

J. Vickers



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Neal R. Gross & Company, Inc.

File: B-240924.2

Date: January 17, 1991

Ronald S. Perlman, Esq., Porter, Wright, Morris & Arthur, for the protester.

Joseph Gallo, Esq., Hopkins & Sutter, for Ann Riley & Associates, Ltd., and Teri A. Benson, Heritage Reporting Corporation, interested parties.

Mary Kay Langan-Feirson, Esq., and Debra J. Rosen, Esq., Department of Transportation, for agency.

James Vickers, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where agency based decision not to set aside for small business concerns court reporting procurement based on the conclusion that small businesses would not be able to satisfactorily perform because of prior difficulties the agency had with a section 8(a) contractor and Federal Supply Schedule contractor (both no longer in existence). An inadequate market survey and at least two small businesses have expressed interest in competing.

DECISION

Neal R. Gross & Company, Inc. protests the decision of the Department of Transportation (DOT) to issue request for proposals No. DTOS59-90-R-00158 on an unrestricted basis. The protester argues that the solicitation should be issued as a small business set-aside. The solicitation is for nationwide verbatim reporting services for DOT's Office of Hearings.

We sustain the protest.

BACKGROUND

DOT's Office of Hearings is responsible for conducting formal proceedings pursuant to the Administrative Procedure Act, 5 U.S.C. § 551, et seq. (1988). Since the Act requires that these proceedings be conducted on a formal evidentiary record, court reporting services are needed to record and transcribe a

050411 / 143000

verbatim account of each proceeding. The reporting service must prepare an official transcript from the record. Prior to 1987, the Office of Hearings obtained its court reporting services pursuant to a General Services Administration Federal Supply Schedule (FSS) contract. Because of the unsatisfactory performance of the small business FSS contractor, DOT obtained an exemption from the FSS contract and entered into a contract with a minority small business enterprise pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988). In 1990, DOT did not exercise its option under the 8(a) contract because of what DOT believed were serious performance problems in 1989. During 1990, DOT obtained the needed services through the use of the small purchase procedures set forth at Federal Acquisition Regulation (FAR) Part 13 on an as-needed-basis. Since this process proved to be time-consuming and inefficient and because DOT expected a significant increase in its workload due to the resumption of the Federal Aviation Administration's (FAA) civil penalty program, DOT decided to issue the subject solicitation for a single contract with one firm capable of handling all of the Office of Hearing's proceedings nationwide.^{1/}

An acquisition of services, such as here, is required to be set aside for exclusive 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 award will be made at fair market prices. FAR § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. FKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. However, an agency must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work, and we will review a protest to determine whether an agency has done so. Stay, Inc., B-239825, Sept. 21, 1990, 69 Comp. Gen. ____, 90-2 CPD ¶ 248.

DOT did not set the requirement aside because the contracting officer determined that she did not have a reasonable expectation of receiving two offers from responsible small businesses. The record shows that in making the determination the contracting officer considered several factors. First, the contracting officer considered the performance problems which the Office of Hearings has had over recent years with the quality of the transcripts generated by some small business firms, including the protester. These problems included the loss of exhibits, errors and deficiencies in the

^{1/} FAA is a component agency of DOT.

transcripts, untimely delivery of transcripts and problems with recording equipment and reporters. Next, the number of hearings to be held during the period covered by the RFP will be significantly higher than in the past due to the resumption of the FAA's civil penalty program. According to DOT, between August 16 and September 10, 1990, 33 civil penalty cases have been docketed compared to 22 other types of cases docketed from January to October 1990. Finally, the contracting officer considered that while most of DOT's past hearings were held in Washington, D.C., the majority of the new proceedings will be scheduled outside Washington. Therefore, according to the agency, there would be problems resulting from a small business contractor having to obtain subcontractors for out-of-town hearings.

Gross maintains that there are several small business firms, including itself, capable of fulfilling the contract requirement and interested in competing.

The performance difficulties experienced by the agency in the past with both the FSS contractor and the section 8(a) contractor involved firms which are no longer in business. As far as the problems cited with the protester are concerned, they relate to the accuracy of the transcripts submitted and we do not agree with the agency that such problems are necessarily the result of the size of a particular firm. In fact, we do not find that the agency made a reasonable attempt to relate the problems it has had in the past with the size of the firms. There simply has been no case made that court reporters supplied by large firms are more accurate and efficient. Further, while the contracting officer states that she made the decision based on her general knowledge of the market, including the fact that she was aware of other agencies' performance problems with small business court reporting firms, the only specific reference to another agency is one noting that the Department of Labor did not set aside a recent court reporting solicitation. There is no evidence that an attempt was made to contact the numerous other federal agencies in the Washington, D.C. area which we understand continue to set aside their transcription requirements. These include the Nuclear Regulatory Commission, the United States Tax Court and the Armed Services Board of Contract Appeals. Nor is there any indication in the record that the agency made a reasonable effort to survey the many small businesses in the area which perform these services in order to assess their capabilities.

While the agency contends that its requirements under the contract will greatly increase over those of prior years, the solicitation estimates indicate that there will be 210 hearings generating 50,000 pages of transcript. This is less than one hearing per federal workday, and we see no basis for

the contracting officer's determination that this is beyond the capability of a small business firm.

Finally, the protester states there should be no subcontracting problem because while more hearings will be held outside Washington, the bulk of the transcript pages are to be generated by the Washington hearings. Since recorders and transcribers are paid by the page, more than 50 percent of a small business's personnel costs will be incurred by the small business's own staff located in Washington, and the requirement that a small business perform at least 50 percent of the work can easily be met. See FAR § 52.219-14.

The agency relies on two prior decisions of our Office, RBC, Inc., B-233589; B-233589.2, Mar. 28, 1989, 89-1 CPD ¶ 316, and MVM, Inc.; et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270, to support its decision not to set aside the procurement. We find those cases to be distinguishable. In RBC, Inc., under a previous small business set aside, only two offers were received, one from the awardee, now a large firm, and the protester whose proposal was found technically unacceptable. In MVM, Inc. et al., four small businesses were already performing near capacity under prior contracts for the investigative services required and those contracts would overlap the performance start date of the protested unrestricted solicitation. In each of these cases, the agency had a clear basis for its determination that the requisite number of small businesses would not compete. Such was not the case here.

We recognize that the Small Business Administration Procurement Center Representative, in an affidavit dated after the protest was filed, states that if he had been contacted before the decision was made, he would have concurred with the contracting officer. In the affidavit, he bases his concurrence on the same reasons given by the contracting officer. While we generally give great weight to the views of the SBA representative, MVM, Inc.; et al., B-237620, supra., our conclusion that the agency's determination was not reasonable is not changed by the SBA representative's concurrence.

We find that the contracting agency did not reasonably determine that there was no likelihood of receiving offers from at least two responsible small businesses. There is no evidence that the agency made a reasonable effort to survey the market place in order to determine whether there are capable small business firms. In fact, the record here shows that there are at least two small firms, the protester and another firm that commented on the protest, interested in competing. Therefore, we find the determination not to set aside the requirement was improper. By separate letter to the Secretary of Transportation, we are recommending that the agency cancel the solicitation and resolicit on a small

business set-aside basis. We also find Gross entitled to be reimbursed its protest costs, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990).

The protest is sustained.

for Milton J. Fowler
Comptroller General
of the United States