



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sunrise International Group, Inc.,
Specialized Contract Services, Inc.

File: B-254875; B-254875.2

Date: January 25, 1994

Ray E. Baker for the protester, Sunrise International Group, Inc.; and Herbert C. Ross, for the protester, Specialized Contract Services, Inc.

Colonel Riggs L. Wilks, Jr., and Captain Elizabeth DiVecchio Berrigan, Department of the Army, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency reasonably determined not to set aside for small business a procurement for lodging and meal services, notwithstanding a previous small business set-aside acquisition, where the agency made a reasonable effort to locate potential responsible small business concerns who would submit a bid for the services, by requesting the Small Business Administration (SBA) to identify small business sources and by publishing a notice in the Commerce Business Daily soliciting small business interest, but was unable to conclude that bids would be received from at least two responsible small business concerns, and where the SBA concurred in the withdrawal of the set-aside.

2. Protest that bidder changed its place of performance as identified in its bid for lodging and meal services in order to provide an acceptable facility involves a question of responsibility and does not provide a basis to object to the award.

DECISION

Sunrise International Group, Inc. protests the Department of the Army's failure to issue invitation for bids (IFB) No. DAKF57-93-B-0046, for meals and lodging for the military entrance processing station (MEPS) in Oakland, California, as a small business set-aside. Specialized Contract Services, Inc. protests the proposed award under the IFB to Convention Marketing Services, Inc. because Convention has been permitted to change the facility identified in its bid.

We deny the protests.

The services had previously been successfully acquired under a small business set-aside. Prior to issuing the IFB on an unrestricted basis, the Army again attempted to procure the services under a total small business set-aside. On April 7, 1993, the Army received nine bids in response to the set-aside IFB, including one from Sunrise. Competing bidders protested the small business size status of the six lowest bidders, including Sunrise. Before these protests were resolved by the Small Business Administration (SBA), the Army canceled the IFB for reasons unrelated to the size protests.

Because of the numerous size protests, the contracting officer investigated the feasibility of continuing to restrict the procurement exclusively for small business participation. The contracting officer solicited the SBA's assistance to determine whether the six low bidders actually qualified as small businesses and in identifying qualified small businesses in the Oakland area. The SBA declined to rule on the size status of the bidders because the solicitation has been canceled, but advised the Army that it was aware of only two qualified small business hotels/motels in the area. When these two facilities were contacted by the Army, only one indicated interest in bidding for these services.

The Army also prepared a synopsis of the procurement for publication in the Commerce Business Daily (CBD) requesting interested small business concerns to advise the Army of their interest within 15 days so the agency could determine whether the procurement could be set aside for small business. Three alleged small business concerns responded to the CBD notice. One of these concerns was the small business identified by the SBA that previously expressed interest in the procurement. The other two concerns that claimed to be small businesses, including Sunrise, were located in North Carolina and apparently did not own facilities in the Oakland area. Because these firms were from outside the Oakland area and Sunrise was among the bidders whose small business size status had been challenged under the canceled procurement, the contracting officer questioned whether they could satisfy the requirement that at least 50 percent of the cost of contract performance incurred for personnel be expended for personnel of the small business bidder. 15 U.S.C. § 644(o)(1)(A) (1988); Federal Acquisition Regulation (FAR) § 52.219-14(b)(1). If these non-local concerns are not able to satisfy this requirement, the SBA would consider them to be other than small. See generally Contract Servs. Co., Inc., B-246604.2 et al., June 11, 1992, 92-1 CPD ¶ 508.

Finally, the Army contacted Convention, which was the incumbent contractor whose contract had expired, to determine its interest in submitting a bid. Convention advised that it no longer qualified as a small business concern. The Army also considered the interim contractor, which was a small business concern, but found that this contractor might not be responsible because the Army had issued a cure notice to the contractor regarding its restaurant facilities which failed to meet material requirements of the interim contract.

Based on the foregoing investigation, the contracting officer determined that there was not a reasonable expectation that offers would be obtained from at least two responsible small business concerns. After consulting with the small and disadvantaged business utilization specialist (SADBUS) and obtaining the concurrence of the SBA procurement representative, the contracting officer decided to issue the procurement on an unrestricted basis.

On August 12, 1993, the Army issued this unrestricted IFB. On September 10, Sunrise protested that the IFB should have been restricted to small business participation. The Army proceeded with the bid opening on September 14 and received seven bids. Sunrise did not submit a bid. Four of the bids were from concerns who certified themselves as small. Convention, which is a large business, was the apparent low bidder and Specialized submitted the next low bid. On December 6, Specialized protested the proposed award to Convention, asserting that it was improperly being permitted to change the facility identified in its bid.

Sunrise objects to the Army's decision to issue the procurement on an unrestricted basis because the prior solicitation yielded nine small businesses, none of which was actually determined to be other than small. Further, Sunrise asserts that the agency's prior "Bidders Mailing List" (BML) reflects that of the six small businesses listed on the BML five bid on the prior procurement. Sunrise also argues that the Army's efforts to identify interested small businesses should have considered those small businesses headquartered outside the Oakland area appearing on the BML which were capable of meeting the subcontracting restrictions, such as Convention, a non-local firm which apparently subcontracted with a local facility and maintained its small business status in the prior procurement. Sunrise contends that the Army's determination that it was not likely to receive at least two offers from responsible small businesses was unreasonable.

As a general rule, a procurement must be set aside for small business 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. FAR § 19.502-2(a). Further, where, as here, the service has previously been successfully acquired under a small business set-aside, the set-aside should be continued unless the factors identified in FAR § 19.502-2(a) no longer exist. FAR § 19.501(g); Defense Federal Acquisition Regulation Supplement § 219.501(g). Where a set-aside is withdrawn, the contracting officer is required to notify the agency small and disadvantaged business utilization specialist (SADBUS) and the SBA procurement center representative. FAR § 19.506(a). We will not object to the contracting officer's decision to withdraw a set-aside unless the contracting officer did not undertake reasonable efforts to ascertain whether it was likely to receive sufficient bids from small businesses to justify a set aside. See Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

We think the contracting officer made reasonable efforts to identify potential small business candidates for the IFB by contacting the SBA and by issuing a CBD notice requesting expressions of interest from small business concerns. See State Mgmt. Servs., Inc., B-252312, June 21, 1993, 93-1 CPD ¶ 474. These efforts resulted in the identification of only one responsible small business concern that was interested in the procurement. While Sunrise points to the firms identified as small business concerns on the prior BML and which bid on the canceled IFB as evidence that the Army acted unreasonably, we note that the size of these firms was protested and that none of these concerns, except for Sunrise, expressed any interest in response to the CBD announcement. Moreover, the SADBUS and the SBA procurement representative were consulted and concurred with the contracting officer's decision to issue an unrestricted procurement, and we generally give significant weight to the views of SBA in these matters. Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., supra; ESC Corp., B-232037, Nov. 23, 1988, 88-2 CPD ¶ 507.

The protester argues that the Army could have made more of an effort to identify capable out of town small businesses, and should have accepted Sunrise's and the other North Carolina firm's representations that they were small business concerns. There is no requirement for using any particular method of assessing the availability of small businesses so long as the agency undertakes reasonable efforts to locate responsible small business concerns. State Mgmt. Servs., Inc., supra. Sunrise has provided no basis for us to question the contracting officer's

trepidation regarding the ability of such out of town sources to meet the subcontracting restrictions. Sunrise does not even identify the facility with which it would have subcontracted if it had submitted a bid or show that its relationship with such a facility would allow Sunrise to be considered a small business concern. Conversely, the agency has furnished a copy of a SBA decision reflecting that Sunrise in the past was denied small business status for failing to satisfy the subcontracting restrictions.¹

Sunrise also argues that eliminating the interim contractor as a potential small business source was tantamount to a premature nonresponsibility determination, subject to SBA review. We disagree. The contracting officer was required to evaluate the potential responsibility of the small business bidder in determining whether a set-aside should be made. See FAR §§ 19.501(g), 19.502-2(a); JT Constr. Co., Inc., B-254257, Dec. 6, 1993, 93-2 CPD ¶ 302.

Finally, Sunrise points to the fact that 4 bids from firms claiming small business status were received as showing the determination not to set aside the procurement was unreasonable. However, the reasonableness of a set-aside decision is determined as of the time it was made, and the fact that bids from small businesses are submitted or that additional sources are subsequently identified does not show that a decision not to set aside was unreasonable. See J. Morris & Assocs., B-254093 et al., Nov. 16, 1993, 93-2 CPD ¶ 284; Universal Hydraulics, Inc., B-232144, Oct. 31, 1988, 88-2 CPD ¶ 417.

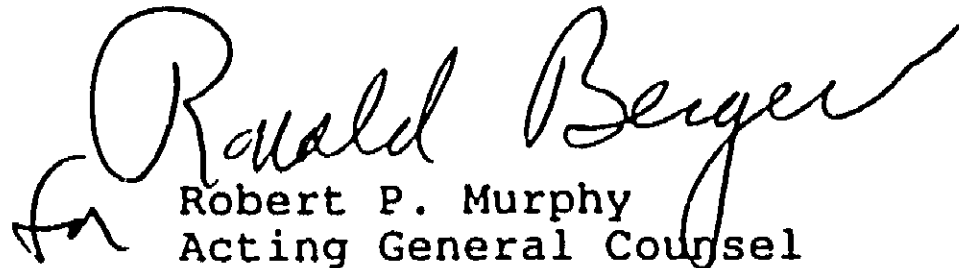
In sum, we conclude that the agency's decision not to set aside the procurement for small business was reasonable.

Specialized protests that Convention's bid should be rejected as nonresponsive because the Army is permitting Convention to change the place of performance that it designated in section K.9 of the representations and certifications contained in its bid. This section requires the contractor to identify performance locations if it intends to use a facility or location other than as represented in the bid as its own address. Convention, an out of town concern, intends to change the place of performance identified in its bid because the original facility failed to meet certain fire codes and regulations.

¹We also note that the facility Sunrise proposed to use on the canceled IFB is the same as that proposed by Specialized under the present IFB and that Specialized has identified itself as other than a small business concern.

A bidder's designated place of performance is generally a matter of responsibility. See Braswell Servs. Group, Inc., B-248336, Aug, 19, 1992, 92-2 CPD ¶ 113. Therefore, there generally is nothing improper with a bidder's altering before award how it intends to perform by deciding to use a facility different from that originally identified in this clause, so long as it complies with the IFB requirements. See Jersey Maid Distributors, Inc., B-217307, Mar. 13, 1985, 85-1 CPD ¶ 307. Whether a bidder's facilities are adequate to satisfy contract requirements is a matter to be considered and possibly rectified as part of the responsibility determination for that bidder. See D.J. Findley, Inc., B-215983, July 24, 1984, 84-2 CPD ¶ 106. An agency's affirmative determination of a contractor's responsibility will not be reviewed by this Office, absent a showing of possible fraud or bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation may have been misapplied. 4 C.F.R. § 21.3(m)(5); King Fisher Co., B-236687.2, Feb. 12, 1990, 90-1 CPD ¶ 177. There is no such evidence in this case. Thus, Convention's change in its place of performance provides no basis for us to object to the award.

The protests are denied.


 Robert P. Murphy
 Acting General Counsel