

Amend



Comptroller General
of the United States

123664

Washington, D.C. 20548

Decision

Matter of: Thermal Solutions, Incorporated

File: B-259501

Date: April 3, 1995

Reginald D. White for the protester.
Georgia Vlahos, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision not to set aside procurement for small disadvantaged business (SDB) concerns was unreasonable, and protest is sustained on this basis, where agency received expressions of interest from five undisputed SDBs, and based decision not to set procurement aside solely on finding of limited SDB competition on: (1) prior SDB set-aside procurements for dissimilar work, and (2) prior procurements for similar work that were not set aside for SDBs; absence of SDB competition on those procurements was not reasonably predictive of whether the five interested SDBs would submit bids to perform current requirement if it were set aside for SDBs, since there is no indication that the five firms do not have the capability to perform the work involved.

DECISION

Thermal Solutions, Incorporated protests the Department of the Navy's decision to issue invitation for bids (IFB) No. N62467-94-B-9665, for the replacement of an air conditioning system at the Naval Training Center, Great Lakes, Illinois, on an unrestricted basis. The protester contends that the agency was required by applicable regulations to issue the solicitation as a small disadvantaged business (SDB) set-aside.

We sustain the protest.

An acquisition of services, such as here, is required to 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

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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. Defense Federal Acquisition Regulation Supplement § 219.502-2-70(a); Simpson Contracting Corp., 73 Comp. Gen. 55 (1993), 93-2 CPD ¶ 331.

In determining whether to issue the IFB here as a SDB set-aside, the Navy published a synopsis of the procurement in the Commerce Business Daily (CBD) on October 19, 1994. Interested SDBs were requested to submit evidence of their eligibility as a small, socially/economically disadvantaged business concern within 15 days from the date of the CBD synopsis. The synopsis also advised that if adequate interest was not received from SDB concerns, the solicitation would be issued on an unrestricted basis.

The Navy received expressions of interest from eight SDB concerns. However, upon further investigation to verify the firms' SDB status and their bonding capability, the contracting officer eliminated three of the eight firms from her assessment of whether it was likely that at least two qualified SDB concerns would submit bids--one did not qualify as an SDB, another was interested only in subcontracting work, and a third failed to return telephone calls concerning its ability to obtain the required bonds. The remaining five firms--Thermal, D.M. Reina, Commercial Engineering Corporation, McGhee Construction, Inc., and A.F.T.T., Inc.--provided sufficient evidence to confirm their SDB status and their ability to provide the required bonds.

To assess the likelihood of the five interested SDB firms submitting bids, the contracting officer considered recent SDB bidding history at the contracting activity. Since these services had not been procured on a set-aside basis, however, the review of the activity's past procurement history was limited to the most pertinent fiscal year 1994 procurements--five unrestricted procurements for similar "chiller" services¹ and three set-aside procurements for dissimilar services (removal of underground storage tanks, interior and exterior renovation of a warehouse/office building, and roofing repair work). The contracting officer's review revealed that while Thermal, D.M. Reina, and Commercial Engineering had requested bid packages for both the unrestricted similar procurements and the SDB

¹The services to be performed under the procurement here involve the replacement of the present steam absorption chiller with a gas-fired chiller, construction of an internal chimney through three floors of the building, and replacement of the cooling tower.

set-aside dissimilar procurements, Thermal had submitted no bids on any of the eight procurements; D.M. Reina had submitted only one bid, which was on the SDB set-aside procurement for warehouse/office renovation; and Commercial Engineering had submitted bids on three of the five unrestricted similar procurements. The remaining two interested SDBs, McGhee Construction and A.F.T.T. submitted no bids on any of the reviewed procurements.

The contracting officer further examined the past procurement history at the contracting activity for the overall SDB bidding rate in comparison to the number of expressions of interest. On the five unrestricted similar procurements, Commercial Engineering was the only SDB firm to bid. As for the three dissimilar SDB set-aside procurements, only one resulted in more than two bids (solicitation for removal of underground storage tanks where 23 SDBs expressed interest and 11 SDB bids were submitted). The two remaining SDB set-asides (solicitation for interior/exterior renovation of a warehouse/office where 21 SDBs expressed interest and solicitation for roofing repair where 7 SDBs expressed interest) resulted in 2 SDB bids each; however, one of these procurements was converted to an unrestricted procurement because it ultimately was determined that the successful bidder could not participate as an SDB.

From her review of the past procurement history, the contracting officer determined that there had been minimal or no bidding by the five interested SDBs, overall low SDB participation, and that interested bidder pools of seven SDBs were necessary for at least two SDB bids to result. Based on these determinations, the contracting officer concluded that it was not likely that two or more bids from responsible SDBs would result from the five SDB expressions of interest here. The contracting officer also considered this conclusion reasonable in light of what she viewed as greater technical complexity of the requirement here (replacement of a building air conditioning system) as compared to the other SDB set-asides (referenced above). Thus, with the concurrence of the agency's Small and Disadvantaged Business Utilization Specialist (SADBUS), the contracting officer issued the IFB on an unrestricted basis. On November 8, the solicitation was issued with a bid opening date of December 9. On November 25, Thermal filed this protest in our Office. Bid opening has been postponed indefinitely, pending our decision in this protest.

We consider the determination of the likelihood of receiving sufficient offers from SDBs to be a business judgment within the contracting officer's discretion; we thus will review a contracting officer's set-aside determination only to

determine whether it was reasonable. McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318.

At the outset, it is clear, we think, that Commercial Engineering was a viable potential SDB bidder. The firm had competed on three of the five similar procurements examined, even though none had been set aside for SDBs, and the Navy does not assert that the firm is incapable of performing the chiller work under the current IFB. There is no reason to believe that an SDB firm which has competed on nonSDB set-aside procurements would not compete for an SDB set-aside award.

The propriety of the set-aside determination thus turns on the agency's finding that not one of the four remaining interested firms could be expected to compete. We think this finding was unreasonable because it was based on procurements that could not reasonably be expected to indicate whether the interested SDB firms would bid on the current requirement. In this regard, while it generally is appropriate to consider such information as SDB firms' prior bidding history and the number of SDB bids on past requirements, the Navy's assessment here was based only on procurements materially different from the current one; the procurements either: (1) had not been set aside for SDBs, or (2) covered work dissimilar to the work here. This is significant because: (1) SDBs often cannot effectively compete with nonSDB firms, and thus may not bid on contracts they are otherwise capable of performing, and (2) SDBs in the air conditioning installation/repair business could not be expected to bid on storage tank removal, roofing repair, or warehouse/office building renovation procurements.

The fact that the agency believed the requirement here was more complex than the previous set-asides reviewed--and that competition for the current requirement thus could be expected to be similarly limited--would appear to have little relevance, since firms could be interested in (or capable of) performing air conditioning work, even though they were not interested in (or capable of) performing the work under the prior SDB set-asides. In this regard, there is no indication in the record that the interested SDBs were not capable of performing the work under the IFB here; indeed, there is no indication that the contracting officer ever examined the capabilities of the five firms.

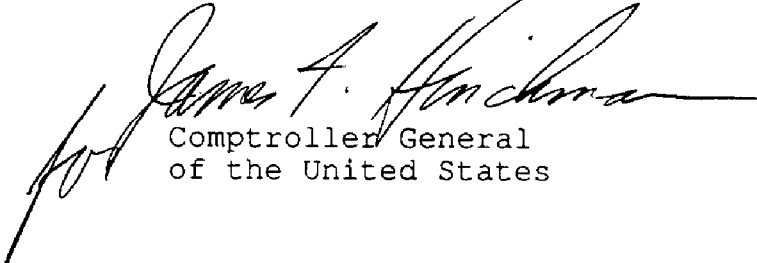
The Navy suggests in its report that because of the low monetary value of the procurement, it was not likely that firms located outside of the Midwest would bid here. Even if the agency is correct, however, the record indicates that at least two of the five interested SDB firms were actually located in the Midwest--Thermal and Commercial Engineering. Additionally, D.M. Reina, although located in California,

bid on a previous SDB set-aside issued by the contracting activity.

We conclude that, while the available information showed limited competition by SDBs under prior procurements, that information was based on materially different procurements. Thus, it did not provide a reasonable basis for discounting the interest expressed by the five SDBs in this specific requirement or concluding that there was no reasonable expectation of receiving fairly priced bids from at least two SDB firms. For this reason, we sustain the protest.

We recommend that the IFB be canceled and reissued as an SDB set-aside. In addition, we find that Thermal is entitled to reimbursement of its costs of filing and pursuing the protest. 4 C.F.R. § 21.6(e) (1995). In accordance with 4 C.F.R. § 21.6(f), Thermal's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.


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