



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** C.S. McCrossan Construction, Inc.

**File:** B-259225

**Date:** March 16, 1995

Kelly P. Albers, Esq., Reeves, Chavez, Greenfield, Acosta & Walker, P.A., for the protester.

Richard A. Couch, Esq., 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

Army reasonably determined to set aside procurement for road repair for exclusive small disadvantaged business (SDB) participation where, after consulting with the agency's Small Business Advisor and being advised that there was considerable responsible SDB interest in the procurement, the contracting officer reasonably determined that it would receive bids from at least two responsible SDBs and award could be made at a price within 10 percent of fair market value.

### DECISION

C.S. McCrossan Construction, Inc. protests the total small disadvantaged business (SDB) set-aside restriction contained in invitation for bids (IFB) No. DAAD07-94-B-0108, issued by the Department of the Army, White Sands Missile Range (WSMR), for road and pavement repair work.

We deny the protest.

This IFB, for the repair of existing roads and pavements at the WSMR, contemplates the award of a fixed-price, indefinite quantity contract for a period of 1 year with two 1-year options. Under the IFB, the repair work is to be assigned through individual delivery orders. The minimum quantity that must be ordered by the Army under the contract

is \$150,000.<sup>1</sup> The total value of the contract is expected to be more than \$10 million. Bidders were required to submit a bid bond, and, if successful, a performance and a payment bond based upon the minimum quantity, with additional bonding to be obtained on a delivery order basis as the minimum quantity is exceeded, and the required bond amount subject to reduction as delivery orders are completed.

Before issuing the set-aside IFB, the contracting officer determined that there was a reasonable expectation that at least two responsible SDBs would bid, that award would be made at not more than 10 percent above the fair market price, and that scientific and/or technological talent consistent with the demands of the acquisition would be offered. See Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-2-70. The contracting officer made this determination after consulting with the WSMR Small Business Advisor who provided the contracting officer with the names of 20 SDB firms that were considered to be responsible and had expressed interest in submitting a bid--several of which had performed similar work. After the IFB was issued, 26 SDBs requested a copy of the solicitation.

McCrossan asserts that the contracting officer could not reasonably determine that it would receive more than two bids from responsible SDBs and that award would be made at not more than 10 percent above fair market price. McCrossan argues that the amount of interest expressed by the SDBs bears no reasonable relationship to the actual bids that would be received; that it is unlikely that SDBs will be able to satisfy the IFB's bonding requirements; that the prior procurement was conducted on an unrestricted basis and there has been no change in the relevant contracting community; that the SDB restriction has had a disproportionate impact upon SIC Code 1611, pertaining to highway and street construction; and that the SDB restriction is allegedly unconstitutional and contrary to the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) (1988), because it assertedly discriminates against non-minority owned businesses.

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<sup>1</sup>The "Delivery-Order Limitations" clause of the contract indicated that the contractor was not obligated to honor any single order in excess of \$500,000, any order for a combination of items in excess of \$975,000, or a series of orders within 30 days that exceed these limitations.

In considering a protest that a determination to conduct a procurement as an SDB set-aside is contrary to applicable regulatory provisions, our Office will determine whether the decision has a reasonable basis. Holmes & Narver Constr. Servs., Inc., B-252321.2, Aug. 9, 1993, 93-2 CPD ¶ 87.

Here, the WSMR Small Business Advisor, recommended restricting the procurement for SDB participation. As explained by the agency, this work is not particularly difficult or technically sophisticated; the record confirms that 20 SDBs expressed interest in the procurement prior to the agency's set-aside determination; and, upon issuance, 26 SDBs requested the IFB. Several of these SDBs have performed similar work. There is no support for McCrossan's allegation that the SDBs who expressed interest could not satisfy the IFB's bonding requirements; indeed, the submitted financial data reviewed by the agency prior to the set-aside determination indicates otherwise and some of the SDBs expressly stated that they could satisfy the bonding requirements.<sup>2</sup> Although McCrossan questions whether the agency will actually receive a sufficient number of bids, there is no reason to doubt that the 26 responses received so far will translate to at least two bids from SDBs, such that award can be made within 10 percent of the fair market value for the work.

The fact that this requirement was previously procured on an unrestricted basis does not negate the Army's determination that it must be set aside here, since the situation meets the DFARS § 219.502--2-70 criteria. In this regard, DFARS § 219.504 requires the Army to give priority to setting aside requirements for SDBs where the regulatory prerequisites are satisfied.

To the extent that McCrossan argues that the set-aside has or will have a disproportionate impact upon SIC Code 1611, the Department of Defense has adopted a specific procedure to consider such claims. Under 10 U.S.C. § 2323(g) (Supp. V 1993), a person may request the Secretary of Defense to determine whether the use of an SDB set-aside by

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<sup>2</sup>McCrossan's protest exaggerates the amount of bonding capacity that will be needed. (McCrossan suggests that a bond based on McCrossan's estimated \$30 million value of the project will ultimately be required.) As stated by the Army, the bonding requirements have been minimized in this IFB. The initial bond amount need only be based on the \$150,000 minimum order with additional bonding required only when delivery orders are issued that cause this minimum to be exceeded, which delivery orders would then be extinguished for purposes of determining the bond amount as they are completed.

a contracting activity has caused a particular industry category to bear a disproportionate share of the contracts awarded. If a category is bearing a disproportionate share, the Secretary shall take action to limit SDB set-asides in that category. Although McCrossan argues that the rules under this procedure are cumbersome, it has not availed itself of this process or otherwise offered any concrete evidence to support its assertion that SIC code 1611 is being disproportionately affected by the award of SDB set-asides and the Army advises that the Secretary has not made such a determination.

Finally, McCrossan asserts that the set-aside program is unconstitutional and in violation of the Civil Rights Act of 1964. In the absence of clear judicial precedent at the federal level, we decline to consider this issue because it is one for the courts, not our Office, to decide. See JWA Sec. Servs., B-253836, Oct. 12, 1993, 93-2 CPD ¶ 219.

The protest is denied.

*for Paul Sulzmann*  
Robert P. Murphy  
General Counsel