



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Alamo Acoustical Restoration Company
File: B-228429.2
Date: February 16, 1988

DIGEST

1. A prospective offeror bears the risk of nonreceipt of a complete solicitation package when it has notice of the defect in the package several weeks prior to the due date for the receipt of proposals, but makes no attempt to contact the agency to obtain the package until it has been eliminated from the competitive range.
2. The decision to set-aside a procurement for small disadvantaged business is a business judgment within the broad discretion of the contracting officer which will not be questioned unless a clear showing is made that the contracting officer abused his discretion.
3. Where the record indicates that the contracting officer did not have a reasonable expectation that proposals would be received from at least two responsible small disadvantaged businesses, which is later confirmed by the lack of acceptable proposals received from such firms, continuation of the procurement as a small business set-aside, instead of converting it to a small disadvantaged business set-aside, is not objectionable.

DECISION

Alamo Acoustical Restoration Company protests any award of a contract under Air Force solicitation No. F-41800-87-R1627 for maintenance of military family housing at Lackland Air Force Base. Alamo contends that it did not receive a complete solicitation package before the proposal due date and therefore was unable to submit a technically acceptable proposal. Alamo further complains that when the Air Force subsequently provided it with a complete solicitation package it was given insufficient time to respond. Alamo also asserts that the Air Force should have issued the solicitation as a small disadvantaged business (SDB) set-aside.

We deny the protest.

041284

On June 2, 1987, the Air Force synopsisized the solicitation in the Commerce Business Daily (CBD) as a small business set-aside; a subsequent notice appeared in the July 23 CBD. The Air Force issued the solicitation on August 3 to 141 firms. Nine proposals were received, including Alamo's, on September 3, the proposal due date. Alamo's proposal was initially eliminated from the competitive range because it did not include a technical proposal, and for failure to acknowledge all amendments. Thereafter, Alamo was given additional time to amend its proposal. The amended proposal achieved a 10.16 percent evaluation score and was again eliminated from the competitive range.

We carefully scrutinize allegations that a particular firm was not provided an opportunity to compete for a particular contract and take into account all of the circumstances surrounding a firm's nonreceipt of solicitation materials, as well as the agency's explanation. However, the government cannot guarantee that mistakes will never occur, even when proper procedures are followed. With two exceptions, the bidder bears the risk of nonreceipt or delay in receipt of solicitations and amendments. The first exception is where the agency deliberately attempted to exclude a bidder from participating in the procurement. Maryland Computer, Inc., B-216990, Feb. 12, 1985, 85-1 CPD ¶ 187. The second exception involves circumstances where the bidder or offeror availed itself of every reasonable opportunity to obtain solicitation documents but the agency, albeit inadvertently, failed to provide them. See Catamount Construction, Inc., B-225498, Apr. 3, 1987, 87-1 CPD ¶ 374.

There is no suggestion on the record that the agency deliberately attempted to exclude Alamo from participating in the procurement. The Air Force provided notice and opportunity for Alamo to compete by announcing the procurement in the CBD on June 2 and July 23. Alamo did not request a solicitation as a result of these announcements and consequently was not placed on the bidders list at that time. Alamo states that it picked up a solicitation on about August 10, and realized at an August 17 preproposal conference that its package was incomplete. Thus, Alamo was on actual notice that it did not have the complete solicitation package on August 17, and we think it should have been on notice of the defect when it picked up the incomplete solicitation on August 10, because the statement of work as well as other terms and conditions were missing. Although Alamo states that the buyer agreed on August 17 to provide it with a complete package, Alamo apparently never pursued the matter. It simply waited until the date proposals were due and submitted a proposal based on what it knew to be an incomplete solicitation. In our view, Alamo did not avail

itself of every reasonable opportunity to obtain the complete document. Therefore, the fact that Alamo did not receive a complete solicitation package prior to the closing date does not under these circumstances warrant sustaining the protest.

Alamo also complains that once it received the complete package it did not have sufficient time to prepare its proposal. After Alamo was first notified that it had been eliminated from the competitive range it complained to the Air Force that it had not received the complete solicitation package and should not have been eliminated from the competitive range. On September 22, Alamo received a complete solicitation package from the Air Force and was given until September 23 at 4:00 to submit a proposal. The Air Force extended this deadline to September 24. Alamo contends that this was insufficient time to prepare the proposal.

As an initial matter, we question the contracting officer's authority to grant additional time only to Alamo to further respond to the solicitation, as any proposal that Alamo would have submitted after the closing date could not be considered to be anything more than a late modification of its initial proposal which the Air Force could not consider in these circumstances. The government's conduct of its procurements must be subject to clearly defined standards that apply equally to all, so that fair and impartial treatment is assured. To permit one offeror to deliver its amended proposal after the specified closing time would tend to subvert the competitive system. See Silvics, Inc., B-225299, Feb. 24, 1987, 87-1 CPD ¶ 204.

Nonetheless, as a general matter, the issue of sufficiency of time in which to prepare a proposal is one that must be protested before bid opening or the time set for the receipt of proposals. Interior Planning Associates, B-223954, Aug. 22, 1986, 86-2 CPD ¶ 218. Thus, even if the procedures followed were proper, Alamo's October 6 protest of this issue is not timely. 4 C.F.R. § 21.2(a)(1) (1987).

Alamo further argues that the Air Force erred in not making this procurement a SDB set-aside. The SDB set-aside serves a purpose similar to the small business set-aside by ensuring equitable opportunities for SDB participation in government acquisitions. In language similar to the small business set-aside regulations, the implementing regulations for SDB set-asides, Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 19.502.72, 52 Fed. Reg. 16268 (May 4, 1987), require the contracting officer to set-aside an acquisition for exclusive SDB participation if he determines that there is "a reasonable expectation that (1)

offers will be obtained from at least two responsible SDB concerns . . . and (2) award will be made at a price not exceeding the fair market price by more than ten percent."

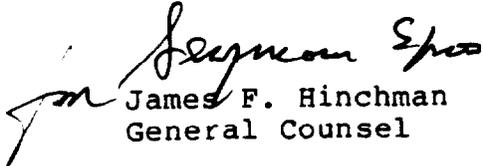
For a small business set-aside this so-called rule of two of the implementing regulation requires the contracting officer to set aside a procurement if he determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and award will be made at a reasonable price. FAR § 19.502-2. We have held that the decision to set aside a procurement for small business is basically a business judgment within the broad discretion of the contracting agency which we will not question unless a clear showing is made that the agency abused its discretion. Id. The contracting officer involved in the procurement makes the determination of whether to set aside for small business based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists and market surveys which include responses to CBD announcements. Litton Electron Devices, B-225012, Feb. 13, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 164. In our view, the decision to set aside a procurement for SDB is similarly a business judgment within the broad discretion of the contracting officer and we will not question that decision unless there is a clear showing that the contracting officer abused his discretion. On the facts before us we do not find that the contracting officer abused her discretion in deciding not to set aside exclusively for SDBs.

After the initial announcement on June 2, the Air Force modified the announcement in the CBD on July 23 to address the SDB issue. The Air Force states that it did not have sufficient factual information to warrant a SDB set-aside at this time, but provided in this July 23 notice that a "preference" for the award of the contract would be given to SDBs if two or more acceptable SDB offers were received with the technical proposals.

While there is some indication in the file that the Air Force buyer believed that there were some number of SDBs among the 141 firms solicited, in fact, after the receipt of initial proposals, there was only one acceptable SDB offer. As a result, the contracting officer's final determination was simply to continue with the set-aside for small business. Although the DFARS provides for a set-aside and not just a preference for SDBs in the award of a contract, the

facts of this case do not indicate that the contracting officer should have been able to determine that there was a reasonable expectation of obtaining at least two acceptable offers from SDB concerns. Consequently, we conclude that the contracting officer did not abuse her discretion on the SDB issue.

The protest is denied.

James F. Hinchman
General Counsel