

Murphy



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ogden Allied Services Corporation
File: B-227837.4
Date: July 29, 1987

DIGEST

Determination by agency to set aside unrestricted procurement for exclusive small business participation, communicated by amendment on the original proposal closing date, does not entitle the protester to proposal preparation costs solely because amendment eliminated the protester, a large business, from competition, where General Accounting Office has no basis on which to legally object to the set-aside and there is no indication that the protester otherwise had a substantial chance of receiving the award.

DECISION

Ogden Allied Services Corporation, a large business, requests reimbursement of proposal preparation costs following the determination of the United States Military Academy (USMA), Department of the Army to set aside for exclusive small business participation request for proposals (RFP) No. DAAG60-87-R-1240, for custodial services at the USMA.

We dismiss the protest and the claim.

The RFP was issued April 6, 1987, on an unrestricted basis. On Thursday, June 11, 4 days before initial proposals were due, a potential offeror who was a small business concern filed a protest with our Office in which the firm contended that the solicitation should not be unrestricted but totally set aside for small business concerns in light of the extent of competition available from them. That protester stated:

"After continued refusal by USMA throughout April of 1987 to set aside the solicitation, [we], in May of 1987, notified the Department of Defense Office of Small and Disadvantaged Business Utilization ('DOD SADBUI'). It agreed that the contract should be set aside and contacted its

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counterparts within the Department of the Army. Army headquarters contacted the Army Materiel Command ('AMC'), which in turn, in late May, sent a letter to the USMA recommending that USMA withdraw the solicitation. Officials at USMA refused to act or, apparently, even to respond to this recommendation prior to the June 15, 1987 deadline for submission of proposals.

"We have been advised by DOD that AMC currently is deciding whether to 'direct' USMA to withdraw the solicitation pursuant to the [Federal Acquisition Regulation]."

The USMA subsequently did set the procurement aside for small business concerns.

Ogden Allied has alleged that in preparation for its submission of the proposal on the original June 15 closing date, it "devoted hundreds of staff hours, personnel from several corporate divisions, and the resources of [Ogden Allied's] proposal reproduction group to research, write and assemble the document." In addition, it had already participated in an offerors' conference. Late in the afternoon of Friday, June 12, Ogden Allied states, it received a call from the procurement official responsible for the RFP, informing it that the contract was likely to be set aside for small business. This telephonic advice was followed by the issuance of amendment 0002 to the RFP on Monday, June 15, changing the solicitation from an unrestricted procurement to a 100 percent set-aside for small business and extending the due date to June 29.

Ogden Allied does not protest the small business set-aside determination per se, but its timing, being communicated by amendment on the date on which proposals under the original, unrestricted procurement, were due. The amendment eliminated Ogden Allied's ability to further participate in this procurement. Ogden Allied contrasts this situation to other government procurements in which "the procurement authority . . . always, in our experience, made sure that participating firms were notified [of similar developments] well before the balance of proposal effort and resources had been committed." In comparison, it states that by the time the first, oral, notice that the RFP would be amended was received (the Friday afternoon preceding the Monday due date) it was reasonable to infer that proposals would be at or near completion. Ogden Allied states that it had already expended approximately \$50,000 in preparing its proposal when it was notified of the set-aside decision which eliminated it from the competition and asserts that it must be compensated in this amount.

We allow the recovery of proposal preparation costs where the protester can show that he had a substantial chance of receiving the award, but was unreasonably excluded from the competition, due to arbitrary or capricious actions on the part of the government. Bencor-Petrifond-Casagrande, B-225408.2, B-225827, Apr. 10, 1987, 87-1 C.P.D. ¶ 396; M.L. MacKay & Associates, Inc., B-208827, June 1, 1983, 83-1 C.P.D. ¶ 587. Thus, the questions to be answered here are whether Odgen Allied was in line to receive the award and whether the USMA's amendment of the RFP, changing the procurement from unrestricted to a total set-aside, on the day original proposals were due, was either arbitrary or capricious action on the part of that agency.

Ogden-Allied has not alleged that it had a substantial chance of receiving the award. In addition, we note that a virtually identical fact situation existed in American Dredging Company, B-201687, May 5, 1981, 81-1 C.P.D. ¶ 344, affirmed on reconsideration, June 17, 1981, 81-1 C.P.D. ¶ 504. In that case, an unrestricted invitation for bids was amended 5 hours before bids were to be opened so as to convert the procurement to a total small business set-aside. This action was taken on the basis of information (apparently including a bid protest by a small business concern) which came to the contracting officer's attention in the 4 days prior to and including the bid opening date. One of the large business-protester's arguments was that even if the decision to set aside the procurement were reasonable, it was an abuse of discretion to restrict the procurement to small business concerns on bid opening day, thereby suddenly disqualifying certain firms.

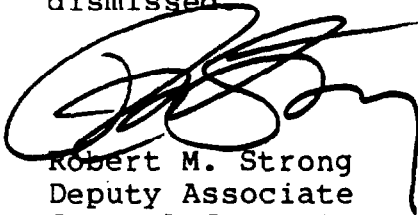
In denying the protest, we stated in part:

"In recognition of the Government's legitimate socioeconomic interests fostered through its procurements, we have upheld the propriety of canceling a solicitation after bid opening so that the procurement could be set aside under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), as amended by Public Law No. 95-507, § 202, 92 Stat. 1761, see A.R.&S. Enterprises, Inc., B-194622, June 18, 1979, 79-1 CPD 433. We have also allowed the setting aside of procurements for small businesses by amendment well after the solicitation issuance date and close to or even after proposal receipt date. See 53 Comp. Gen. 307 (1973); Gill Marketing, Inc., B-194414.3, March 24, 1980, 80-1 CPD 213; Ampex Corporation, et al., B-183739, November 14, 1975, 75-2 CPD 304. Although these latter three cases involved

negotiated procurements, the rationale of those cases is equally applicable here. In light of the statutory mandate that a fair proportion of procurement contracts be placed with small businesses, plus the absence of any regulatory requirement that a set-aside be made at any particular time, see Federal Procurement Regulations § 1-706.5 (1964 ed. amend. 192), a set-aside determination is permissible after solicitation issuance if there is a reasonable basis for the determination at the time it is made.

"Responding in the above cases to allegations similar to those raised by American, we decided the matter on the reasonableness of the set-aside determination based on facts and circumstances existing at the time of the determination"

In the present case, the protester has not challenged the reasonableness of the set-aside determination. While from the protester's perspective it would have been preferable for this determination to have been arrived at and communicated earlier, we have no legal basis on which to object to what occurred here. The protest and the claim are therefore dismissed.



Robert M. Strong
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General Counsel