



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Aspen Systems Corporation

File: B-272213.2

Date: October 22, 1996

Gilbert J. Ginsburg, Esq., and Constance A. Wilkinson, Esq., for the protester.
Dalton F. Phillips, Esq., and Michael Colvin, Department of Health and Human Services, for the agency.
Charles W. Morrow, Esq., Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A procurement for services supporting an information clearinghouse was properly set aside for exclusive small business participation, where the agency head's designee reasonably determined that the agency could expect offers from at least two responsible small business concerns and that award would be made at a fair market price, notwithstanding that the contracting officer had earlier reached a contrary conclusion.

DECISION

Aspen Systems Corporation protests the decision of the Department of Health and Human Services (HHS) to set aside request for proposals (RFP) No. 200-96-0502(P) for exclusive small business participation. The RFP was issued by the Centers for Disease Control and Prevention (CDC) for information retrieval services.

We deny the protest.

The CDC initiated this procurement to obtain a contractor to develop, maintain, and operate a comprehensive centralized clearinghouse for information concerning HIV/AIDS, sexually transmitted diseases, tuberculosis, and other preventable diseases. The CDC Small And Disadvantaged Business Utilization Specialist (SADBUS) recommended to the contracting officer that the CDC conduct the procurement as a total small business set-aside because there appeared to be six small business firms that were capable of performing the contract work. In response to the SADBUS' recommendation, the contracting officer published a "sources sought" notice in the Commerce Business Daily to evaluate the interest and capability of small business concerns. Interested small businesses were requested to submit technical and experience information, subject to a 20-page limitation, to demonstrate their capability to perform the contract.

Fourteen small business concerns submitted technical capability statements. The contracting officer determined that only one small business concern was qualified, that eleven firms were not qualified, and that two firms were "obviously not qualified." With respect to the one qualified small business, the contracting officer determined that it was unlikely that this firm would submit a proposal at a reasonable price because, in a prior procurement, this firm had submitted an offer for similar services which was approximately 30 percent higher than the eventual contract award price. The contracting officer decided not to set aside the procurement for exclusive small business participation based upon her view that it was not reasonable to expect offers from at least two responsible small business concerns at a reasonable price. Under Federal Acquisition Regulation (FAR) § 19.502-2, a contracting officer is only authorized to set aside a procurement for exclusive small business participation where there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and award will be made at a fair market price.

The HHS Office of Small And Disadvantaged Business Utilization Specialist (OSBDU) and the Small Business Administration (SBA) Procurement Center Representative (PCR) disagreed with the contracting officer's conclusion because of contacts OSBDU and the PCR had from three interested small businesses that appeared capable of performing the contract work. Also, the OSBDU and PCR believed that the contracting officer made too restrictive an evaluation of the interested small business concerns' capability statements, which caused the contracting officer to eliminate capable small businesses for a perceived lack of capability, even though the particular concerns could have been addressed in complete technical proposals. The PCR requested that the contracting officer set aside the procurement for exclusive small business participation. The contracting officer denied this request.

In accordance with FAR § 19.505,¹ the PCR appealed the contracting officer's decision to the Director of the CDC. The CDC Director upheld the contracting officer's determination that this procurement should not be set aside for exclusive small business participation. SBA appealed to the Secretary of HHS, who through the Secretary's designee--the Deputy Assistant Secretary for Grants and Acquisition Management--upheld the SBA's appeal, finding that there were at least two

¹Under FAR § 19.505, the PCR may appeal the contracting officer's decision not to set aside a procurement for exclusive small business participation to the head of the contracting activity. If the head of the contracting activity agrees with the contracting officer, SBA may appeal the procuring agency's determination to the head of the agency. The agency head's decision concerning whether the procurement should be restricted to small businesses is final as to SBA and the contracting officer.

responsible small business concerns that could perform the contract at a fair market price and directed the contracting officer to conduct the procurement as a total small business set-aside.

This protest followed, in response to which we obtained a report from HHS and the SBA and conducted a hearing to receive the testimony of the HHS Deputy Assistant Secretary for Grants and Acquisition Management concerning his determination to set aside the procurement for exclusive small business participation.

As a general rule, the decision as to whether to set aside a particular procurement is within the discretion of the contracting agency. ACCU-Lab Medical Testing, B-270259, Feb. 20, 1996, 96-1 CPD ¶ 106. We will not disturb the agency's discretion absent a clear showing that the agency has abused that discretion. See Israel Aircraft Indus., Ltd., B-258229, Dec. 28, 1994, 94-2 CPD ¶ 262.

The Deputy testified that he determined it was reasonable to anticipate the receipt of offers from at least two responsible small businesses at reasonable price after consulting with various high-level CDC procurement and program officials, the OSBDU, and other HHS procurement officials as well as cognizant SBA officials, and after reviewing CDC's written evaluation summaries of each of the small businesses' technical capability statements and the SBA's appeal. Video Transcript (VT) at 9:45:37-9:46:00. Specifically, the Deputy found, from his review of the evaluation summaries, that a number of the responding small businesses were operating other information clearinghouse systems work which the CDC evaluators had found was similar to the work to be performed here. The Deputy concluded that the evaluators' comments concerning these small businesses evidenced that these firms possessed the technical skills and competence to perform the required contract tasks, and was persuaded by the evaluators' comments that this other work was sufficiently similar as to evidence these firms' capabilities to successfully perform this contract. VT at 10:03:42-10:07.

The Deputy discounted the contracting officer's contrary judgment because it was based upon assertedly insufficient information concerning the capabilities of the interested small businesses. In this regard, the Deputy found that the capability statements were considered by the contracting officer and CDC evaluators as if they were technical proposals required to be responsive to the agency's detailed requirements, even though they were not intended to be such. For example, although the capability statements had strict page limitations, the CDC evaluators criticized these statements as not containing complete technical information to demonstrate how the small businesses would perform the contract. In the Deputy's view, the capability statements did not have to provide that level of comprehensiveness; in his further view, as confirmed by his discussions with cognizant HHS and SBA officials, the statements were sufficiently detailed to reasonably establish the likelihood that actual proposals from some number of

these small businesses would establish these firms' capabilities to perform this contract work. See VT at 10:03-10:07, 10:59-11:02:44.

Based on his review and consultation with cognizant HHS and SBA officials, the Deputy believed that at least six small businesses appeared qualified and capable of performing, and that with this level of competition there would be adequate price competition resulting in a fair market price. See VT at 9:55, 10:07. Given that a number of the interested small businesses had received contracts to operate other, albeit smaller, clearinghouses, necessarily at fair and reasonable prices, we cannot say that the Deputy's determination was unreasonable.

Aspen argues that the Deputy did not have the authority to overturn the contracting officer's judgment that the procurement should not be set aside for exclusive small business participation. As indicated, while FAR § 19.505 vests the contracting officer with the authority to make set-aside decisions, that regulation expressly provides for SBA appeals of such decisions to the agency head whose determinations are final as to the SBA and the contracting officer. The authority of agencies to conduct procurements is vested in the head of the agency who generally may delegate his or her authority. See FAR § 1.601; Advanced Sciences, Inc., B-259569.3, July 3, 1995, 95-2 CPD ¶ 52. Here, the record shows that the authority of the head of agency to determine whether the procurement should be set aside for small businesses was properly delegated to the Deputy.

Aspen also argues that the Deputy's determination to set aside the procurement for small businesses was unreasonable because the Deputy did not consult directly with the contracting officer or any of the CDC evaluators to determine the basis for their evaluation of the small businesses and failed to consider all the underlying documentation supporting the evaluation panel's determination that most of the responding small businesses were not capable. See VT at 10:47:50-57, 10:49:23, 10:49:49.

The question for our Office is whether the Deputy had a reasonable basis for his determination that at least two offers from responsible small businesses could be expected and award made at a fair market price. We find that he did. As noted above, the Deputy reviewed the evaluation summaries of the capability statements and consulted with a number of HHS and SBA officials; the protester has not demonstrated that this provided insufficient information upon which the Deputy could base his decision, even though the Deputy did not review the underlying statements or interview the contracting officer or evaluators as to their opinions. While Aspen clearly disagrees with the Deputy's exercise of his discretion, and

would prefer the contracting officer's determination, this does not demonstrate that the Deputy acted unreasonably.

The protest is denied.

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