments. Thus, we consider the matter abandoned and will not consider it. Consolidated Devices, Inc.--Reconsideration, B-225602.2, Apr. 24, 1987, 87-1 CPD ¶ 437.

Finally, XMCO has questioned whether the specifications in the RFP were unduly restrictive. We will not consider this matter. As indicated earlier, protest issues which concern alleged solicitation deficiencies must be raised prior to the closing date for receipt of proposals, 4 C.F.R. § 21.2(a)(1), and this protest was filed well after that date.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel