



The Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Techplan Corporation

File: B-234161

Date: May 12, 1989

DIGEST

1. Protest that contracting officials had agreed, as part of settlement of earlier protest, to conduct unrestricted procurement for support services contract and, therefore, agency's issuance of request for proposals as a set-aside for exclusive small business participation was improper is denied. Inherent in any settlement agreement was that (1) future procurement would be conducted in accord with Federal Acquisition Regulation (FAR) and therefore, (2) in accordance with the FAR, if sufficient number of small businesses showed interest in competing for the contract, the procurement would be set aside for exclusive small business participation.

2. Protest alleging that contracting agency officials acted unfairly and in bad faith in setting aside procurement for exclusive small business participation is denied, where there is no evidence that contracting officials intended to harm the protester and the decision to set aside was properly made in accordance with Federal Acquisition Regulation § 19.502-2 which governs small business set-aside determinations.

DECISION

Techplan Corporation protests the Washington, D.C. Naval Regional Contracting Center (NRCC) decision to set aside request for proposals (RFP) No. N00600-89-R-0659 for exclusive small business participation. The RFP solicited offers to provide management support services for the Navy's International Armaments Cooperation Program (IACP). Techplan alleges that, as a result of discussions between Techplan and Navy personnel which resulted in settlement of an earlier protest Techplan had filed with our Office concerning the Navy's procurement of IACP support services, the Navy agreed to conduct a competitive and unrestricted procurement. Techplan asserts that the Navy has failed to meet its commitment to Techplan by setting aside the present

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procurement using a standard industrial classification that precludes Techplan from competing. We deny the protest.

For a number of years, the Assistant for International Research and Development (designated OP-098F by the Navy), an office under the Chief of Naval Operations, has used contractors to obtain management support services relating to international research and development programs in support of IACP. At the request of the Chief of Naval Operations, the Office of the Chief of Naval Research (OCNR) was the designated contracting activity that procured several such support services contracts. In the early part of 1988, Techplan had been working for the Navy for approximately 10 years under various contracts procured by OCNR and was still under contract to provide support services to OP-098F on a cost-plus-fixed-fee basis. On February 10, OCNR instructed Techplan to stop all work in connection with its IACP support services contract (which had already been extended beyond the original expiration date) and stated that Techplan's contract would not be extended further.

On March 21, 1988, Techplan protested to our Office alleging that OCNR had improperly modified a support services contract between the Navy and BK Dynamics to include work that should have been performed by Techplan under its recently terminated IACP support services contract. The contract with BK Dynamics (designated a "bridge contract" by the parties) was to provide support services to OP-098F for an interim period of approximately 3 months until OCNR could perfect a follow-on contract with the Small Business Administration (SBA) pursuant to section 8(a) of the Small Business Act. Techplan argued that the modification went beyond the scope of BK Dynamics' original support services contract and, therefore, amounted to an improper sole-source award.

By letter of April 12, 1988, Techplan withdrew its protest, stating that counsel for OCNR had assured Techplan that the bridge contract with BK Dynamics had been terminated, that no additional bridge contracts for IACP support services would be awarded, and that an unrestricted competitive solicitation for the IACP support services would be developed and issued in the future. Accordingly, we closed our file on April 18 without issuing a decision on the merits of Techplan's protest.

On August 5, 1988, NRCC published a notice in the Commerce Business Daily (CBD) announcing its intention to procure management support services in support of IACP as a small business set-aside, and solicited inquiries from interested firms. In response, the contracting activity received expressions of interest from 63 firms of which 17 identified

themselves as small businesses. After consulting with the small business specialist on the matter, and noting that NRCC "has, in the past, awarded similar contracts for management support services as the result of small business set-asides," the contracting activity decided that the impending procurement should be set aside for exclusive small business participation. Accordingly, on October 27, a second CBD notice was published announcing that the procurement would be set aside for exclusive small business participation using standard industrial classification No. 8742.

On November 18, 1988, the NRCC issued the present RFP, a total small business set-aside, soliciting offers for providing management support services in support of IACP, including: meeting assistance, research in the preparation of various reports and analysis, data generation, data analysis, data maintenance, various levels of program assistance, financial management and international acquisition support. The RFP contemplates award of a time-and-materials, labor-hour contract for a basic period of 1 year with options for 5 additional years. The RFP states that the applicable standard industrial classification is No. 8742, management support services, which restricts consideration to offerors whose average annual receipts for the preceding 3 fiscal years do not exceed \$3.5 million.

Techplan states that it is precluded from competing for the contract, because its average annual receipts are above the \$3.5 million limitation. The protester contends that the Navy has broken its promise to procure IACP support services by an unrestricted competition. Techplan argues that the Navy should be estopped to deny the existence of its agreement to issue an unrestricted procurement, because Techplan relied upon the Navy's representation to its detriment in withdrawing the earlier protest. Techplan further argues that the Navy has exhibited bad faith and unfair dealing towards Techplan, and therefore, should be required either to cancel the present set-aside procurement and issue a new, unrestricted solicitation or to amend the present RFP to incorporate a new, less restrictive standard industrial classification which will allow Techplan to compete for award.

The Navy's position is that, regardless of whether Techplan thought it had a commitment from the Navy to conduct an unrestricted procurement, the contracting officer was required to set this procurement aside for exclusive small business participation under section 19.502-2 of the Federal Acquisition Regulation (FAR). In this regard, the Navy neither admits nor denies that OCNR agreed to conduct an unrestricted procurement for IACP support services in order to settle the earlier Techplan protest. The Navy also

points out that, while OCNR used to be the contracting activity responsible for procuring IACP support services, the present procurement was handled by NRCC, an entirely different contracting activity, at the request of OP-098F. Thus, assuming for the sake of argument that personnel representing the original contracting activity did agree to issue an unrestricted solicitation, the Navy argues that the OCNR officials had no authority to commit the new contracting activity to any particular method of procurement, especially where the method of procurement allegedly agreed upon--an unrestricted competition--would contravene express provisions of the FAR.

We find the Navy's position to be basically correct. When the circumstances giving rise to the alleged agreement between Techplan and the Navy are taken into account--an allegedly improper sole-source award to be followed by a section 8(a) award--we think it is reasonably clear that the Navy would have been agreeing to abandon the sole-source and section 8(a) approaches and to seek competition consistent with law and regulation. Indeed, it would have been improper for the agency to agree to anything other than to adhere to the applicable statutes and regulatory provisions. Thus, inherent in any agreement was that the future procurement would be conducted in strict accord with the FAR.^{1/}

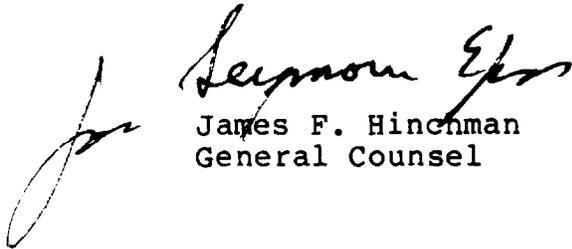
The FAR, of course, requires that, if two or more responsible small businesses show interest in competing for the contract and the contracting officer can expect to receive reasonable prices, the procurement be set aside for exclusive small business participation. FAR § 19.502-2. Also, as the FAR is published in the Federal Register and the Code of Federal Regulations, all parties, including the protester, are on constructive notice of its provisions. FAR § 1.104-1(a); All Destinations, B-233505.3, Dec. 29, 1988, 88-2 CPD ¶ 640. Accordingly, while the record contains no evidence that either the Navy's or Techplan's representatives even considered the possibility that there would be sufficient small business interest to warrant a set-aside, when that interest appeared the Navy had no choice but to operate within the parameters prescribed by the FAR and set aside the procurement.

^{1/} The FAR is issued under authority of the Office of Federal Procurement Policy Act, 41 U.S.C. § 401 et seq. (Supp. IV 1986), and contracting officers are bound by its directives. FAR § 1.102(a); see International Line Builders, 67 Comp. Gen. 8 (1987), 87-2 CPD ¶ 345; see also Northwest Forest Workers Ass'n--Request for Reconsideration, B-218193.2, Apr. 19, 1985, 85-1 CPD ¶ 450.

Since, in our view, it was implicit in any agreement between the parties that any future procurement would be conducted in accordance with the requirements of the FAR, and since the record indicates that pursuant to the FAR the Navy properly determined that a small business set-aside was appropriate based on the circumstances at the time the solicitation was issued, we find without merit Techplan's argument that the Navy was estopped from conducting the procurement on anything but an unrestricted basis. See Whitco Industrial Corp., B-202810, Aug. 11, 1981, 81-2 CPD ¶ 120. Moreover, to the extent that Techplan contends that the standard industrial classification in the RFP should be changed to one which would permit Techplan to compete, the protest raises an issue for review solely by SBA. See 4 C.F.R. § 21.3(m)(2) (1988).

Lastly, Techplan alleges that the Navy has acted in bad faith and has treated it unfairly in setting this procurement aside for small businesses. In order to prove bad faith on the part of procurement officials, the protester would have to show that their actions were done with the specific intent to harm the protester. Seaward International, Inc., 66 Comp. Gen. 77 (1986), 86-2 CPD ¶ 507. The record contains no evidence of any such intent, and, in view of our finding above that the set-aside determination was properly made in accord with the FAR, we cannot agree that the Navy's treatment of Techplan was unfair.

The protest is denied.



James F. Hinchman
General Counsel