



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

Decision

Matter of: McGhee Construction, Inc.
File: B-249235
Date: November 3, 1992

Timothy S. Kerr, Esq., Starfield & Payne, for the protester.
John Pettit, Esq., and Col. Scott L. Silliman, Department of
the Air Force, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq.,
Office of the General Counsel, GAO, participated in the
preparation of the decision.

DIGEST

1. Contracting officer's determination not to set aside a procurement for small disadvantaged business (SDB) concerns was reasonable (1) where the agency synopsisized the procurement in the Commerce Business Daily (CBD) to assess whether qualified SDB concerns were interested in the procurement but only received expressions of interest from two firms that had a prior procurement history of bidding significantly more than 10 percent above the fair market price and from two other SDB concerns that did not provide the screening information requested by the CBD announcement and (2) where the agency had received no offers from SDB concerns for recent procurements for similar services at the contract activity.
2. Contracting officer was not required to amend a solicitation, which had been issued on an unrestricted basis, to set it aside for small disadvantaged business (SDB) concerns based upon information first learned after the issuance of the solicitation.

DECISION

McGhee Construction, Inc. protests the terms of invitation for bids (IFB) No. F31610-92-B-0012, issued by the Department of the Air Force, for the installation of new underground electrical service to housing units, underground cable television service, and underground telephone service at Seymour Johnson Air Force Base (AFB), North Carolina. The protester contends that the IFB should have been set aside for small disadvantaged businesses (SDB).

We deny the protest.

The procurement was advertised in the Commerce Business Daily (CBD) on May 15, 1992, as being considered for an SDB set-aside. The advertisement instructed interested SDB concerns to provide the contracting officer, not later than 15 days from the date of the notice, with evidence of their capability to perform, including bonding capability to \$500,000 (the maximum magnitude of the contract), previous contract experience, and a positive statement of eligibility as an SDB concern. It also advised that if adequate interest was not received from SDB concerns, the IFB would be issued on an unrestricted basis.

By the May 30 due date for submission of SDB expressions of interest in the procurement, the contracting officer had received expressions of interest from four SDB concerns. Two SDB firms failed to provide the required information concerning their bonding capability and prior contract experience, and were thus not considered by the contracting officer in her assessment of whether it was likely that at least two qualified SDB concerns would submit offers. The other two SDBs, including McGhee, provided all the required information. The contracting officer concluded, however, based upon McGhee's and the other SDB firm's past bidding history, that there was no reasonable expectation that McGhee or the other SDB concern would offer a bid price within 10 percent of the procurement's fair market price.

On May 30, the contracting officer decided to issue the IFB on an unrestricted basis; the agency's small and disadvantaged business utilization (SADBUS) coordinator concurred in this decision. On May 30, the IFB was issued on an unrestricted basis, with a bid opening date of June 29. After the IFB was issued but before the bid opening date, the contracting officer received eight more expressions of interest from SDB firms.

On June 26, McGhee protested to our Office that the IFB should be set aside for SDB concerns. The Air Force received eight bids by the June 29 bid opening date. Neither McGhee nor any other SDB concern submitted a bid on the IFB. No award has been made pending our decision in this protest.

Initially, the Air Force argues that McGhee's pre-bid opening protest is untimely and should be dismissed. Specifically, the agency contends that the issuance of the IFB on an unrestricted basis was an adverse agency action that the protester was required to protest within 10 working days. We disagree. Whether a solicitation should properly be set aside for SDB firms concerns an apparent solicitation impropriety that must be protested prior to bid opening.

See McGhee Constr. Inc., B-241556, Jan. 10, 1991, 91-1 CPD ¶ 27; Professional Aviation Maint. & Mgmt. Servs., Inc., B-232078, Oct. 13, 1988, 88-2 CPD ¶ 350. Accordingly, McGhee's pre-bid opening protest challenging the terms of the IFB is timely. See 4 C.F.R. § 21.2(a)(1) (1992).

McGhee contends that the contracting officer's determination to issue the procurement on an unrestricted basis is unreasonable because, within the 12 months prior to the date that the IFB was issued, the Air Force had received bids or offers for construction services from numerous SDB concerns, including McGhee. McGhee contends that this established a reasonable expectation that the agency would receive bids from at least two responsible SDB concerns at a price not more than 10 percent of the fair market price. McGhee also complains that, after the IFB was issued on May 30, the contracting officer received expressions of interest from another eight SDB concerns regarding this procurement, and therefore the contracting officer should have amended the IFB to set aside the procurement for SDB concerns.

The regulations implementing the Department of Defense (DOD) SDB program, set forth in DOD Federal Acquisition Regulation Supplement (DFARS) part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-2-70(a) (1991 ed.); A.W. & Assocs., Inc., B-243289, July 10, 1991, 91-2 CPD ¶ 40. We will not disturb a contracting officer's set-aside determination unless the determination is unreasonable. See Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.

Here, we find that the contracting officer's decision to issue the IFB on an unrestricted basis was reasonable. That is, the contracting officer made a reasonable effort to ascertain the interest of SDB firms in competing for the contract work and could reasonably determine from the information available to her at the time of her decision that there was no reasonable expectation of receiving offers from at least two responsible SDB concerns at a price not exceeding the fair market price by more than 10 percent. See FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ ____.

First, as noted above, the Air Force advertised the procurement in the CBD to ascertain whether there was sufficient interest from qualified SDB concerns to set aside the IFB for only SDB firms. Of the four expressions of interest received from SDB firms prior to the issuance of the IFB,

two of the companies failed to provide the required information to show that they could satisfy the contract requirements. Since these firms did not provide sufficient information to meet the minimum screening requirements published in the CBD, the agency was not required to consider their expressions of interest.¹ See Electronic Sys. and Assocs., Inc., B-244878, Nov. 13, 1991, 91-2 CPD ¶ 456. The other SDB firm and McGhee supplied the requisite information, but McGhee's and the other firm's prior procurement history at Seymour Johnson AFB showed that the two firms offered prices that significantly exceeded the fair market price by more than 10 percent.² On average, McGhee bid more than 65 percent greater than the low bid or government estimate on three procurements while the other SDB company bid more than 78 percent greater than the government estimate on one procurement.³ On another procurement, which was set aside for SDB concerns at McGhee's and the other firm's request, neither McGhee nor the other firm submitted a bid.

Also, the Air Force states that the past procurement history for similar services indicates that the agency would not receive at least two bids from responsible SDB concerns. Specifically, the agency states that for two recent procurements for similar construction services involving the relocation of electrical systems underground, it received no offers from SDB concerns. McGhee does not dispute this but contends that numerous SDB concerns have submitted bids for construction services at Seymour Johnson AFB and that there is nothing "exotic" or "unique" about repairing an electrical system. We agree with the agency that the construction services to which McGhee points are not similar to the contract work here. The IFB sought bids for the installation of (1) new underground electrical services to housing units, (2) new underground cable television service, and (3) new underground telephone service. The construction services to which McGhee refers, on the other hand, were for

¹The record indicates that neither of these two SDB concerns had submitted bids for construction services at Seymour Johnson AFB within the prior 12 months. Also, neither firm has expressed any further interest in this procurement or the protest.

²At Seymour Johnson Air Force Base, McGhee and the other SDB firm have participated only in SDB set-aside procurements.

³The one procurement for which both McGhee and the other SDB firm submitted bids was canceled and resolicited on an unrestricted basis because the Air Force determined that none of the bids received from SDB concerns was reasonably priced.

the repair of roof shingles, the installation of fire treated board in attics, and the replacement of door locks.

McGhee also argues, citing obsolete DFARS § 219.502-72(c) (1988 ed.), that the DFARS requires the contracting officer to presume that requirements for setting aside a procurement for SDB concerns have been met if the acquisition history shows that: (1) within the last 12 months a responsive offer was received from at least one SDB concern within 10 percent of the award price on a previous procurement of similar supplies or services, and (2) the contracting officer has reason to know (from the procuring activity's relevant solicitation mailing list, response to resolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. The 1991 edition of the DFARS, which is applicable to this procurement, no longer provides this presumption. In any event, as described above, we do not find that, within the past 12 months, the Air Force received at least one offer from a SDB concern on a previous procurement for similar services.

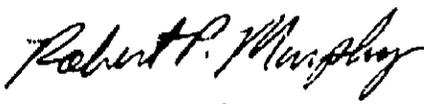
Based on our review, we find that the information available to the contracting officer, as discussed above, provided a reasonable basis for the determination to issue the IFB on an unrestricted basis, particularly in view of the concurrence of the SADBUS coordinator. EKW Inc., supra.

McGhee finally argues that since, after the IFB was issued, the contracting officer received a number of expressions of interest from SDB concerns, the contracting officer abused her discretion by not amending the IFB to set aside the procurement for SDB firms. We disagree. Information that first becomes available after the issuance of a solicitation does not show that a contracting officer's determination not to set aside a procurement was unreasonable.⁴ Fayetteville Group Practice, Inc., 66 Comp. Gen. 489 (1987), 87-1 CPD ¶ 541. Nor does such information received after the issuance of the solicitation require a contracting officer to amend the solicitation and restrict the procurement. While a contracting officer retains the discretion to make new set-aside determinations after a solicitation has been issued, there is no requirement that a contracting officer restrict a procurement after the solicitation is issued on an unrestricted basis where the contracting officer's determination not to set aside the solicitation was reasonable at

⁴The record shows that none of the SDB concerns submitting late expressions of interests in the contract work had competed for construction service contracts at Seymour Johnson AFB within the prior 12 months, and none submitted a bid under the IFB.

the time the solicitation was issued. Id.; FKW Inc., supra. Good procurement policy generally dictates that a set-aside determination should be made before the issuance of a solicitation. See National Steel and Shipbuilding Co. et al., B-202399 et al., Dec. 15, 1981, 81-2 CPD ¶ 471.

The protest is denied.


for James F. Hinchman
General Counsel