



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc.

File: B-249114; B-249114.2

Date: October 22, 1992

Ronald S. Perlman, Esq., and James McAleese Esq., Porter, Wright, Morris & Arthur, for Neal R. Gross and Co., Inc.; and Edna Segal for Capital Hill Reporting, Inc., the protesters.

Joseph Gallo, Esq., for Ann Riley & Associates, Ltd.; and Marc F. Efron, Esq., Crowell & Moring, for Heritage Reporting Corporation, interested parties.

Marcy C. Adams, Department of Agriculture, for the agency. Donald A. Morrison, Esq., for the Small Business Administration.

Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the agency improperly decided to issue an unrestricted solicitation for work previously set-aside for small business, despite its expectation of competition from two or more responsible small businesses, solely because the agency doubted that a small business set-aside procurement would allow for an award at a fair market price, without first consulting the Small Business Administration (SBA) procurement center representative, as required by applicable regulations; SBA, to whose views the General Accounting Office (GAO) will give deference in these matters, reasonably found that the procuring agency's decision was unsupported and not based on adequate investigation, and GAO's review confirms SBA's views.

DECISION

Neal R. Gross and Co., Inc. and Capital Hill Reporting, Inc. protest the decision of the Department of Agriculture, Washington, D.C., to issue invitation for bids (IFB) No. IFB-00-92-B-14 for verbatim/court reporting services on an unrestricted basis. The protesters assert that this solicitation was required to be set aside for small business.

We sustain the protests.

The IFB, issued on an unrestricted basis, calls for court reporting services in the United States, Puerto Rico, and the Virgin Islands. Agriculture has used a variety of approaches to meet this requirement in the past, including (1) the Small Business Administration (SBA) 8(a) program; (2) small purchase procedures; and (3) a General Services Administration (GSA) Multiple Award, Federal Supply Schedule contract.¹ Following the GSA contract's expiration, Agriculture made two unsuccessful attempts to procure these services using 100-percent small business set-asides; both solicitations were canceled, in part, because of Agriculture's receipt of unreasonable prices. In the interim, the agency met its requirements through small purchases. In May 1990, the agency issued a revised 100-percent small business set-aside² under which it awarded two contracts for services through September 1992. One contract, awarded to Deposition Services, Inc. of Rockville, Maryland, covers the District of Columbia and the states of Delaware, Maryland, Pennsylvania, Virginia, and West Virginia. The second contract, awarded to R&S Typing Service of Longview, Texas, covers the rest of the nation.

Approximately a month and a half after the awards, on September 29, 1990, Heritage Reporting Corporation, a large business and former GSA schedule contractor, wrote an agency official urging termination of the small business awards on the ground that the prices were unreasonable because they greatly exceeded Heritage's 1988 schedule prices--which Heritage assertedly was willing to continue to offer to the agency.

In February 1992, Heritage's letter and problems experienced with one of the two small business awardees (R&S) prompted the agency contracting officer to prepare a "[MEMORANDUM] TO THE FILE, SUBJECT: Non set-aside determination, Court Reporting Requirement." The thrust of the memorandum was that R&S's performance problems were attributable to the nature of the contract rather than to R&S's responsibility, and that the agency may be paying too much for the services.³ The memorandum concluded that the agency should

¹Agriculture was a mandatory user of the schedule contract until GSA elected not to extend the contract in July 1989.

²IFB-00-90-B-26 was issued on May 17, 1990. Agriculture received nine bids of which five were responsive, three nonresponsive and one late. Agriculture awarded the two contracts on August 10, 1990.

³The contracting officer noted that "[w]hile award was based on adequate competition it does not substantiate that the per page rate was at a fair market price."

withdraw the set-aside and procure its future requirements on an unrestricted basis. On May 12, the instant IFB was issued on an unrestricted basis. These protests followed.

As a general rule, a procurement must be set aside for small businesses where the contracting officer determines that there is a reasonable expectation of receiving offers from at least two responsible small business concerns and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.502-2(a). For the most part, we view this determination as a business judgment within the contracting officer's discretion. See EKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32. However, we will review the record to determine whether the agency undertook reasonable efforts to ascertain whether it is likely to receive offers that would support a decision to set-aside the procurement for small business. See Neal R. Gross & Co. Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53.

Agriculture concedes that it expects that it would receive bids from more than two small businesses and that those firms would be capable of performing satisfactorily.⁴ Agriculture's only reason for not continuing to set-aside the requirement is that it does not have reasonable assurance that "the service will be at a fair market price." While Agriculture acknowledges that other agencies obtain these services from small businesses, it is not convinced that those agencies are paying a fair market price.

Under FAR § 19-501(g), an agency may withdraw a set-aside for a requirement that had previously been acquired under a small-business set-aside, if it determines that the factors authorizing the set-aside no longer exist--i.e., there is no reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns, and

⁴In its internal justification to Agriculture's small business and disadvantaged business specialist for not setting aside this requirement, Agriculture primarily references the alleged lack of financial capability of the incumbent small business contractors that allegedly led to poor performance. The protesters persuasively contend that this poor performance was caused by Agriculture's failure to make awards to responsible small business contractors and there are a number of such contractors capable of performing the work on this nationwide contract. In its report on the protest, Agriculture admits that there are a number of small business concerns capable of performing the work, but asserts that there is no reasonable assurance that they will perform the work at a fair market price.

(2) the award will be made at a fair and reasonable price.⁵ Conversely, where there is a reasonable expectation that two or more responsible businesses will submit offers and that award will be made at a fair and reasonable price, an agency may not issue an unrestricted procurement. FAR § 19.502-2(a). A procuring agency asserting that there is not a reasonable expectation that award will be made at a fair and reasonable price must have a reasonable basis in order to justify not setting aside a procurement where there are more than two responsible small businesses who are likely to bid. See Ann Riley & Assocs., Ltd., 71 Comp. Gen. 117 (1991), 91-2 CPD ¶ 544, recon. denied, Ace-Fed. Reporters, Inc.; Federal Energy Regulatory Comm'n--Recon., B-245149.2; B-245149.3, Apr. 6, 1992, 92-1 CPD ¶ 347 (agency had no factual basis for its determination that there was no reasonable expectation that it would obtain fair and reasonable prices for court reporting services that would justify not setting aside for small business a procurement for such services).

In determining not to issue or to withdraw a small business set-aside, the FAR and Agriculture's regulations generally require that the SBA Procurement Center Representative (PCR), where one is assigned, be notified, so that SBA can make its views known if it disagrees with the agency's decision not to set aside the procurement. See FAR §§ 19.402(c), 19.403, 19.501(b), 19.505, 19.506; 13 C.F.R. § 125.6(a)(2) (1992); Department of Agriculture Acquisition Regulation, 48 C.F.R. § 419.402(a) (1991). In this case, SBA has assigned a full time PCR to Agriculture agencies in the Washington, D.C., metropolitan area. 48 C.F.R. § 419.402(a). The SBA PCR was not notified of this procurement until we requested SBA's views on the protests.

⁵FAR § 19.501(g) provides:

"Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall, if required by agency regulations, be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns, and (2) awards will be made at fair market prices. Withdrawal of a repetitive set-aside will be in accordance with 19.506."

As indicated above, Agriculture concedes that the services here had previously been acquired under a small business set-aside so that the decision not to set aside this procurement could be considered a withdrawal of the set-aside, requiring compliance with FAR § 19.506. See FAR § 19.501(g). FAR § 19.506 requires the procuring agency to give both the agency's small and disadvantaged business utilization specialist and the SBA PCR a written statement of the reasons for the withdrawal. See U.S. Constructors, Inc.; Eletech, Inc., B-248329; B-248605, Aug. 19, 1992, 92-2 CPD ¶ 112. Agriculture also requires that its acquisition offices in the Washington, D.C., area notify and make available for review by the SBA PCR all of its proposed acquisitions in excess of \$10,000 that are not set aside for small business, with no limitation on whether or not the services had been previously procured under a small business set-aside. 48 C.F.R. § 419.402(b); see also 13 C.F.R. § 125.6(a)(2) (the SBA PCR is responsible for screening procurements that are not recommended for a set-aside to ascertain whether they can be recommended for set-aside action). FAR § 19.505 provides a process whereby the SBA PCR can appeal to a higher agency official any decision of a contracting officer not to accept the SBA PCR's recommendation on such matters as a decision to issue a procurement on an unrestricted basis instead of as a small business set-aside as recommended by the SBA PCR.

It is clear that the foregoing regulations contemplate interaction between the contracting officer and SBA PCR in deciding whether a procurement should be set-aside. We think that small businesses are prejudiced when agencies withdraw repetitive small business set-asides without the benefit of the required PCR advice because the PCR, as an outside reviewer, is in a position to forcefully bring a point of view contrary to the contracting officer's to the attention of the agency's upper echelons before the solicitation is issued. This is particularly important where the agency admits the existence of a sufficient number of small businesses interested in the work and capable of performing it, and the only question is the likelihood of receiving bids at a "fair market price." See Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337.

In this case, Agriculture did not notify the SBA PCR of its decision to withdraw the set-aside, contending that notice was not necessary because the agency had obtained the approval of Agriculture's small and disadvantaged business specialist. While the Agriculture regulations only refer to disputes between the contracting officer and the small and disadvantaged business specialist on decisions to withdraw a set-aside, see 48 C.F.R. § 419.506, those regulations also specifically require the SBA PCR to be notified of all

unrestricted procurements of this size, 48 C.F.R. § 419.402(b), FAR § 19.506, as set out above, provides procedures for the SBA PCR to present his or her views to cognizant agency officials regarding such decisions. Here, the SBA PCR could not avail himself of these procedures being unaware of the procurement action.

In response to our request, SBA has presented its views on Agriculture's decision not to set aside this requirement for small business. SBA states that it was not notified of this procurement, even though the form sent to the Agriculture small and disadvantaged business specialist had a space for the SBA PCR's concurrence, and applicable regulations required notification so the SBA PCR could present his or her views on the decision not to set aside the procurement.

SBA has also reviewed the record and found that Agriculture's decision not to set aside the procurement for small business was not supported and was unreasonable. SBA notes that Agriculture no longer relies on the justification given in obtaining the consent of the small and disadvantaged business specialist, *i.e.*, poor past performance and lack of capability of the incumbent small businesses, and that Agriculture now admits that there are sufficient responsible small business cost reporting firms that could provide the service. SBA notes that Agriculture has not supported its contention that it will not obtain fair and reasonable prices from small businesses and asserts that Agriculture has not made a reasonable effort to survey the awards of any of the other agencies who obtain the same services under small business set asides to ascertain their similarity and pricing. SBA finally notes that a fair market price need not be the lowest possible price and that Agriculture has not supported its argument that similar awards by other agencies were not at fair market prices.

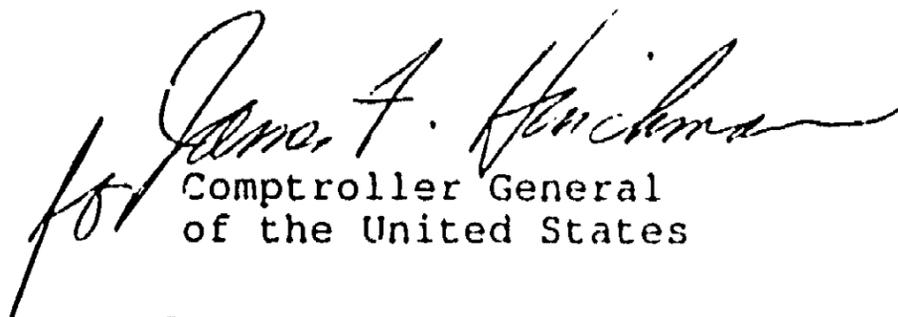
From our review, we agree with SBA that Agriculture has not provided a reasonable basis for its determination that it does not have a reasonable expectation of making award at a fair and reasonable price. In this regard, we generally give great weight to the views of SBA in these matters. Neal R. Gross & Co., Inc., supra; see also Library Sys. and Servs./Internet Sys., Inc., supra (protest against failure to set aside a procurement with which the SBA PCR took issue is sustained); U.S. Constructors, Inc.; Eletech, Inc., supra (protest against withdrawal of set-aside is denied where the SBA PCR elected not to appeal the agency's decision).

Agriculture's contention that the other agencies who obtain these services from small businesses are not paying a fair and reasonable price is simply unsupported by the record; it appears that Agriculture, which initially advanced other reasons for its decision not to set aside the procurement,

did not make a reasonable effort to confirm whether fair and reasonable prices were obtained for similar services from small businesses, but simply relied upon the disputed assertions of a large business court reporter that it could offer lower prices.⁶ See Neal R. Gross & Co., Inc., supra (procuring agency did not make reasonable effort to survey the marketplace to determine if there were sufficient responsible small business firms to provide stenographic court reporter services). The fact that the services are to be performed on a nationwide basis, which may entail subcontracting by small businesses, also does not mean that fair and reasonable prices will not be obtained, since more than two small business court reporting companies currently provide nationwide services and have offices in several cities. See id. (where we rejected the same agency argument defending its decision to not set aside a procurement of nationwide court reporter services).

The protests are sustained.

We recommend that the current solicitation be canceled and the requirement be issued as a small business set-aside. We also find that the protesters are entitled to be reimbursed their costs of pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1992).


Comptroller General
of the United States

⁶The protesters assert that the large business's pricing is misleading and does not demonstrate that the numerous small businesses will not offer fair and reasonable prices.