

Matter of: JT Construction Co., Inc.

File: B-254257

Date: December 6, 1993

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DIGEST

Contracting Officer's determination not to set aside a procurement for small disadvantaged business (SDB) concerns was reasonable. Here the agency synopsisized the procurement in the Commerce Business Daily (CBD) to assess whether responsible SDB concerns were interested in the procurement and received expressions of interest from SDB concerns that either did not provide the screening information requested by the CBD announcement or from SDB concerns that evidenced that the firms may lack the capability to perform a contract of the magnitude contemplated by the announcement.

DECISION

JT Construction Co., Inc. protests that request for proposals (RFP) No. F41684-93-R-0118, issued by the Department of the Air Force for renovation of military family housing units at Laughlin Air Force Base (AFB), Del Rio, Texas, should be set aside for small disadvantaged business (SDB) concerns.

We deny the protest.

The Air Force published a synopsis in the Commerce Business Daily (CBD) on June 4, 1993, announcing that the procurement of all labor, equipment, and material necessary to renovate 208 military family housing units was being considered for an SDB set-aside. The synopsis stated that the proposed work included the replacement of floors, doors, windows, electrical systems, bathroom and kitchen cabinets, and gypsum wallboard, as well as the removal and disposal of materials containing asbestos, and that the magnitude of the project was between \$5 and \$10 million. The advertisement

instructed interested SDB concerns to provide the contracting officer, not later than 15 days from the date of the synopsis, with a statement of their eligibility as SDB concerns, evidence of their bonding capability, specific information demonstrating their capability to perform projects of the complexity and magnitude of that outlined in the synopsis, and "[c]omplete information concerning their management experience in similar work and financial status . . . with references." The synopsis also advised that if adequate interest was not received from SDB concerns, the RFP would be issued on an unrestricted basis.

By the June 19 due date for SDB concerns' expressions of interest in the procurement, the contracting officer had received correspondence from 19 SDB concerns. The contracting officer determined, upon reviewing the correspondence submitted, that only 10 of the 19 firms submitted any information demonstrating their capability to perform projects of the complexity and magnitude of that outlined in the advertisement. Further, only the protester and three other firms submitted evidence of their capability to obtain sufficient bonding for the project and of these four firms the protester and one other firm failed to submit the requested information concerning their management experience and financial status. Based on its review of the submitted information of the two firms remaining under consideration, the Air Force found that the firms may not be sound financially, that neither firm had completed a military family housing project of similar size, and that while one of the firms was currently performing on a contract similar in size to that contemplated here, the other firm's submission did not evidence experience in performing contracts of this magnitude.

The contracting officer also contacted the Army and Engineering Division, Portland, Oregon, which is a repository of performance reports on Department of Defense (DOD) construction contracts, and received information concerning six of the SDB concerns that had expressed interest in the solicitation, including the four firms which had submitted evidence of their capability to obtain sufficient bonds. The information obtained from this source indicated that none of these six firms had completed a project similar to the work and magnitude outlined in the CBD.

Based on the foregoing, the contracting officer determined that the RFP should not be issued as a total set-aside for SDB concerns. On July 16, the agency issued the RFP on an unrestricted basis.

JT Construction protests the contracting officer's determination not to issue the RFP as an exclusive set-aside for SDB concerns. JT Construction first complains that the scope of information requested by the agency in the CBD advertisement was "far in excess" of what was needed to reasonably determine whether to set aside the procurement for SDB concerns. The protester also contends that the agency should have contacted it and the other SDB concerns that had expressed interest in the procurement but had submitted what the agency considered to be insufficient information, in order to make a reasonable assessment of SDB concern interest and capability, given the scope of information requested and the number of SDB concerns that responded. The protester argues that, in any event, its response to the synopsis fully addressed its management capabilities and financial status, and the agency's determination to the contrary was erroneous. The protester finally argues that the agency's determination that there was not a reasonable expectation that offers would be obtained from at least two responsible SDB concerns constituted a premature, impermissible determination of nonresponsibility without referral of the determination to the Small Business Administration (SBA).

The regulations implementing the DOD SDB program, set forth at 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; (2) award will be made at a price not exceeding the fair market price by more than 10 percent; and (3) scientific and/or technical talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a); All Star Maintenance, Inc., B-249810.3, Nov. 24, 1992, 92-2 CPD ¶ 374. We generally view this determination as a business judgment within the contracting officer's discretion, and we will not disturb a contracting officer's set-aside determination unless it is unreasonable.

¹The RFP does provide that an evaluation preference will be accorded to SDB concerns by adding a factor of 10 percent to the offers of non-SDB concerns for evaluation purposes. See Defense Federal Acquisition Regulation Supplement (DFARS) §§ 219.7000-7003; 252.219-7006.

McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318. However, a contracting officer must undertake reasonable efforts to ascertain whether he is likely to receive offers that would support a decision to set aside a procurement for SDB concerns, and we will review a protest to determine whether a contracting officer has done so. See Neil R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

With regard to JT Construction's complaint concerning the scope of information requested by the agency in the synopsis, there is no requirement that a contracting officer use any particular method for assessing the availability of SDBs. FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270. Because the contracting officer was obligated under DFARS § 219.502-2-70(a) to affirmatively determine whether there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns, and given that this project is for the renovation of 208 military family housing units at an estimated cost of \$5 to \$10 million, we think the agency could reasonably request the scope and type of information requested in the synopsis. See McGhee Constr., Inc., supra (synopsis required interested SDB concerns to submit a statement of their eligibility as an SDB concern, and evidence of their previous contract experience and capability to perform, including bonding capability). While the agency may have solicited and considered less detailed responses to advertisements of prior procurements that were being considered for SDB set-asides, the agency points out that these prior procurements involved smaller, less complex construction at Laughlin AFB. They do not, therefore, belie the reasonableness of the agency's decision here to require more detailed information.

The protester argues with regard to its own submission that because the advertisement did not require that the information be presented in any specific format, the denotations in its response of a bank reference and its accountant should be considered sufficient evidence of its financial status as these individuals could be contacted by the agency for information, and the list of projects it has completed should be considered sufficient evidence of its management experience. We disagree.

The synopsis provided clear instructions as to what information interested SDB concerns were to provide in their responses to aid the agency in determining whether to set aside the procurement for SDB concerns. These instructions specifically required that interested SDB concerns provide, among other things, "complete information" of their management experience and financial status, including references. JT Construction, by submitting only the names of two individuals, their business addresses, and their

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telephone numbers, as evidence of its financial status, and a list of completed projects as "complete information" concerning its management experience, simply failed to provide the agency with the requested information so the agency could reasonably ascertain whether the protester had adequate financial standing and management experience to accomplish the \$5 to \$10 million project announced in the CBD. We note that in contrast to JT Construction's meager submission, other interested SDB concerns submitted information which set forth their financial status in general terms, such as assets and liabilities, and general descriptions of similar prior projects and the specific management experience gained.

As stated above, 16 other responses from SDB concerns also contained insufficient information. These responses ranged from one paragraph statements of SDB eligibility and interest in the procurement, without any representations made as to performance or bonding capabilities or experience in similar work, to responses similar to that submitted by the protester, which provided some of the requested data but were still insufficient to allow any sort of meaningful agency evaluation as to the SDB concerns' capabilities to accomplish a contract of this magnitude. We also note that only one of these 16 responses demonstrated that the SDB concern was capable of obtaining bonding for a project of the size contemplated here. Given the clear instructions in the CBD advertisement, the agency was not required to contact these firms that did not provide sufficient information to meet the minimum screening requirements published in the CBD in order to obtain further information, and did not act unreasonably in not giving further consideration to these firms in determining not to set aside the procurement. See McGhee Constr., Inc., supra.

There were two responses that contained information addressing the firms' eligibility as SDB concerns, their capability to perform projects of the complexity and magnitude of that outlined in the synopsis, including their bonding capability, and information concerning their management experience in similar work and financial status. The agency determined that one of these firms may be unsound financially for a procurement of this magnitude because, as reported by the firm, its liabilities exceeded its assets. Moreover, the largest contract the concern had performed on totaled less than half of the size of the one contemplated here in terms of cost, and was not similar to the work involved in the renovation of military family housing

units.² For these reasons, we believe that the agency reasonably concluded that the firm was not a responsible prospective SDB concern for purposes of this procurement. This left only one eligible SDB concern.

Finally, the protester maintains that where, as here, the agency receives expressions of interest from more than two SDB concerns, the agency's determination not to set aside a procurement for SDB concerns constitutes an impermissible determination of nonresponsibility absent referral to the SBA.

The protester's argument fails to distinguish between the agency's duty to decide if there is a reasonable expectation of receiving offers from at least two responsible SDB concerns at prices within 10 percent of the fair market price, DFARS § 219.502-2-70(a); see Commercial Energies, Inc., B-243402, July 30, 1991, 91-2 CPD ¶ 102, and an agency determination that a particular offeror is not considered responsible for performance of a particular contract. In the first instance, the agency is called upon to make a pre-solicitation determination regarding the likely responsibility of prospective offerors. See Commercial Energies, Inc., supra. In the second, the agency decides that a specific offeror otherwise in line for award should not receive the award because of concern regarding the offeror's ability to perform in accordance with contract requirements. See Federal Acquisition Regulation (FAR) subpart 9.1. The Small Business Act provides that a contracting officer may not "preclude" a small business concern from contract award on the basis of a nonresponsibility determination without referring the matter to the SBA, which is given statutory authority to conclusively determine the responsibility of small business concerns for a specific contract. 15 U.S.C. § 637(b)(7)(A) (1988). This provision clearly has no applicability to the first situation since a decision not to set aside a procurement does not preclude any firm from receiving a contract. Thus, we long ago recognized that the decision a contracting officer must make about potential offerors' responsibility in deciding whether to set aside a procurement is not a responsibility determination under subpart 9.1 of the FAR and therefore, when the decision is

²We need not consider the agency's conclusion concerning the other of these two firms, because with the elimination of one of these firms from consideration, there is no longer the possibility of obtaining offers from at least two responsible SDB concerns.

not to set aside, no referral to the SBA is required.³ See Fermont Div., Dynamics Corp. of Am.; Onan Corp., 59 Comp. Gen. 533 (1988), 80-1 CPD ¶ 438.

In sum, we conclude that the contracting officer's determination to issue the RFP on an unrestricted basis was reasonable. That is, the contracting officer made a reasonable effort to ascertain the interest of SDB concerns in competing for the contract work, and reasonably determined from the information available that there was not a reasonable expectation of receiving offers from at least two responsible SDB concerns at a price not exceeding the fair market price by 10 percent. McGhee Constr., Inc., supra.

The protest is denied.

James F. Hinchman
General Counsel

³The protester relies on footnote 1 in Ace-Fed. Reporters, Inc.; Fed. Energy Regulatory Comm'n--Recon., B-245149.2; B-245149.3, Apr. 6, 1992, 92-1 CPD ¶ 347, to support its argument that an SBA referral was required here. That footnote, however, simply responded to the protester's argument in that case that a potential small business offeror was nonresponsible--we correctly pointed out that such a determination could not be made prior to receipt of offers because it would be a premature determination of responsibility and such an ultimate conclusion could be determined only by the SBA.