

144198



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Heritage Reporting Corporation--Reconsideration
File: B-240924.3
Date: June 20, 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.
Debra J. Rosen, Esq., Department of Transportation, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Reconsideration of previous decision is denied where party requesting reconsideration provides no basis, beyond some adverse performance history and speculation regarding prices to be proposed by two potential small business bidders, to refute General Accounting Office's conclusion that agency failed to reasonably determine that there was no likelihood of receiving offers from at least two responsible small businesses.

DECISION

Heritage Reporting Corporation requests reconsideration of our decision Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53, in which we sustained Gross's protest of the decision of the Department of Transportation (DOT) to issue request for proposals (RFP) No. DTOS59-90-R-00158, for nationwide verbatim reporting services, on an unrestricted basis, rather than as a small business set-aside. Heritage, a large business, argues that our decision was in error.

We deny the request for reconsideration.

As we explained in our initial decision, an acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns

and (2) award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a).

Pursuant to this regulation, DOT's contracting officer considered several factors in determining that she did not have a reasonable expectation of receiving offers from two responsible small businesses. First, she considered problems experienced by the agency with the quality of transcripts generated by some small business firms, including Gross, the protester. The contracting officer also considered that the number of hearings to be held during the period covered by the RFP is to be significantly higher than in the past. Finally, since most of the additional proceedings will be scheduled outside of Washington, according to the agency, problems would result from a small business contractor having to obtain subcontractors for out-of-town hearings.

We sustained Gross's protest based on our finding that the contracting agency did not reasonably determine that there was no likelihood of receiving offers from at least two responsible small businesses. We first found that the agency made no reasonable attempt to relate the problems it had experienced in the past with the size of its previous reporting service contractors. Further, while the contracting officer stated that she made the decision based in part on her awareness of problems experienced by other agencies with small business reporting firms, the only specific reference to another agency concerned the Department of Labor's failure to set aside a recent court reporting solicitation. There was no evidence of any attempt to contact the numerous other federal agencies in the Washington, D.C. area which continue to set aside their transcription requirements. Nor was there any indication of a reasonable effort to survey the many small businesses which perform these services in the area to assess their capabilities. We also noted that while the agency contends that its requirements under the contract will increase over those of prior years, we saw no basis for the contracting officer's determination that the estimated requirements set out in the solicitation are beyond the capability of a small business firm.

In conclusion, we stated that DOT made no reasonable effort to survey the market place to determine whether there are capable small business firms and noted that there were at least two small firms, the protester and another firm that commented on the protest, interested in competing. We therefore determined that the decision to not set aside the requirement was improper and we recommended that DOT cancel the solicitation and resolicit on a small business set-aside basis.

In its reconsideration request, Heritage argues that it was not provided a copy of Gross's final protest submission dated October 29, 1990, which in Heritage's view contained erroneous information. Therefore, according to Heritage, it could not correct errors in the record. In this respect, Heritage generally disputes assertions in Gross' October 29 letter relating to the scope of reporting contracts previously performed by small businesses and the quality of performance under those contracts. Further, Heritage argues that had DOT performed a more thorough survey, the results would have supported the agency's decision not to set aside the requirement.

Heritage argues at some length that Gross and Ann Riley have performed poorly on recent reporting contracts that were smaller in scope than the current solicitation and, as a result, a number of those contracts were terminated for default or convenience. Thus, according to Heritage, regardless of the fact that two small businesses expressed interest in DOT's solicitation, because of their performance problems on other contracts, and because small business firms have previously offered prices which Heritage describes as "exorbitant," if a proper survey were conducted, the contracting officer would not conclude that there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns and (2) awards will be made at fair market prices.
FAR § 19.502-2(a).

We have carefully reviewed the record in the context of Heritage's reconsideration request and we see no reason to change our original conclusion.

When we issued our decision, Gross and Ann Riley, both small businesses, clearly indicated their interest in competing and the record included no reasonable determination by the agency that either of those firms were not capable of performing the contract. Also, there was no indication in the record that those firms would bid unreasonable prices. Although Heritage now questions the responsibility of those firms and their experience and argues that they would offer excessive prices, both Gross and Ann Riley dispute Heritage's contentions and continue to express interest in competing. In our view, Heritage's allegations regarding the past performance of Gross and Ann Riley and speculation as to the amounts those firms would charge provides no basis to reverse our decision.

Heritage and DOT in its comments on the reconsideration request also argue that we should modify our recommendation that the requirement be resolicited on a set-aside basis and instruct the agency to now conduct a proper survey. Since, as indicated above, the record showed that there existed two

small businesses willing to compete, we recommended in our decision that the agency go ahead and resolicit on a set-aside basis. We still think that recommendation is appropriate because the record, in our view, still shows the existence of two interested small businesses. Further, we note that DOT is not obligated to make award to any small business under a set-aside solicitation if it does not get an offer from a responsible small business at a fair market price. See FAR § 19.506(a). If DOT cannot get a fair price from a small business under the resolicitation, it may withdraw the set-aside and solicit the requirement on an unrestricted basis. In fact, had DOT followed our recommendation at the time it was made, the set aside solicitation would have in effect taken the place of the survey both it and Heritage say they want. We therefore see no reason to alter our recommendation.

The remainder of Heritage's reconsideration request consists of arguments in support of the contracting officer's decision to not set aside the solicitation. These arguments have nothing to do with the alleged misinformation contained in Gross's October 29 submission. Heritage could have raised them during the protest but chose not to. We will not reconsider a prior decision where the party requesting reconsideration bases its request on evidence, information and analysis it could have, but chose not to, presented during our initial consideration of the protest. Newport News Shipbuilding and Dry Dock Co.--Recon., B-221888.2, Oct. 15, 1986, 86-2 CPD ¶ 428. To allow Heritage to submit evidence and arguments now that it could have submitted earlier would undermine the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all the parties' arguments on a fully-developed record. See Department of the Army--Recon., B-240647.2, Feb. 26, 1991, 91-1 CPD ¶ 211.

The reconsideration request is denied.


for James F. Hinchman
General Counsel