

Cunningham



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: RBC, Inc.

File: B-233589; B-233589.2

Date: March 28, 1989

DIGEST

Contracting officer's decision to procure certain services on an unrestricted basis, and not through a small business set-aside, is not an abuse of discretion where the procurement history and contracting officer's knowledge of the market did not support an expectation that offers from two or more responsible small business concerns would be received; where agency distinguished this procurement from another concurrent one for services which is set aside; and where the agency small and disadvantaged business utilization specialist and the Small Business Administration procurement center representative have expressed their concurrence with the decision not to set aside the procurement.

DECISION

RBC, Inc., has protested the decision of the Naval Air Development Center (Center) to issue request for proposals (RFP) No. N62269-89-R-0100 on an unrestricted basis rather than as a small business set-aside. The solicitation is for operational system developmental testing tasks for anti-submarine warfare programs on a cost-plus-fixed-fee basis for a base year and up to 4 option years.

We deny the protest.

An acquisition of services, such as here, is to be set aside exclusively for small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that awards will be made at reasonable prices. Federal Acquisition Regulation (FAR) § 19.502-2. In addition, since the services sought under RFP -0100 had been successfully acquired in 1985 on the basis of a small business set-aside, the current procurement is subject to a similar requirement concerning

045036/ 138312

repetitive set asides. FAR § 19.501(g) provides that once a service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements for that particular service shall, if required by agency regulations, shall be acquired on the basis of a repetitive set-aside. Here, agency regulations do so provide. Department of Defense Federal Acquisition Regulation Supplement § 19.501(g) (1988 ed.).

Both FAR § 19.501(g) and § 19.502-2, however, provide that a set-aside shall not be made if the contracting officer does not have a reasonable expectation of receiving offers from at least two responsible small business concerns and at reasonable prices. The protested RFP was not set aside because the contracting officer found that he did not have a reasonable expectation that offers would be obtained from at least two responsible small business concerns. Generally, we regard such a determination as a matter of business judgment within the contracting officer's broad discretion which we will not disturb absent a clear showing that it has been abused. Universal Hydraulics, Inc., B-232144, Oct. 31, 1988, 88-2 CPD ¶ 417.

The record shows that in making his determination, the contracting officer considered a number of factors. The Navy most recently contracted for this operational system development testing work in 1985 under a total small business set-aside, under which only two small business offers were received: one from RBC (whose offer was then found to be technically unacceptable) and one from Pacer Systems, Inc., which received an award under the RFP but which is currently not a small business. This procurement history did not favor a set-aside for the current procurement.

Next, the contracting officer relied on his general knowledge of the small business community which has traditionally served the Center, and concluded that those firms lacked the capacity to provide the magnitude of the effort which would be required under this contract.

Finally, the contracting officer considered the advice of the Center's small and disadvantaged business utilization specialist as to whether RFP -0100 should be set aside for small business. The representative:

" . . . took into account the magnitude of the tasks involved, their knowledge of small business firms which might possibly be capable of performing the work, as well as the prior procurement

history and concluded that there was no reasonable expectation that the Navy would receive offers on the instant RFP from two or more small businesses."

The contracting officer reached the same conclusion. Consequently, the Navy issued RFP -0100 as an unrestricted procurement, which prompted RBC's protest.

RBC has advanced numerous arguments in support of its contention that this procurement should be a small business set-aside. For example, RBC contends that in fact there are a number of small business concerns capable of performing this requirement, including the protester itself. As for the protester, we note that its proposal submitted in response to the most recent procurement was deemed technically unacceptable, which left only one other offeror, the now large-business incumbent, in the competition. Moreover, the Navy states that RFP -0100 is more challenging with a greater level of effort than the prior RFP. We have recognized that the procurement history is an important factor to be considered by a contracting officer in determining whether to set a procurement aside for small business concerns. Aegis Services, Ltd., B-227854 et al., Sept. 15, 1987, 87-2 CPD ¶ 255.

As for the alleged availability of other small business concerns capable of performing this requirement, including one--J.F. Taylor, Inc.--whose representative attended the bid protest conference held by our Office, the Navy has several observations. First, with specific reference to Taylor, it does question that firm's capacity to perform the tasks under this procurement, stating that the magnitude of the work involved would put a "huge strain" on this company of about 50 employees. The contracting officer also was not persuaded that two or more of the other small business firms who expressed interest in this procurement to the procuring activity could successfully perform the work, given the complexity of the contract work and the significant level of effort. Nothing in the record belies the contracting officer's expectation in this regard.

Second, the Navy maintains that not much weight should be placed on the fact that four small business concerns appear on the mailing list for this solicitation (something to which RBC has pointed) because the list was broadly drawn to indicate any firm which might be interested in this procurement, and was not intended to signify a determination that the listed firms reasonably had the capability or

capacity to perform the tasks under RFP -0100 based on the contracting officer's and the small and disadvantaged business utilization representative's analysis of past and present contracting experience.

Third, the Navy points out that regulatory changes made since the 1985 procurement make it even less likely than before that a small business concern could qualify for award of this procurement as a set-aside. Specifically, the Navy refers to the recent (October 1987) regulatory restriction (50 percent) on the amount of business a small business may subcontract to large businesses under a set-aside contract, and states that it has:

" . . . seen a significant decrease in teaming arrangements between small and large businesses, especially in procurements [like RFP -0100] requiring [many] highly-skilled personnel."

In view of this record, we do not think the protester has shown that the contracting officer issued this RFP as an unrestricted procurement in the face of information establishing that it should have been set aside. Additionally, we find that the contracting officer was not required to do more than he did to seek out small business concerns who were qualified and interested in performing this contract. See Fayetteville Group Practice, Inc., 66 Comp. Gen. 489 (1987), 87-1 CPD ¶ 541.

Next, RBC contends that the failure to set aside this procurement is inconsistent with the Center's decision to set aside another, concurrent procurement for engineering support for system test software requirements and testing and evaluation. The protester maintains that the services required, and the type of personnel disciplines employed, are virtually identical in both solicitations and that therefore if one procurement is set aside so should the other.

In response, the Navy explains that it last contracted for the two types of services involved as two "lots" under the same 1985 solicitation. The competitive results differed between the lots, however, in that (as we indicated above) only one technically acceptable offer was received for the services now being acquired here, whereas two acceptable small business offers were received for the other "system test software" lot. Moreover, although the Navy acknowledges that there are common general task items and job disciplines in the two contracts, both of which support the

Anti-Submarine Warfare program, it insists that the work here is more sophisticated and requires some different job disciplines and a significantly greater level of effort than the other, set-aside procurement.

The protester disagrees with the Navy's analysis and in support of its position has prepared a specific comparison of the two contracts. While there may be some similarities between the two different contracts, we cannot conclude--especially in light of the fact that the Navy was previously successful in obtaining small business competition for the other work but not for that being acquired here--that its decision not to set aside this procurement amounts to an abuse of discretion.

In sum, we find that the contracting officer was acting within his discretion in issuing RFP -0100 on an unrestricted basis because: (1) there was no recent successful procurement of similar services on a set-aside basis since the prior award under the 1985 RFP was made to the one, technically acceptable small business offeror who is no longer a small business; (2) it appears the procurement history and work requirements relating to this solicitation are distinguishable from those of the concurrent, set-aside procurement of the system test software program; and (3) the Navy's small and disadvantaged business utilization specialist and, in retrospect, as noted below, the Small Business Administration (SBA) procurement center representative, have concurred in the decision not to set aside RFP -0100 based on an analysis of a considerable amount of the relevant information, as reviewed above. See Universal Hydraulics, Inc., B-232144, supra; Geronimo Service Co., B-231637, Sept. 22, 1988, 88-2 CPD ¶ 277. In this regard, we give great weight to the fact that the contracting officer's determination was made with the concurrence of the small and disadvantaged business utilization specialist. See Fayetteville Group Practice, Inc., 66 Comp. Gen. supra.

Finally, RBC notes that, through unintentional error, the contracting officer failed to comply strictly with the provisions of FAR §§ 19.501(g)(2) and 19.506(a), which, read together, provide that in withdrawing a repetitive set-aside the contracting officer is required to give written notice of the withdrawal not only to the agency small and disadvantaged business utilization specialist, but to the "SBA procurement center representative, if one is assigned, stating the reasons." Although the Navy's contracting officer gave notice to the Center specialist, as noted above, he did not give written notice to the SBA's procurement center representative for the reason that both the

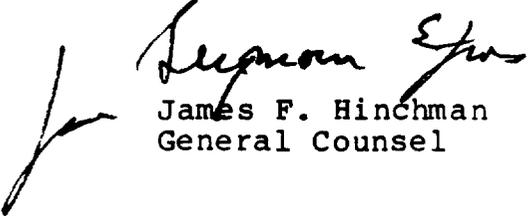
contracting officer and the Center specialist erroneously believed, in apparent good faith, there was no SBA procurement center representative assigned to the Center, since SBA personnel were spread very thin at the time and no one actually visited the Center during the July-November 1988 period in question.

The SBA states that a representative was assigned, but it was understandable that the Center personnel would be unaware of this fact. Regardless of this unintentional error, the Navy has furnished us with an affidavit of SBA's procurement center representative, who was, in fact, the representative assigned to the Center up to September 11, 1988. In that affidavit, the representative states that:

" . . . I am aware of some of the facts regarding this protested procurement, and in particular the history on the previous buy, and I would not have regarded the decision not to set aside the procurement as a serious problem. Moreover, given the experience on the procurement, i.e., a set-aside which had elicited only two offers, one from the awardee which is now a large business, and one from a company that had been found technically unacceptable, I would not have objected to [the] decision not to set aside the procurement."

RBC argues that this affidavit is so qualified in its language that it falls short of an assertion that the SBA procurement center representative actually agrees with the contracting agency's decision. We are not persuaded by this argument; the plain meaning of the quoted statement is that the representative does agree, and if contacted earlier would have agreed, with the decision not to set aside the procurement. Under these circumstances, we cannot ascertain any prejudice which would have accrued to RBC as a result of the failure to give notice to the SBA procurement center representative.

The protest is denied.


James F. Hinchman
General Counsel