



Comptroller General
of the United States

Washington, D.C. 20548

146-2661
K. Riback

Decision

Matter of: Dakota Systems, Inc.

File: B-246697

Date: March 27, 1992

Maurice Yagud for the protester,
Alfred F. Chatterton III, Esq., Office of Personnel
Management, for the agency,
Katherine I. Riback, Esq., John W. Van Schaik, Esq., and
John Brosnan, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

1. The Small Business set-aside program applies to multiple-award Federal Supply Schedule contracting.
2. Protest is sustained where agency decision not to set aside for small business concerns any or all of the three categories of services and products covered by a multiple-award Federal Supply Schedule solicitation did not include the determination, required by the "rule of two," that offers were not expected from at least two small businesses.

DECISION

Dakota Systems, Inc. protests the decision of the Office of Personnel Management (OPM) to issue request for proposals (RFP) No. OPM-RFP-91-02503, a multiple-award Federal Supply Schedule (FSS) solicitation, on an unrestricted basis. The solicitation is for supplies and services to assist federal agencies in implementing Total Quality Management (TQM) principles. Dakota contends that the solicitation should have been issued as a small business set-aside.

We sustain the protest.

TQM is a management approach that relies on principles of quality assurance and makes managers and employees alike responsible for providing quality supplies and services. In order to expand the resources available to federal agencies that are implementing TQM, in 1988, OPM and the Federal Quality Institute, an office within OPM, established a multiple-award FSS for the acquisition of TQM training,

consultation and related products.¹ Although typically the General Services Administration (GSA) manages the FSS, on August 9, 1988, GSA delegated to OPM, through an interagency agreement, the authority to establish and maintain a multiple-award FSS for the acquisition of training services to be used in implementing the Federal Quality Institute's TQM program. The original TQM FSS, when it was established in September 1989, included three types of services and supplies which were identified by special item numbers (SIN): SIN 822-1, Implementation Consulting Services; SIN 822-2, Implementation Training Services; and SIN 822-3, Deliverables. Eventually 24 contracts were awarded under the FSS, 8 of which were awarded to small businesses.

OPM issued the protested solicitation on September 11, 1991, to replace the original FSS contracts as they expire. This solicitation was issued on an unrestricted basis, although it stated that separate awards would be made to several companies under the Small Business Administration's 8(a) program. The solicitation requested proposals for 4-year requirements contracts on the multiple-award FSS, which is to include the same three SIN categories of supplies and services as the original FSS. The solicitation lists GSA as the only mandatory user of the schedule and all other federal agencies are listed as nonmandatory users.

After OPM issued the solicitation on an unrestricted basis, Dakota protested that pursuant to Part 19 of the Federal Acquisition Regulation (FAR), the solicitation should have been set aside exclusively for small business competition. Dakota contends that a sufficient number of small business concerns have shown an interest in this solicitation so that OPM should have set aside the solicitation for small businesses. In this respect, of the 137 offerors that submitted proposals in response to the solicitation, approximately 68 were small businesses. No awards have been made pending the outcome of this protest.

Pursuant to the Small Business Act, 15 U.S.C. § 631 et seq., Part 19 of the FAR instructs contracting agencies to set aside certain acquisitions for exclusive small business competition. FAR § 19.502-2 sets out what is referred to as the "rule of two":

"The entire amount of an individual acquisition or class of acquisitions . . . shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be

¹The Federal Quality Institute was established within OPM to assist federal agencies in implementing TQM principles.

obtained from at least two responsible small business concerns . . .; and (2) awards will be made at fair market prices."

In this case, OPM does not argue that it applied the rule of two and declined to set aside the requirement because there was no "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." Rather, OPM argues that because of the circumstances of this procurement, involving an FSS for TQM supplies and services, the rule of two should not apply. For instance, OPM states that it declined to set aside the solicitation for exclusive small business competition because the "rule of two" applies "more appropriately to single award situations and is not [meant] for this multiple-award FSS procurement, where the goal is to provide a multiplicity of quality experts to assist [federal agencies] with their TQM implementation efforts."

We disagree with OPM's contention that "the rule of two" contained in FAR § 19.502-2 is not applicable to a solicitation for a multiple-award FSS. The interagency agreement by which GSA delegated to OPM the authority to establish and maintain a multiple-award FSS for TQM services requires that the resulting FSS be in accordance with FAR Part 38, entitled "Federal Supply Schedule Contracting." FAR § 38.203(b) states that "[s]mall business set-aside programs apply to both single and multiple-award schedule contracting (see Part 19)." Our Office has recognized the applicability of the set-aside program to FSS procurements in several cases. See Advance Mach. Co., B-217399, Sept. 20, 1985, 85-2 CPD ¶ 311; DISA Elec., 62 Comp. Gen. 271 (1983), 83-1 CPD ¶ 306; Gill Marketing Co., Inc., B-194414.3, Mar. 24, 1980, 80-1 CPD ¶ 213. Thus, under FAR § 38.203(b), OPM is not at liberty to decline to apply the "rule of two" in the context of a multiple-award FSS.

Other reasons advanced by OPM for not setting aside the requirement also focus on OPM's view of the appropriateness of a set aside for a FSS for TQM services. In this respect, OPM argues that no "[t]wo small businesses alone" or even all eight small business firms on the current FSS could meet the TQM needs of federal agencies. OPM states that the demand for TQM services is expanding rapidly and limiting the schedule to only small businesses would be inconsistent with the objective of giving federal agencies the opportunity to select a TQM approach that meets their

requirements from a wide range of private sector quality experts.²

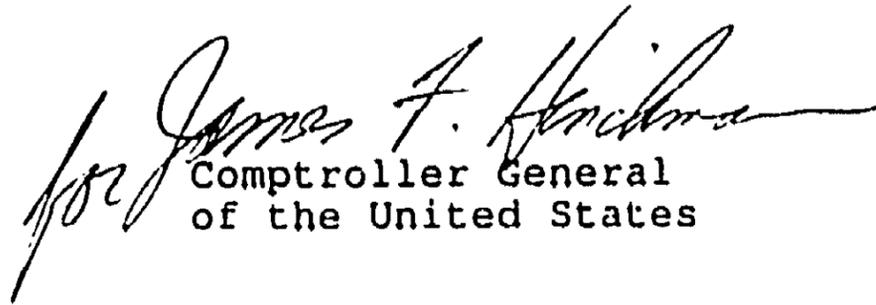
Even if two small business concerns could supply services at a reasonable price under a multiple-award FSS contract, we do not believe that FAR § 19.502-2 would require limitation to small businesses unless the eligible firms had sufficient cumulative capacity (responsibility) to compete for and provide the anticipated volume of required services and supplies. In this case, the record does not establish that the number and capacity of small businesses is insufficient to meet the government's needs for TQM services. OPM based its judgment that small business concerns alone could not handle the government's needs for TQM services on an informal survey of 30 federal agencies and its knowledge of an increased demand for TQM services. Since OPM did not document this survey, it is unclear whether the survey considered only the eight small businesses on the current schedule or also considered the larger number of small business firms that may be available to perform these services today. The eight small businesses on the current FSS were added in 1989 or early 1990 and, according to the agency, many more private suppliers are available, both large and small. In this respect, approximately 68 of the responses to the current solicitation were from small businesses. Clearly, regardless of the situation when proposals were accepted for the original TQM FSS, there are far more than eight small businesses providing TQM services today, and the record shows that OPM made little or no examination of the capabilities of existing small businesses.

The determination of whether or not to set a procurement aside is a matter within the agency's discretion which we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. Nevertheless, the agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from a sufficient number of small businesses with the capability to perform the work. The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. The record does not establish that OPM's survey, as described above, constituted a reasonable effort to determine the availability of small businesses. See Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337.

The protest is sustained.

²In this respect, during fiscal year 1990, 866 delivery orders were issued by agencies for the FSS contractors' services, while during fiscal year 1991, 2,018 delivery orders were issued.

By separate letter of today to the Director of OPM, we are recommending that OPM adequately investigate the potential small business interest in each of the three SIN categories in this solicitation. If the agency finds that there are a sufficient number of small business concerns with the capacity and ability to compete for and provide the anticipated volume of the required services and supplies (and that awards can be made at fair market prices), the RFP should be amended to set aside each of the SIN categories in the solicitation for small business concerns. We also find that Dakota is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1991).


Comptroller General
of the United States