

Matter of: Digital Systems Group, Inc.

File: B-256422; B-256521

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DIGEST

Determination of whether Financial Management Software Systems mandatory Multiple Award Schedule (FMSS Schedule) should be set aside for small business concerns is properly for resolution at the time competition for inclusion on the FMSS Schedule is conducted, and not at the time government agencies issue letters of interest to fulfill their requirements using FMSS Schedule.

DECISION

Digital Systems Group, Inc. (DSG), a small business concern, protests the failure to consider setting aside for exclusive small business participation, the letters of interest (LOI) issued by the United States Coast Guard (solicitation No. DTCG40-94-R-10004), and the Overseas Private Investment Corporation (OPIC) (solicitation No. OPIC-94-R-1001), for computer software and support services to be ordered under the Financial Management Software Systems mandatory Multiple Award Schedule (FMSS Schedule). DSG contends that the decision whether to set aside the requirements should be made by the user agency when it issues an LOI, not by the General Services Administration (GSA) at the time it issues the solicitation for the FMSS Schedule.

We deny the protests.¹

BACKGROUND

In 1987, the Office of Management and Budget requested GSA to develop a multiple award schedule for commercially available accounting/financial management systems software packages to modernize and standardize the federal government's financial management systems. In developing the FMSS Schedule, GSA included certain uniform requirements in five functional areas: general ledger, accounts payable/disbursements, receivables, budget execution/funds control, and cost accumulation. These areas are known collectively as the "core financial system" and represent a minimum standard which must be met by any financial system design to be included on the FMSS Schedule. The FMSS Schedule is mandatory for all federal executive agencies, including the Department of Defense, for acquisition of commercial software for primary accounting systems and for the acquisition of services and support related to the implementation of such software. Federal Information Resources Management Regulation (FIRMR) §§ 201-24.107 and 201-39.804-2.

The FMSS Schedule operates on a 3-year cycle: contracts for the FMSS Schedule are negotiated and awarded for a base year and then negotiated for possible renewal in each of 2 option years. The first year, GSA issues a basic solicitation and in option years holds an "open season." During the open season, firms already on the FMSS Schedule may seek renewal of their contracts and any firm not on the FMSS Schedule may submit a proposal to obtain a contract under the Schedule. When an agency requires financial management software, it must announce its requirements in an LOI to all contractors participating in the FMSS Schedule contracts program. FIRMR § 201-39.804-4(a). The LOI must contain sufficient information to permit a competitive acquisition under the FMSS Schedule contracts program, include instructions to the Schedule contractors for responding to the LOI, and include evaluation and award factors. FIRMR § 201-39.804-4(c).

The current FMSS Schedule (amendment No. 5 to GSA solicitation No. KECF-91-001) represents the second renewal option. Prior to issuing amendment No. 5, GSA explicitly considered whether to set aside the FMSS Schedule for small businesses. See Federal Acquisition Regulation (FAR) § 19.501 (requiring contracting officers to consider set-asides). At the time of the determination, six contractors

¹While the two protests concern different solicitations, we have consolidated our review of the protests in this decision since they were filed by the same protester and raise identical issues.

were on the FMSS Schedule, five of which were large businesses. Accordingly, GSA concluded that it was not feasible to set the FMSS Schedule aside for small businesses and the Small Business Administration concurred. Accordingly, GSA issued amendment No. 5 on an unrestricted basis.

DSG submitted a proposal for inclusion on the FMSS Schedule by the May 13 closing date for receipt of proposals. Prior to that time, DSG did not challenge GSA's failure to set the acquisition aside. On January 31, 1994, DSG was selected for inclusion on the FMSS Schedule.

THE COAST GUARD AND OPIC LOIs

On December 3, 1993, the Coast Guard issued an LOI for its requirements to all the contractors then on the FMSS Schedule. The LOI included various requirements of the agency in addition to the core functions, including specific personnel experience and ability to operate on specified equipment. On December 10, the Coast Guard furnished a copy of the LOI to DSG. On February 3, 1994, prior to the closing date for receipt of proposals, DSG requested that the Coast Guard set aside its requirement for small businesses, since the protester and another small business were on the FMSS Schedule. On February 4, the Coast Guard denied the request on the basis that it could not set aside the procurement without violating the terms of the FMSS Schedule. DSG then filed its protest with our Office on February 9.

On February 1, DSG received a copy of OPIC's LOI. It also included various agency requirements in addition to the core functions, including requirements for compatibility with the agency's existing system. On February 7, prior to the closing date for receipt of proposals, DSG requested that OPIC set its requirement aside for small businesses based on the existence of two small businesses on the FMSS Schedule. OPIC denied the request and on February 22, DSG filed its second protest with our Office.

On February 10, several months after the closing date for receipt of proposals, DSG requested that GSA set aside a portion of the existing FMSS Schedule for small businesses. On March 21, GSA denied the request as untimely.

ANALYSIS

The FMSS Schedule covers computer software and support services, *i.e.*, information resources. Thus, contracting officials are to follow the policies and procedures in the

FAR except in those areas where the FIRMR (41 C.F.R. Ch. 201) prescribes policies, procedures, provisions, or clauses. FAR § 39.001; FIRMR § 201-39.102(a). Section 201-39.804 of the FIRMR sets forth the policies and procedures for the FMSS Schedule, but does not include any provisions regarding small business set-aside determinations. Thus, FAR part 19 applies.

It is the government's policy to place a "fair proportion" of its acquisitions with small businesses. FAR § 19.201. It is the contracting officer's responsibility to consider whether to set aside an acquisition for small business concerns (FAR § 19.501), and an agency must set aside an acquisition for exclusive small business participation if the contracting officer determines there is a reasonable expectation that offers will be obtained from at least two responsible small businesses at fair market prices. FAR § 19.502-2. Thus, it is clear that contracting officials have a responsibility to consider setting aside an acquisition. The issue here is at what point in the FMSS Schedule process a set-aside decision must be made.

DSG argues that any user agency issuing an LOI under the FMSS Schedule must first consider whether to set aside the acquisition for small businesses. The agencies--GSA, the Coast Guard, and OPIC--maintain that the question of whether to set aside an acquisition is for GSA determination prior to issuing the FMSS Schedule solicitation. We agree with the agencies.

In the related area of Federal Supply Schedule (FSS) contracts, it is plain that a set-aside determination is to be made at the time an FSS solicitation is issued. Section 38.203(b) of the FAR details the requirements for FSS contracting officers in preparing and issuing solicitations for FSS contracts. It specifically provides that small business set-aside programs apply to both single and multiple award schedule contracting and refers to FAR part 19. Id. While the protester has argued that this provision would also make consideration of a set-aside appropriate at the user agency level, part 38 deals exclusively with FSS contract formation, not procedures for ordering from an FSS. The ordering procedures, found in FAR subpart 8.4, do not mention any requirement for set-aside consideration. In fact, contracting officers are advised that since the planning, solicitation, and award phases of a FSS contract comply with FAR requirements, they are relieved of various responsibilities, including those associated with small business small purchase set-aside procedures (FAR § 13.105). FAR § 8.404(a). Although we have not specifically addressed the issue of the timing of a small business set-aside determination under an FSS contract, several of our decisions address situations where the set-aside

determination was made at the time of the FSS Schedule contract solicitation process. See, e.g., DISA Elec., 62 Comp. Gen. 271 (1983), 83-1 CPD ¶ 306; Dakota Sys., Inc., B-246697, Mar. 27, 1992, 92-1 CPD ¶ 312; Advance Mach. Co., B-217399, Sept. 20, 1985, 85-2 CPD ¶ 311.

In our view, the same result obtains with respect to the FMSS Schedule program. Although the FAR and the FIRMR provide no specific guidance as to the time at which the set-aside determination is to be made for FMSS Schedule contracts, for the following reasons we believe there is no basis for "reading in" any requirement to consider set-asides at the user agency level.

First, the Competition in Contracting Act of 1984 (CICA) mandates full and open competition through the use of competitive procedures. 41 U.S.C. § 253(1)(A). CICA specifically provides that GSA's multiple awards schedule program, of which the FMSS Schedule is a part, is considered to be a competitive procedure, and purchasing from the schedule requires no further competition. 41 U.S.C. § 259(a)(3) (1988); see FAR § 6.102(d)(3); Mohawk Data Science Corp., 69 Comp. Gen. 13 (1989). The reason for declaring this form of contracting "competitive" is that a full and open competition is held by GSA to create the schedule. Just as the set-aside determination in other types of procurements are made prior to conducting the competition, we think it is appropriate for GSA to consider setting aside the schedule contract--the principal competition in which all interested firms are eligible to participate--in whole or in part.

Second, the multiple award schedule program authority under CICA was intended to enable user agencies to acquire commercially available goods and services with minimal administrative burdens on user agencies. See H.R. Conf. Rep. No. 861, 98th Cong., 2d Sess. 423, reprinted in 1984 U.S. Code & Cong. Admin. News 2111. Thus, once the schedule contracts are executed, user agencies such as the Coast Guard and OPIC reasonably expect that their administrative burdens in this contracting area will be relieved.² DSC's approach would largely defeat this purpose.

Here, GSA considered whether to set aside the FMSS Schedule both at the time it was initially competed and at each open season since. In determining not to set aside the

²For example, publishing a notice of the order in the Commerce Business Daily is not required for purchases from a mandatory schedule. Precise Copier Servs., B-232660, Jan. 10, 1989, 89-1 CPD ¶ 25. Instead, agencies using the FMSS Schedule issue LOIs. FIRMR § 201-39.804-4(a).

requirements, GSA observed that at the time it issued each of the solicitations, it was aware of only one small business capable of meeting the requirements. In the absence of two responsible small businesses, the contracting officer was not required to set the acquisition aside. FAR § 19.502-3(a). DSG could have challenged GSA's determination at that time.³ See Komatsu Dresser Co., 71 Comp. Gen. 260 (1992), 92-1 CPD ¶ 202 (supply schedule "open season" is tantamount to new supply schedule solicitation making the terms of such amended solicitations subject to protest prior to the closing date for receipt of proposals).

Third, while DSG now suggests that the user agencies are free to make a set-aside determination, the fact remains that user agency acquisitions are delivery orders under the FMSS Schedule contract. Thus, while agency LOIs appear as complete solicitations, the provisions of the Schedule contract ultimately govern the responsibilities of the user agencies. In this regard, the provisions of the FMSS Schedule contract, when read in conjunction with the applicable FIRMR provisions, preclude the setting aside of an acquisition at the user agency level. Specifically, section H.21 of the Schedule contract RFP and each Schedule contract provides that use of the schedule contracts resulting from the solicitation "will be mandatory for the acquisition of financial management systems software" and that "[a]gencies are responsible for distributing the LOIs to all FMSS Schedule Contractors."

DSG argues that this provision merely requires that notice, in the form of an LOI, be given to each contractor under the FMSS Schedule. We think it is clear, however, that section H.21 was not only intended to require that all schedule contractors be apprised of agency requirements, but also that all contractors be allowed to submit proposals for meeting the agency's requirements. This interpretation is consistent with the applicable FIRMR provisions. The FMSS Schedule "Procedures" require the contracting officer to announce an agency's requirements to all FMSS Schedule contractors. FIRMR § 201-39.804-4(a). The procedures then require that the agency "conduct an analysis of the offerings of the FMSS [Schedule] contractors and issue a delivery order to the contractor that provides the most advantageous alternative to the Government." FIRMR § 201-39.804-4(d). This FIRMR section contains no qualification

³DSG argues that it did not request a set-aside at the GSA level because it could not anticipate the requirements of the user agencies at that time. While that may be correct, we believe the protester could have sought a partial set-aside or total set-aside based on the capabilities of DSG and the other small businesses on the Schedule.

that fewer than all responding Schedule contractors may be considered. It logically follows, we think, that all FMSS Schedule contractors are to be provided an opportunity to compete for the agency's requirements. (We also note that, according to a GSA Program Paper concerning the FMSS Schedule, consideration of all FMSS Schedule contractors under each LOI was GSA's intent when it created the Schedule.)

DSG also suggests that since a user agency is free to include its own requirements for its system, it is free to restrict its acquisition to small businesses. We disagree. While section H.21 specifically provides for user agencies to "further delineate the standard FMSS functional requirement" and "specify additional requirements that are not included in the current specifications," such requirements still are covered by the FMSS Schedule contract terms. Thus, while this provision puts FMSS Schedule contractors on notice that user agencies may have additional technical requirements, nothing in the provision implies that any schedule contractors may be excluded from competition under individual LOIs.

We conclude that the appropriate time for determining whether a small business set-aside is warranted is at the time of the Schedule contract formation, not at the time a user agency issues an LOI. Accordingly, GSA properly made its determination not to set aside the FMSS Schedule prior to issuing the solicitation; neither user agency was required to further consider setting aside its LOI.

The protests are denied.

/s/ John M. Melody
for Robert P. Murphy
Acting General Counsel