



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Safety Storage, Inc.

File: B-280851

Date: October 29, 1998

Sam Z. Gdanski, Esq., and Jeffrey I. Gdanski, Esq., for the protester.
John P. Patkus, Esq., Defense Logistics Agency, for the agency.
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GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency decision not to set aside procurement for small business concerns is sustained where decision was based on insufficient efforts to ascertain small business capability to perform the contract.

DECISION

Safety Storage, Inc. (SSI) protests the decision of the Defense Industrial Supply Center (DISC) to issue request for proposals (RFP) No. SPO-500-98-R-0999 for mobile reuse centers (MRC) for shore and land-based operations for the control and storage of hazardous materials, on an unrestricted basis. SSI, a small business, argues that the requirement should be set aside for small business concerns.

We sustain the protest.

Background

The RFP contemplates the award of an indefinite-quantity, indefinite-delivery requirements contract for a 1-year base period with up to four 1-year option periods. RFP at 105. The total estimated value of the procurement is \$499,999 for a maximum of 125 MRCs over the life of the contract. Agency Report (AR) at 1, and RFP clause No. I67. The Defense Supply Center, Columbus, Ohio (DSC-OH), initially synopsised the solicitation in the Commerce Business Daily (CBD) on September 3, 1997, as an unrestricted procurement. Subsequently, in a November 5 CBD notice, the agency announced that the solicitation was canceled and that a new solicitation would be issued by DISC, Philadelphia, Pennsylvania (DISC-PA). DISC-PA synopsised the procurement in the CBD on January 23, 1998, and issued the RFP on April 17, on an unrestricted basis.

In a letter to DISC-PA dated May 23, SSI pointed out that the required MRC units are comparable to items that both itself and another small business had

manufactured in the past, and requested that the RFP be set aside for small businesses. DISC-PA responded that:

As stated at the pre-proposal conference, the MRC has never been purchased by DISC before. At this point in time, it has not been determined that 2 small businesses can manufacture this item. This MRC has never been purchased with the specifications that are required for this item in this solicitation. Solicitation will continue to be an unrestricted solicitation.

DISC-PA's May 27 response to SSI. SSI subsequently filed this protest in our Office.

The protester maintains that the contracting officer should have expected offers from at least two small business concerns. In this regard, SSI states that the required MRCs are not unique and are almost identical to MRCs procured under previous solicitations and manufactured by three different small businesses, including SSI. The protester asserts that the MRCs previously manufactured by these companies were of equivalent tube steel frame construction; enclosed with heavy gauge sheet metal; and that, except for one "minor cosmetic difference," the MRC design shown in an appendix to the RFP is almost identical to the units previously supplied to the government. Protest, August 21, 1998, at 2. SSI also points out that more than two small business concerns are on the bidders' mailing list prepared for this solicitation.

The agency responds that this is the first time DISC-PA has purchased this MRC, and that the MRC is a very complex and "military-unique" item. AR at 4. According to the agency, among the complexities are the need to "meet a habitability requirement including a wide range of operating environments . . . which are beyond typical commercial applications," and "the need to 'withstand 100% shock loads and retain [the] integrity of the sump and provide no missile hazard to surrounding personnel or equipment.'" Id. at 4-5.

In addition, the agency disagrees with the protester's assertion that there are only "cosmetic differences" between the MRC solicited here and units that were manufactured in the past by small businesses. The agency points out, for instance, that the MRCs required here include thicker tubular components; an indentation at one end that allows the item to be certified for safe containers; and the addition of "[s]ignificant material and structure . . . to provide 'egg-crating' in the sump area to limit sloshing due to US Navy defined ship motion. . . ." Id. at 5. In sum, the agency concludes that primarily based on the complexity of the required MRC and the fact that this is a first-time buy for DISC-PA, the contracting officer properly determined not to set aside the procurement for small businesses.

Discussion

Contracting officers generally are required to set aside for small business all procurements exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. Federal Acquisition Regulation (FAR) § 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 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Mortara Instrument, Inc., B-272461, Oct. 18, 1996, 96-2 CPD ¶ 212 at 3. Our Office will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7.

In our view, the record does not show that the contracting officer reasonably investigated whether the procurement could be set aside for exclusive small business participation. 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., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. McSwain & Assocs., Inc.; Shel-Ken Properties, Inc.; and Elaine Dunn Realty, B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 3. Based upon the facts underlying the determination as they were provided to our Office, we conclude that the contracting officer's determination not to set aside the procurement was based on incomplete information, unsupported assertions regarding the complexity of the required MRCs, and insufficient efforts to ascertain small business capability to perform the contract.

According to the agency, 22 firms, most of them small businesses, responded to the initial September 3, 1997 CBD announcement issued by DSC-OH and 3 small business firms, including SSI, responded to the CBD announcement issued by DISC-PA. Agency's Sept. 23, 1998 response to questions for the record at 1. In this connection, the protester states, and the agency report confirms, that the announcement published by DISC-PA appeared as a "Special Notice"¹ in the CBD,

¹FAR § 5.205(c), regarding special notices, states in relevant part:

(continued...)

which, according to SSI, is not where notice of this type of procurement would be expected to appear. This might explain why the agency received 22 responses when the notice appeared where expected in the CBD, and only 3 responses when DISC-PA issued its CBD announcement. In any case, it is clear that by the time DISC-PA issued the RFP, the agency had received expressions of interest in competing from at least three small businesses, including the protester. However, there is no evidence in the record that the contracting officer surveyed any of these firms to assess their capability to perform the contract.

The agency also asserts that based on a meeting with a consulting firm regarding the technical aspects of the MRC solicitation, after discussing the complexity of the unit and the problems encountered with a previous Navy contract, and based on his review of the specifications for this RFP, "the contracting officer could not make a positive determination as to the existence of two or more small businesses capable of complying with the new specifications and all the new tests required . . ." under the RFP. Agency's Sept. 23, 1998 response to questions for the record at 2.

The agency's general assertion that the MRCs and the tests required are too complex to be successfully accomplished by a small business simply states a conclusion that is not supported by any facts provided to our Office. While the technical complexity of a required item and the fact that it is a first-time buy may be factors an agency may properly consider in determining whether to set aside a procurement for small business participation, Mortara Instrument, Inc., *supra*, there is no evidence in the record that the MRC or tests required here are beyond the capability of small business firms. As for the agency's reference to asserted problems with a previous Navy contract, the agency does not explain the nature of those problems and concedes that the Navy contract involved different specifications. Agency's Sept. 23, 1998 response to questions for the record at 2. In any case, the agency has provided no evidence that the asserted problems encountered in the Navy contract were related to technical complexities of the required units.²

¹(...continued)

Contracting officers may publish in the CBD special notices of procurement matters such as business fairs, long-range procurement estimates, pre-bid/pre-proposal conferences, meetings, and the availability of draft solicitations or draft specifications for review.

Clearly, special notices are not intended to replace the requirement that contracting officers synopsise contract actions pursuant to FAR § 5.201.

²In a submission to our Office by Shields Environmental, one of the small businesses identified by SSI as having produced the MRCs in the past, Shields states (continued...)

Further, as already explained, there is no evidence in the record that the agency made any attempt to contact any of the small businesses that had responded to the initial DSC-OH CBD announcement, or surveyed the three small business firms that responded to the subsequent DISC-PA CBD announcement. In addition, there is no evidence in the record that the agency made any attempt to coordinate its determination with the Small Business Administration or with the agency's Small Business Utilization Specialist. See FAR §§ 19.401, 19.501(c). In short, we conclude that there is no evidence in the record that the agency made any reasonable effort to adequately survey the market place in order to determine whether there are any small businesses capable of performing the contract.

Conclusion and Recommendation

We conclude that the contracting officer's determination that there was no likelihood of receiving offers from at least two responsible small businesses was not reasonable, and we sustain the protest on this basis. We recommend that the contracting officer conduct a proper market survey to adequately investigate the potential small business capability and interest in the procurement and determine whether there is a reasonable expectation that offers will be obtained from two responsible small business concerns and that award can be made at a fair market price. Although the agency recently has received offers under the RFP, unless the contracting officer now determines, after conducting a proper market survey, that there is not a reasonable expectation of receiving offers from at least two responsible small businesses at a fair market price, the contracting officer should cancel the RFP and re-issue it as a set-aside for small businesses. SSI is also entitled to its costs of filing and pursuing the protest. Bid Protest Regulations, 4

²(...continued)

that under a Navy contract (N00600-94-C-2792), the firm experienced difficulty in meeting its obligations due to the quantities of MRCs ordered. Specifically, Shields states that "[t]he volume of production was well beyond the capacity of our financial and facility resources." Letter from Shields Environmental at 1 (Sept. 4, 1998). Nothing in Shields's letter suggests, however, and the agency has presented no evidence, that the difficulties the firm encountered in performing that contract were related to the technical complexities of the required units. Further, the agency's rationale for not setting aside the procurement did not indicate that financial or facility issues were its concern.

C.F.R. § 21.8(d)(1) (1998). The protester should submit its certified claim for such costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

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