

K. Riback



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: State Management Services, Inc.

File: B-251715

Date: May 3, 1993

Kelsey Lewis for the protester.
Lydia Kupersmith, Esq., General Services Administration, for the agency.
Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency's determination not to set aside a procurement for small business concerns is reasonable where the agency concluded, after a thorough consideration of relevant factors, including the procurement history of prior comparable requirements and the relatively complex nature of the requirement, and with the concurrence of the agency's Small Business Administration representative, that it could not reasonably expect to receive proposals from at least two responsible small business offerors.

2. Agency reasonably required that firm, fixed-price proposals for facility management services include all designated repair work under listed dollar thresholds. Offerors were provided sufficient information to estimate the likely cost of such repairs and factor it into their prices; procuring agency is entitled to reduce its administrative burden and is not obligated to remove all performance uncertainties and risks under solicitation specifications.

DECISION

State Management Services, Inc. protests the decision of the General Services Administration (GSA) to issue request for proposals (RFP) No. GS-11P-92-MJC-0071 for commercial facilities management (CFM) for the National Foreign Affairs

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Training Center, Arlington Hall, Arlington, Virginia,¹ on an unrestricted basis. State Management asserts that the procurement should be a small business set-aside. State Management also contends that certain repairs called for under the RFP should be acquired using an indefinite quantity line item, not on a firm, fixed-price basis.

We deny the protest.

The GSA contracting officer investigated whether the procurement should be restricted to small businesses in accordance with Federal Acquisition Regulation (FAR) § 19.502-2 and determined that a set-aside was not feasible. GSA then published a synopsis in the Commerce Business Daily (CBD) on September 29, 1992, and on October 21, issued the solicitation on an unrestricted basis. The RFP contemplates a firm, fixed-price contract with an award fee, for a base period of 1 year with four 1-year options. GSA held two preproposal conferences, and the solicitation encouraged prospective offerors to visit the facility. By the closing date for receipt of proposals, GSA received 12 proposals, one from a small business. State Management did not submit a proposal.

Prior to the closing date for receipt of proposals, State Management protested to the agency that the procurement should be set aside for exclusive small business participation, and State Management subsequently protested to our Office that the contracting officer unreasonably determined that the RFP should not be a total small business set-aside.

Generally, we regard a contracting officer's decision determining whether to set aside a procurement 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. EKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270; Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203.

Under FAR § 19.502-2, a procurement is required to be totally set aside for small business when there is a reasonable expectation of receiving proposals from at least two responsible small business concerns and the award can be made at a reasonable price; conversely, unless such a determination can be made, a total small business set-aside should not be made. The contracting officer must undertake reasonable efforts to ascertain whether there is a

¹The facility is a State Department compound; the State Department requested that the GSA procure the services because of the size and complexity of the CFM contract.

reasonable expectation that two or more responsible small business concerns will actually submit proposals. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

Here, in making the determination not to set the requirement aside because there was no reasonable expectation of receiving two offers from responsible small businesses at a reasonable price, the contracting officer considered several factors. Because this facility is new and there is no history of competition for this particular requirement, he reviewed the procurement history of prior comparable requirements. In 1984 the agency issued an unrestricted solicitation for CFM services in Washington, D.C., which yielded four proposals from small businesses, all at unreasonably high prices. An unrestricted solicitation for CFM services in 1987 in Rockville, Maryland yielded no responses from small businesses. In 1989, in response to an unrestricted solicitation for CFM services in Washington, D.C., the agency received a proposal from one of the small businesses, Contract Services, which was eventually awarded the contract. Also in 1989, in response to an unrestricted solicitation for CFM services, the agency received proposals from two small businesses. However, the proposal of only one small business, Contract Services, was found technically acceptable and included in the competitive range; the other small business failed to submit a price proposal. The contracting officer was aware that Contract Services is no longer a small business.

Next, the contracting officer considered the nature of this requirement. The contractor as a facility manager is fully responsible for management, operation, maintenance, and support operations of the National Foreign Affairs Training Center. This facility consists of the Foreign Service Institute, the Administration Building, the Visitor Center, the Conference/Dining Building, two Sears cottages, the gymnasium, and the Central Plant. The contractor must provide all management, administrative and technical support for the effective and timely accomplishment of: facilities management, operation and maintenance of equipment, architectural/structural and sustaining maintenance and repairs, janitorial and snow removal, trash removal and disposal, reimbursable facility alterations, and energy management systems. The contracting officer concluded that the complexity of the requirements and the need for a large staff with considerable managerial oversight required a contractor with expertise and resources not usually available to small business concerns.

²Contract Services submitted a proposal in response to this solicitation in which it certified that it is a large business.

Next, the contracting officer sought advice from the Manager of the GSA Business Service Center, an internal agency source knowledgeable about small business firms, to help locate small business firms capable of performing this CFM at a reasonable price. This individual was unable to identify any small business firms capable of providing the services. Based upon this analysis, the contracting officer concluded that there was no reasonable expectation of receiving proposals from at least two responsible small business concerns.

The contracting officer then requested the Small Business Administration (SBA) Procurement Center Representative to review the specifications and recommend any known small business firms capable of meeting the requirements of the contract. The SBA representative was unable to suggest any known small business firms as potential sources for these CFM services and, therefore, concurred with the contracting officer's determination that a set-aside was not feasible.

State Management first contends that there are a number of small business concerns, including itself, capable of performing this contract and that the GSA did not undertake a reasonable effort to ascertain their existence. Specifically, State Management asserts that GSA should have solicited small business interest through the CBD. State Management also points out that there were more than two small business concerns on GSA's mailing list for this solicitation; thus, the agency should have set the procurement aside.

The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. FKW Inc., supra; Raven Servs. Corp., supra. Factors that may constitute adequate grounds for not setting aside a procurement include prior procurement history, nature of contract, type of contract, market surveys, and/or advice from the agency's small business specialist and technical personnel. Id. Here, the agency made reasonable efforts, which included reviewing GSA's experience under similar requirements, considering the complex nature of the contract requirements, and consulting with appropriate small business specialists.

The mere presence of small businesses on the bidders' mailing list is not conclusive on the matter of sufficient small business interest, even where the agency is aware that they are small businesses. Kunz Constr. Co. Inc., B-234093, Mar. 30, 1989, 89-1 CPD ¶ 334. Here, the contracting officer explains that according to his experience, it is not unusual for small businesses to request a copy of a CFM proposal, and to become included on the mailing list,

because they want to be apprised of the subcontracting opportunities which will arise when the prime CFM contract is awarded.

We find that the contracting officer acted within his discretion in issuing the RFP on an unrestricted basis. The information available to the contracting officer provided a reasonable basis for the determination to conduct an unrestricted procurement, particularly in view of the concurrence of the SBA Procurement Center Representative. See Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269; The Saxon Corp., B-238652, June 20, 1990, 90-1 CPD ¶ 575.

State Management also complains that certain repair requirements should have been priced under an indefinite quantity line item, rather than included in the monthly firm fixed price. In particular, the RFP called for the contractor to be responsible for the first \$1,000 of any architectural/structural repair and for the first \$5,000 of any mechanical/electrical repair. Thus, the RFP required the contractor to include the anticipated cost of these repairs in its overall monthly prices, and provided for separate reimbursement for any given repair only if the specified dollar threshold is exceeded. The protester's complaint is essentially that the contractor is at risk that there may be repeated below-threshold repairs for which it will not receive any additional reimbursement.

A procuring agency must provide sufficient information in a solicitation to enable offerors to compete intelligently and on a relatively equal basis. Mark Dunning Indus., Inc., B-243757, Aug. 22, 1991, 91-2 CPD ¶ 187. There is no requirement, however, that an RFP eliminate all performance uncertainties and risks. Id. In this regard, offers for service contracts, by their very nature, often require the computation of prices based on visual inspections, and the presence of some element of risk does not mean that fair competition is precluded or that a solicitation is improper. Ronald E. Borello, B-232609, Jan. 11, 1989, 89-1 CPD ¶ 28. It is within an agency's discretion to construct a solicitation so that the resulting contract imposes substantial risk upon the contractor with the minimum administrative burden on the agency. Bean Dredging Corp., B-239952, Oct. 12, 1990, 90-2 CPD ¶ 286.

The solicitation includes a description of the facility and the services to be rendered, and invites prospective offerors to attend two preproposal conferences that will:

"provide a briefing on the contracting concept, the scope of the work, and the specifications, so that offerors can ascertain the complexities of the services to be performed, along with general conditions which could materially affect conduct of the operations or the cost thereof."

The solicitation also encourages prospective offerors to visit the facility.³

One would expect a low rate of repairs for structural or mechanical/electrical repairs in such a new facility, and offerors could ascertain through inspection what brands and models of equipment are in place, making reasonable estimates of repair needs during the contract term. We see no reason why a prospective offeror could not use its business acumen, the site visit, and the preproposal conferences to determine the effort required. See Ronald E. Borello, supra.

The agency also took into account the costs and burdens of contract administration in deciding on how to allocate performance risks and responsibilities. Providing separate reimbursement for each repair would require the agency to submit a repair request to the building manager, and if no line item price existed for the repair, the building manager would then have to negotiate a price for the required work. The building manager would be required to inspect the work before payment could be authorized. In contrast, under the firm, fixed-price arrangement provided for in the solicitation, the contractor will make repairs as necessary and seek reimbursement from the agency only when the cost of the repairs exceeds the dollar thresholds specified in the solicitation. We believe that lump-sum pricing except for high cost repairs is an appropriate compromise reducing both the agency's burden and limiting the risk to the contractor. Also, we agree with the agency that making the contractor responsible for repairs below a certain dollar threshold increases the incentive for the contractor to more effectively maintain the facilities in order to keep such repair costs to a minimum.

³State Management did not attend either of the preproposal conferences nor did it visit the site on a scheduled site visit.

We conclude that the solicitation contained sufficient information for offerors to intelligently prepare their proposals, and that the pricing format properly minimized the agency's administrative burden without imposing an unreasonable performance risk on the offerors. In reaching this conclusion, we note that 12 proposals were received, and that no other offeror questioned the terms of the solicitation:

The protest is denied.



 James F. Hinchman
General Counsel