



Comptroller General
of the United States

5462810

Washington, D.C. 20548

Decision

Matter of: Ryon, Inc.
File: B-256752.2
Date: October 27, 1994

Robert G. Fryling, Esq., and Eric H. Vance, Esq., Blank, Rome, Comisky & McCauley, for the protester.
Riggs L. Wilks, Jr., Esq., and Gerald P. Kohns, Esq., Department of the Army, for the agency.
Christina Sklarew, Esq., Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency determination to cancel unrestricted solicitation after bid opening, but prior to award, was justified where agency reasonably determined cancellation was required because of the contracting officer's erroneous initial determination not to set the procurement aside for exclusive small disadvantaged business participation.

DECISION

Ryon, Inc. protests the Department of the Army's cancellation of invitation for bids (IFB) No. DAHA49-94-B-0002, for the construction of a composite munitions trailer and paint spray booth facility for the National Guard Bureau. Ryon contends that it was improper for the agency to cancel the unrestricted solicitation after bids had been opened but prior to award, based on its conclusion that the contracting officer had improperly failed to consider whether the procurement could be set aside for exclusive small disadvantaged business (SDB) participation.

We deny the protest.

The contracting officer received a purchase request for this project from the National Guard in June 1993. The project was advertised in the Commerce Business Daily as an unrestricted procurement the following November. The National Guard initially approved the Army's IFB, pointing out, however, that "an 8(a) or SDB set-aside should be considered for this construction." The contracting officer did not think a set-aside was mandatory for this procurement, and proceeded with the solicitation process on an unrestricted basis without investigating whether adequate

competition could reasonably be expected from SDB concerns. The agency received 10 timely bids, including Ryon's. The apparent low bid contained a mistake for which the agency could not allow correction. Ryon's bid was second low, and thus was in line for award. The bid was determined to be responsive, and Ryon was found responsible. When the Army forwarded the proposed contract to the National Guard for approval, however, the National Guard disapproved the award on the basis that the solicitation had not complied with Federal Acquisition Regulation (FAR) requirements concerning SDB or 8(a) set-asides. The agency proposed to resolicit the project as a set-aside, in coordination with the Small Business Administration.

The contracting officer advised Ryon that the solicitation was canceled, and this protest followed.

Ryon asserts that the contracting officer's initial determination not to set the procurement aside was reasonable, citing the absence of any expression of interest from any SDB during the process of the procurement, and the lack of any procurement history which could have led the contracting officer to expect SDB participation for this acquisition. The protester argues that this determination was within the contracting officer's discretion, and that the National Guard's disagreement does not provide a sufficiently compelling basis for cancellation.

A contracting agency must have a compelling reason to cancel an IFB after bid opening because of the potential adverse impact on the competitive bidding system of resolicitation after bid prices have been exposed. FAR § 14.404-1(a)(1); P&C Constr., B-251793, Apr. 30, 1993, 93-1 CPD ¶ 361. The fact that a solicitation is defective in some way does not justify cancellation after bid opening if award under the solicitation would meet the government's actual needs and there is no showing of prejudice to other bidders. Aero Innovations, Ltd., B-227677, Oct. 5, 1987, 87-2 CPD ¶ 332. However, FAR § 14.404-1(c)(10) specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the government's interest; for instance, correction of a violation of a statutory obligation may constitute a compelling reason. See Sunrise Int'l Group, Inc., B-252892.3, Sept. 14, 1993, 93-2 CPD ¶ 160. The question here is whether the cancellation was reasonable in light of the contracting officer's failure to investigate or consider whether conditions were present that would require setting this procurement aside.

The Department of Defense (DOD) SDB set-aside program implements section 1207 of Public Law 99-661, as amended. 10 U.S.C. § 2301 note (1988 and Supp. V 1993). The

authorizing legislation established for DOD a goal to award 5 percent of the dollar value of its contracts to SDB concerns, but left the promulgation of regulations and procedures necessary to achieve that goal to DOD's discretion. 10 U.S.C. § 2323 (Supp. V 1993); Sletager, Inc., B-241149, Jan. 25, 1991, 91-1 CPD ¶ 74.

The DOD regulations regarding SDB concerns are found in Defense Federal Acquisition Regulation Supplement (DFARS) part 219. They provide that a procurement shall be set aside for exclusive SDB participation when the contracting officer determines 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 technological talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a); see also Grove Roofing, Inc., B-240743; et al., Dec. 10, 1990, 90-2 CPD ¶ 470. The DOD program also sets forth a number of exceptions to the set-aside requirement, including when the acquisition is for construction and, as is the case here, is valued at less than \$2 million. DFARS § 219.502-2-70(b)(2).

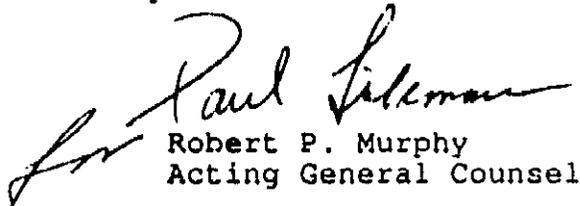
However, DFARS subpart 219.10 also provides that when, as here, small business set-asides cannot be considered for acquisitions in designated industry groups,¹ the exception noted above does not apply, and the acquisitions shall be considered for SDB set-asides. DFARS § 219.1006(b)(1)(A). Accordingly, the exemption from SDB set-aside requirements for construction procurements valued at under \$2 million does not apply here. Instead, DFARS § 219.502-2-70(a) must be followed, and that regulation provides that "the contracting officer shall set aside an acquisition for [SDBs]" when there is a reasonable expectation that the conditions requisite to an SDB set-aside (listed above) are present.

In this case, the contracting officer failed to consider or investigate whether any SDB interest in the procurement could be expected. The contracting officer simply concluded, without factual support, that since this requirement had not been previously procured, there was no need to set the procurement aside for exclusive SDB participation. Although the National Guard had earlier raised concerns regarding the unrestricted status of the procurement, the contracting officer failed to look into the issue. It was only after the National Guard refused to approve the award on this basis that the agency concluded,

¹This period, currently in force, extends through September 30, 1996. Public Law 102-366 § 201.

and we believe reasonably so, that the contracting officer was required to investigate whether the conditions requisite to an SDB set-aside could be expected. Once the contracting officer recognized the obligation to investigate whether any possible SDB interest existed, as directed by the user-agency, the Army reasonably determined to cancel the solicitation and to resolicit the requirement as an SDB set-aside.

The protest is denied.


Robert P. Murphy
Acting General Counsel