



The Comptroller General
of the United States

Washington, D.C. 20548

Ashen

Decision

Matter of: W. M. Marable, Inc.
File: B-234987; B-235097; B-235098
Date: May 3, 1989

DIGEST

Agency properly did not apply small disadvantaged business evaluation preference where procurements were conducted either as total small business set-asides or on an unrestricted basis pursuant to the Small Business Competitiveness Demonstration Program Act of 1988, since applicable regulations preclude applying the preference in such circumstances.

DECISION

W. M. Marable, Inc., protests the award of contracts under invitation for bids (IFB) Nos. DACA01-89-B-0049 (IFB -0049), DACA01-89-B-0050 (IFB -0050), and DACA41-89-B-0293 (IFB -0293), issued by the Army Corps of Engineers for building construction. Marable contends that, under the National Defense Authorization Act for Fiscal Year 1987, Pub. L. 99-661, 100 Stat. 3816, 3973, the Corps is required to apply a price differential in favor of Marable based on its status as a small disadvantaged business (SDB). Section 1207 of that Act establishes the goal of awarding to SDBs five percent of the dollar value of total contracts awarded by the Department of Defense (DOD) for fiscal years 1987, 1988 and 1989. Although the Act does not itself provide for application of an evaluation preference or any other specific means for attaining the five percent goal, an evaluation preference for SDBs in certain circumstances is provided for in the DOD Federal Acquisition Regulations Supplement (DFARS) § 219.7001 (1988 ed.), adopted by DOD to implement the Act. According to the protester, its bids would have been low had the preference been applied.

We dismiss the protests.

On January 26, 1989, subsequent to issuance of the regulations providing for an SDB evaluation preference, DOD published in the Federal Register, as an amendment to the

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DFARS, an interim rule for the implementation of the Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. 100-656, 102 Stat. 3889, 3892. See 54 Fed. Reg. 4246 (1989). Pursuant to the Act, the interim rule provides that DOD solicitations issued on or after January 1, 1989, for acquisitions in any of four designated industry groups-- construction, refuse systems, architectural and engineering services, and non-nuclear ship repair--with an anticipated dollar value greater than \$25,000, shall not be considered for small business set-asides unless otherwise directed; further, when use of small business set-asides is suspended for the designated industry groups, the regulations provide that the evaluation preference otherwise available for SDBs under DFARS § 219.7001 shall not be applied. DFARS § 219.1070-1 (54 Fed. Reg. 4247).1/

IFB -0049 and IFB -0050 were issued in early January 1989 as small business set-asides. Since the procurements were for construction, one of the designated industries under the Small Business Competitiveness Demonstration Program Act, and the anticipated awards were expected to total more than \$25,000 each, the Corps amended the solicitations to delete the provision for a small business set-aside, and included instead both a notice that the procurement was being conducted "on an unrestricted basis pursuant to the Small Business Competitiveness Demonstration Program," and the DFARS standard clause entitled "Small Business Concern Representation for the Small Business Competitiveness

1/ The Small Business Competitiveness Demonstration Program Act of 1988 designated the four industry groups for the purpose of demonstrating whether the competitive capabilities of small business firms in certain industries will enable them to successfully compete on an unrestricted basis for federal contracting opportunities. Sections 711 and 717. The Act provides that contract opportunities with an anticipated value of \$25,000 or more for the procurement of services from firms in the designated industries, unless set-aside under the Small Business Act 8(a) program or pursuant to the National Defense Authorization Act for Fiscal Year 1987, shall be solicited on an unrestricted basis if the agency has attained its small business participation goal, set at 40 percent of the dollar value of the contract awards for each of the designated industries. Sections 712 and 713. In addition, the Act requires agencies to develop a program for enhancing small business participation with respect to selected products and services in ten industry categories which have historically-demonstrated low rates of small business participation. Section 712.

Demonstration Program," DFARS § 252.219-7012 (54 Fed. Reg. 4248), which requires bidders to indicate the number of employees and total revenues.

Obviously, these procurements were conducted in accordance with the regulations implementing the Act. The acquisitions each involve construction services expected to exceed \$25,000, and each was conducted under the demonstration program. Under DFARS § 219.1070-1, the SDB evaluation preference clearly is not applicable. Therefore, the Corps properly did not apply the preference.^{2/}

IFB -0293 was issued on February 6, 1989, as a small business set-aside. Since the procurement also was for construction and award was expected to exceed \$25,000, the Corps subsequently amended the solicitation in late February, deleting the standard Federal Acquisition Regulation (FAR) clause entitled "Notice of Total Small Business Set-Aside," FAR § 52.219-6, and adding the DFARS clause, "Small Business Concern Representation for the Small Business Competitiveness Demonstration Program." Although the agency intended thereby to bring the procurement under the Small Business Competitiveness Demonstration Program, it failed to delete the statement on the first page of the solicitation that the procurement was a total small business set-aside, and did not (as it had done with the other IFBs, discussed above) insert a notice that the procurement would be conducted on an unrestricted basis under the new program. Regardless of whether the amended solicitation is viewed as unrestricted under the demonstration program or as a small business set-aside, the protester cannot prevail. As indicated above, the preference is not available under the demonstration program. Under DOD's regulations, the preference also does not apply in the case

^{2/} The regulations also provide that whenever the evaluation preference is to be used, the contracting officer shall insert a notice to that effect in the solicitation. DFARS § 219.7002 (DAC 88-2). The Corps advises us that the solicitations neither included such notice nor otherwise provided for an evaluation preference. Since bids must be evaluated in accordance with solicitation evaluation provisions, Marable has no legal basis for claiming entitlement to an evaluation preference under IFB -0049 and IFB -0050. See Mycon Construction Co., Inc., B-231544, June 14, 1988, 88-1 CPD ¶ 572.

of a total small business set-aside. DFARS § 219.7000(a) (1988 ed.). Marable, therefore, has no legal basis for claiming an entitlement to an evaluation preference under IFB -0293.

The protests are dismissed.

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