



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: EAA Capital Company, LLC

File: B-282377.2

Date: June 23, 1999

John J. Ervin for the protester.

Michael J. Farley, Esq., Department of Housing and Urban Development,
for the agency.

Adam Vodraska, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Contracting agency was not required by Federal Acquisition Regulation (FAR) § 19.502-2(a) to issue a purchase order to the protester as the only responsible small business submitting an acceptable quotation where the agency inadvertently set aside the request for quotations for small business and the FAR set-aside provisions do not apply because the requirement does not involve the expenditure of appropriated funds.

DECISION

EAA Capital Company, LLC, protests the Department of Housing and Urban Development's (HUD) issuance, without a small business set-aside, of request for quotations (RFQ) No. TESTING 002 for a National Testing Administrator to provide examinations to Federal Housing Administration (FHA) real estate appraisers in all 50 states and U.S. territories.¹ HUD issued the RFQ without a small business set-aside after it determined that it had inadvertently set aside the identical requirement in an earlier RFQ (No. TESTING 001), following EAA's earlier protest of HUD's selection of Sylvan Prometric, a large business, to be the National Testing Administrator. The protester contends that as the only responsible small business submitting an acceptable quotation under RFQ No. TESTING 001, HUD should have selected EAA and issued it the purchase order for the requirement.

We deny the protest.

¹ The appraisers will be tested on new FHA appraisal handbook requirements and on the proper use of a revised appraisal form (including the appraisers' responsibility to identify property defects and potential hazards).

On February 5, 1999, HUD synopsisized its requirement for the National Testing Administrator in the Commerce Business Daily. The synopsis stated that the requirement would be solicited under simplified acquisition procedures and that no appropriated funds are involved. The synopsis did not specify that the acquisition was set aside for small business.

HUD issued RFQ No. TESTING 001 on February 24. The RFQ cover form was marked to indicate that the requirement was set aside for small business. The cover form also stated that the value of the requirement was anticipated to be under \$100,000. The RFQ included a "Notice of Small Business-Small Purchase Set-Aside," which informed vendors that quotations were solicited from small business concerns only and that quotations received from concerns that were not small businesses would not be considered.

The RFQ explained that the contract would be funded from the fees to be charged the test takers by the National Test Administrator, with no expenditure of government funds involved. The RFQ listed the following evaluation criteria: the frequency the vendor offered the examination (dates and times); the vendor's capability to administer the FHA appraisal testing on a national basis; the number and location of the vendor's testing centers; the frequency and duration of the vendor's test advertising methodology; and the registration methods to be used by the vendor. The RFQ also listed as evaluation criteria the reasonableness of the vendor's proposed fees to be paid by the test takers. Under the RFQ's evaluation scheme, the vendor's proposed fees were considered of secondary importance to the technical factors.

Two vendors--the protester and Sylvan--submitted quotations by the RFQ's March 2 due date. In a letter dated March 22, HUD informed the protester that it had issued a purchase order for the requirement to Sylvan "based upon the highest technical evaluation with cost being secondary." Protest, exh. 6.

On March 25, EAA filed protests with the contracting officer, the Small Business Administration (SBA) and our Office against HUD's issuance of the purchase order to Sylvan. EAA contended that Sylvan should not have been selected because its affiliation with a large business rendered it ineligible for award under the RFQ's small business set-aside provision. Our Office dismissed EAA's protest on March 30, on the basis that the Small Business Act gives the SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements.

In response to EAA's March 25 protests, the contracting officer realized that the RFQ had been issued erroneously as a small business set-aside. According to the contracting officer, the requirement was never intended to have been restricted to small business because a market survey had revealed that no small business could provide the services required. Agency Report, exh. 9., Summary of Procurement Actions, at 1st unnumbered page. The contracting officer canceled the purchase order with Sylvan and on April 15 issued a replacement RFQ (No. TESTING 002) without

the small business set-aside “[i]n order to ensure maximum competition and fairness” and to make it clear that the RFQ was not intended to be set aside. Contracting Officer’s Statement ¶ 8. Except for the absence of the set-aside, the replacement RFQ (No. TESTING 002) was identical to the original RFQ (No. TESTING 001). EAA filed this protest on April 16, prior to the due date established by the replacement RFQ for receipt of quotations. EAA and Sylvan resubmitted their quotations. After reevaluating the quotations, HUD determined again that Sylvan was the best qualified vendor to serve as National Test Administrator and issued the purchase order to Sylvan.

EAA contends that because the original RFQ (No. TESTING 001) was set aside for small business pursuant to Federal Acquisition Regulation (FAR) § 19.502-2(a), HUD was required to reject the quotation from Sylvan, a large business, and to issue the purchase order to EAA. FAR § 19.502-2(a) in relevant part provides that:

each acquisition of supplies or services that has an anticipated dollar value exceeding \$2,500, but not over \$100,000, is automatically reserved exclusively for small business concerns and shall be set aside for small business unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. . . . If the contracting officer receives only one acceptable offer from a responsible small business concern in response to a set-aside, the contracting officer should make an award to that firm. If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis. [Emphasis added.]

EAA maintains that since it was the only responsible small business that submitted an acceptable quotation under the set-aside RFQ (No. TESTING 001), HUD should have selected EAA as the National Testing Administrator and issued it the purchase order.

In arguing that FAR § 19.502-2(a) is applicable, the protester relies on the fact that the original RFQ indicated that the value of the requirement was anticipated to be under \$100,000, and thus automatically reserved exclusively for small business concerns. However, notwithstanding the original RFQ’s cover sheet, the value of the requirement greatly exceeded \$100,000,² and the contracting officer represents that

² EAA itself states that the \$100,000 figure does not accurately characterize the financial value of the contract, which EAA stated is in excess of \$1.7 million, based on Sylvan’s quotation. Protester’s Comments at 5; Protest, exh. 10, at 2 n.1. Indeed, HUD’s response to a vendor question incorporated into the original RFQ stated that the \$100,000 “ceiling” noted on the RFQ cover sheet “does not apply” because

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HUD did not intend to limit responses to small business concerns, because, based on the results of a market survey, no small business could provide the services required. Contracting Officer's Statement ¶ 2. The contracting officer also maintains that she did not realize until EAA filed its initial protest on March 25 that the RFQ inadvertently and incorrectly indicated that the RFQ was set aside for small business. Id. at ¶¶ 3, 7. The fact that the RFQ failed to specify an applicable size standard (as prescribed by FAR § 52.219-1(a)(1)) and that a large concern such as Sylvan was solicited further evidences that the contracting officer inadvertently made the acquisition a set-aside.³

Moreover, because the acquisition here does not entail the agency's expenditure of appropriated funds, the FAR set-aside requirements do not apply. Simplix, B-274388, Dec. 6, 1996, 96-2 CPD ¶ 216 at 5 (licensing agreements under which services are being provided at no cost to the government need not be set aside because the FAR set-aside requirements are inapplicable to such contractual arrangements that do not involve the expenditure of appropriated funds); Good Food Serv., Inc., B-253161, Aug. 19, 1993, 93-2 CPD ¶ 107 at 3-4, recon. denied, B-256526.3, July 11, 1994, 94-2 CPD ¶ 16 (FAR set-aside provisions do not apply to procurement of concession services because expenditure of appropriated funds would not be involved). Accordingly, even assuming that EAA submitted an acceptable quotation in response to the set-aside RFQ (No. TESTING 001), since the contracting officer did not intend to set aside the RFQ and the set-aside requirements do not apply to this acquisition, we have no basis to object to HUD's decision not to issue a purchase order to EAA under that RFQ and instead to issue the replacement RFQ on an unrestricted basis.

EAA maintains that HUD issued the replacement RFQ without the set-aside to avoid issuing a purchase order to EAA because of EAA's affiliation with Ervin and Associates, "a whistle blower" that has revealed improprieties at HUD in other matters. EAA alleges that HUD's actions here evidence a continuing pattern of retaliation and bad faith by the agency in violation of the protester's constitutional rights. However, procurement officials are presumed to act in good faith and

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"[t]here is no cost to the Government." Rather, HUD explained that "[a]ll cost[s] are to be paid by the test taker; and all direct and indirect costs are to be built into the charge to the appraisers taking the examination." RFQ No. TESTING 001 amend. 1, Questions.

³ As the set-aside was made through inadvertence and the contracting officer intended the procurement to be unrestricted, the procedures (FAR § 19.506) pertaining to the withdrawal of set-asides do not apply. Culligan, Inc., B-192581, Mar. 6, 1979, 79-1 CPD ¶ 149 at 6.

allegations to the contrary must be supported by virtually irrefutable proof that they had specific and malicious intent to harm the protester. Ervin and Assocs., Inc., B-278849, Mar. 23, 1998, 98-1 CPD ¶ 92 at 3. There is no such evidence here. On the contrary, our review of the record reveals that HUD fully and contemporaneously documented its evaluation of how EAA and Sylvan proposed to satisfy the requirements of the RFQ's statement of work and that HUD considered the merits of what each vendor proposed under the RFQ's stated evaluation criteria. The record also indicates that HUD reasonably concluded, based on this evaluation, that Sylvan was the best qualified vendor, due to its significantly higher evaluation score, a conclusion that has not even been challenged by EAA. We thus have no basis to question HUD's evaluation or the agency's selection of Sylvan as the National Testing Administrator.

The protest is denied.

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