



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: McSwain & Associates, Inc.; Shel-Ken Properties, Inc.;
and Elaine Dunn Realty

File: B-271071; B-271071.2; B-271071.3; B-271071.4; B-271071.5;
B-271071.6; B-271071.7; B-271071.8; B-271071.9

Date: May 20, 1996

Michael J. McSwain for McSwain & Associates, Inc.; Charlotte C. Jenkins for Shel-Ken Properties, Inc.; and Elaine Dunn for Elaine Dunn Realty, the protesters. W. Graham Moses, Esq., Department of Housing and Urban Development, for the agency.

Wm. David Hasfurther, Esq., Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests are sustained where agency decision not to set aside real estate asset manager services procurement for small business concerns was based on insufficient efforts to ascertain small business capability to perform the contract.

DECISION

McSwain & Associates, Inc., Shel-Ken Properties, Inc., and Elaine Dunn Realty protest the decision of the Department of Housing and Urban Development (HUD), Georgia State Office, to procure real estate asset manager (REAM) services on an unrestricted basis under request for proposals (RFP) No. DU204-R-95-0021. The protesters contend that the procurement of these services, which has in the past been limited to small business concerns, should be set aside solely for small businesses. They also contend that the agency has improperly failed to clarify certain RFP requirements.

We sustain the protests.

The agency advances three reasons for its decision to issue the RFP on an unrestricted basis. First, it states that the greatly increased size of each service area under the RFP and the increased managerial and financial resources needed to service each area make it impossible for small businesses to perform successfully without entering into joint ventures. Second, it contends that since the dollar amount of any contract under the RFP will exceed the maximum dollar level (\$1.5 million) permitted by the applicable Standard Industrial Classification (SIC) code (SIC code 6531) for a small business, no firm obtaining an award under the

RFP can be considered a small business for purposes of this procurement. Third, it argues that a Greensboro (North Carolina) Field Office's attempted set-aside, which had to be canceled when acceptable small business offers were not received, proves the inappropriateness of setting the current procurement aside. The agency also notes that the objective of HUD Notice 91-12, which established the REAM procurement procedures, is not to limit these procurements to small businesses, but rather to obtain high-quality property management services.

The protesters maintain that there are several small business firms, including the protesters, that are capable of fulfilling the contract requirements and are interested in competing.

An acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at fair market prices. Federal Acquisition Regulation § 19.502-2(b). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses with the capability to perform the work and we will review a protest to determine whether an agency has done so. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337; The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. Library Sys. & Servs./Internet Sys., Inc., *supra*.

The record does not show that the contracting officer met her duty to reasonably investigate whether the procurement could be set aside for exclusive small business participation. Based upon the facts underlying the determination as they were provided to us, the agency's determination not to set aside the procurement was based on incomplete information and unsupported assertions. While the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys and/or advice from the agency's small business specialist and technical personnel may all constitute adequate grounds for a contracting officer's decision not to set aside a procurement, American Imaging Servs., Inc., 71 Comp. Gen. 249 (1991), 92-1 CPD ¶ 188, the

assessment must be based on sufficient facts so as to establish its reasonableness. Here, however, the agency's general assertion that the service areas are too large to be successfully serviced by a small business simply states a conclusion that is not established by any facts provided to our Office. The agency offers no meaningful comparison of the current requirements to those of the service areas which have been successfully serviced by small businesses in the past to support its position; additionally, no facts have been offered to establish the applicability of the Greensboro experience, where acceptable small business offers were not received, to the present procurement.

The agency here simply did not conduct an adequate review of the potential small business market. For instance, the agency did not contact any of the small businesses that expressed interest in the contract, or those with known REAM contract experience, to ascertain whether they were qualified to meet the increased requirements. Rather, the agency concluded, without evidentiary support, that any small business would be incapable of meeting the contract requirements, particularly with regard to financial capacity. Although the agency states that it reviewed prior small business REAM contracts and proposals in reaching its conclusion, the agency has not explained how a review of these prior contracts is relevant to determining the availability of responsible small businesses to meet the current requirements.

The agency's conclusion that small business contractors lack the financial capability to satisfactorily perform the contract was based upon the agency's experience with incumbent small business contractors' complaints regarding their need to use their own financial resources (sometimes exceeding \$100,000) between agency payments. The protesters respond, however, that they are financially able to perform the current contract requirements and that the contractor complaints referenced by the agency were the result of the agency's own violations of the prompt payment terms of those contracts. The agency has not rebutted the protesters' position and, in the absence of any further explanation concerning these circumstances and the causes of the small business incumbents' complaints, we are not persuaded that this concern justifies an unrestricted procurement where other small businesses may in fact have the financial capability. (The record shows that there has been no review of the interested small businesses' financial capability to satisfactorily perform the current requirements in accordance with the RFP's payment terms.)

We do not question the legitimacy of the agency's concerns that the increased requirements may be excessive for certain small businesses or reach any conclusion as to whether there actually are two or more small businesses that can meet the RFP's requirements. We find only that the agency was required to more actively investigate the current capabilities of at least a representative number of interested small business firms before determining, based only upon incomplete information and unsupported assertions, that no small business concern would be able to

perform the work. Because the agency failed to make reasonable efforts to ascertain whether small business firms are capable of performing the contract, we conclude that the decision not to set aside this procurement for exclusive small business competition is not adequately supported and, therefore, the protests are sustained. DCT Inc., B-252479, July 1, 1993, 93-2 CPD ¶ 1.¹

Accordingly, we recommend that the contracting officer adequately investigate the potential small business interest in this procurement and the responsibility of interested small business firms. If the contracting officer finds that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns (and that award can be made at a fair market price), the agency should take the necessary steps to set aside this procurement for small businesses. We also recommend that the protesters be reimbursed their costs of filing and pursuing their protests. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1996). The protesters should submit their detailed and certified claim for costs

¹Further, the agency's reliance on the applicable SIC code--for purposes of arguing that since the current contract will exceed that code's small business size ceiling (of \$1.5 million in annual receipts), no firm can be considered a small business--is misplaced. The dollar amount of the current contract would be excluded from the calculation of a firm's annual receipts for compliance with the applicable SIC code ceiling for this procurement. In any event, the SIC code's effect on offeror eligibility as to size status is a matter for the Small Business Administration (SBA). See StaffAll, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195. We also note, regarding the SBA, that the agency did not seek the opinion of that agency in making its determination not to set aside the procurement for small business concerns.

directly to the agency within 90 days after receipt of this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.²

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²McSwain and Shel-Ken raised numerous other challenges to the procurement (e.g., alleged bias or criminal activity on the part of the agency) that have been reviewed by our Office, but which are not supported by the record or are rendered academic in light of our decision above sustaining the protests of the agency's determination not to set aside the procurement for small businesses. To the extent the protesters challenge certain specifications of the RFP as restrictive of competition or ambiguous, that insufficient time was permitted for the preparation of proposals, and that the requirement should be procured under sealed bidding procedures, we have no basis to question the contested terms of the procurement. The record shows that all offerors were given sufficient time and information to intelligently prepare their proposals on an equal basis, reasonably allowing for the exercise of their own business judgment.