



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

Decision

Matter of: E. L. Hamm & Associates, Inc.
File: B-249642
Date: December 8, 1992

Robert N. Davis for the protester.
Howard B. Rein, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly decided to set procurement aside for small business concerns is denied where the agency reasonably concluded that it would receive bids from at least two small business concerns in response to the solicitation and the procurement did in fact generate sufficient small business interest.
2. Where agency initially issues solicitation on unrestricted basis and subsequently determines, shortly before bid opening date, to set procurement aside for small business concerns, claim for bid preparation costs is denied since there is no evidence of bad faith on the agency's part.

DECISION

E. L. Hamm & Associates, Inc., a large business concern, protests the Department of the Navy's conversion of invitation for bids (IFB) No. N62472-92-B-2034 from an unrestricted procurement to a 100-percent small business set-aside. The IFB is for miscellaneous real property maintenance at Portsmouth Naval Shipyard, Kittery, Maine.

We deny the protest.

The Navy initially issued an unrestricted IFB on June 19, 1992, with bid opening scheduled for July 21. On July 15, the incumbent contractor, a small business concern, contacted the Navy contract specialist assigned to the procurement to find out why the Navy decided to issue an unrestricted IFB rather than a restricted IFB; the incumbent contractor also informed the contract specialist that although the solicitation called for maintenance work, it

contained a Standard Industrial Classification code which is designated for construction work.

Following the incumbent's inquiry, the contracting officer reviewed the agency's initial decision not to set the procurement aside; as a part of this review, the contracting officer examined the current "planholders list" (that is, the listing of the firms or individuals that requested copies of the solicitation) as well as the prior procurement history. The contracting officer discovered that even though the prior solicitation was issued on an unrestricted basis, all the bids received were from small business concerns. The contracting officer also discovered that several of the bidders on the current "planholders list" were small business concerns that had in the past submitted competitive bids for work similar to that called for under the current solicitation. As a result, the agency determined that the acquisition should be set aside exclusively for small business concerns and, thus, issued amendment No. 3 to inform the bidders of the conversion. E. L. Hamm's protest to our Office followed. While the protest was pending at our Office, the agency held bid opening and received 13 bids; E. L. Hamm was the only large business concern that submitted a bid.

E. L. Hamm contends that the Navy's decision to convert the solicitation from an unrestricted procurement to a small business set-aside was improper. To support its allegation, the protester argues that the agency could not reasonably have expected to receive bids from at least two responsible small business concerns. The protester also argues that converting the solicitation to a set-aside 2 days before bid opening was improper because the "contracting officer had at least 30 days to have made this decision." As a result, the protester contends that it is entitled to recover its bid preparation costs since it incurred these expenses based on the fact that the solicitation was initially issued on an unrestricted basis.

An acquisition is to be set aside exclusively for 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 a fair market price. Federal Acquisition Regulation (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. RBC, Inc., B-233589.2, Mar. 28, 1989, 89-1 CPD ¶ 316.¹ However, an agency must make reasonable efforts to ascertain whether it is likely that it 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 the agency has done so. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

The use of any particular method of assessing the availability of small businesses is not required so long as the agency makes reasonable efforts to locate responsible small business competitors. See id. Factors such as prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer to decide whether or not to set aside a procurement. American Cyanamid Co., B-230044 et al., Apr. 7, 1988, 88-1 CPD ¶ 350. Here, we conclude that there is adequate evidence to support the agency's decision to set the procurement aside.

As explained in the agency report, the agency reviewed the prior procurement history and the current planholders list for the acquisition. The contracting officer discovered that five small business concerns had submitted reasonable bid prices in response to the prior solicitation for maintenance services at Portsmouth Naval Shipyard and that several small business concerns had requested copies of the

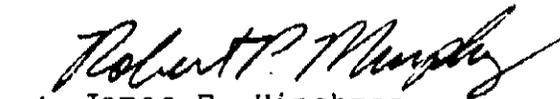
¹To the extent that the protester questions the agency's motives for deciding to restrict the procurement because the agency's decision stems from conversations between agency personnel and the incumbent contractor, it is not necessary for us to decide this issue. Since FAR § 19.502-2 is specific about the requirements for setting aside requirements for small businesses, the reasonableness of a set-aside decision is independently verifiable regardless of the motivation of individuals within the agency.

Nor are we persuaded by the protester's argument that the discussions between the incumbent contractor and agency personnel are a "violation of the Procurement Integrity Act." Contrary to the protester's assertion, the Office of Federal Procurement Policy Act provisions set forth in 41 U.S.C. § 423 (1988 and Supp. II 1990) do not prohibit the type of discussions that were involved here, but instead prohibit activities which involve soliciting or discussing post-government employment, offering or accepting a gratuity, and soliciting or disclosing proprietary or source selection information.

current solicitation. In light of the fact that small businesses submitted bids in response to the prior IFB and the fact that small businesses expressed an interest in the current procurement, the agency reasonably concluded that there was a likelihood that it would receive bids from at least two small business bidders under the solicitation.²

With regard to the timing of the issuance of the amendment announcing the set-aside, while it would have been preferable to set aside the procurement early in the procurement process, the fact that the decision was not made until a few days before bid opening does not, by itself, entitle the protester to recover its bid preparation costs. Even assuming that the agency acted negligently--which the protester has not alleged--in not reviewing the prior procurement history before it initially issued the unrestricted solicitation, recovery of bid preparation costs is allowed only where there is a showing of bad faith on the agency's part. The Taylor Group, Inc., 70 Comp. Gen. 343 (1991), 91-1 CPD ¶ 306. To show bad faith, the protester must establish that the agency officials acted intentionally to injure the protester. See Oliver Prods. Co., B-245762.2, Apr. 28, 1992, 92-1 CPD ¶ 501. There is neither an indication in the record nor an allegation by the protester that the decision was made in bad faith; rather, the record shows that the set-aside determination was properly made based on prior procurement history and current expressions of interest from small business bidders.

The protest is denied.


for James F. Hinchman
General Counsel

²The agency's decision to set the procurement aside is also supported by the fact that 12 small businesses actually submitted bids. See Litton Electron Devices, 66 Comp. Gen. 257 (1987), 87-1 CPD ¶ 164 (protest against a set-aside decision denied where the decision lacked a reasonable basis at the time it was made, but the agency later received indications of interest from two small businesses).