



United States General Accounting Office  
Washington, DC 20548

## Decision

**Matter of:** The Writing Company

**File:** B-284622.2

**Date:** May 19, 2000

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Jerrold M. Sanders for the protester.

Donald M. Suica, Esq., and Edward N. Ramras, Esq., Department of the Treasury, for the agency.

Christina Sklarew, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Agency decision not to place procurement under 8(a) program or to set procurement aside for exclusive small business participation is unobjectionable where decision was concurred with by Small Business Administration, and there is no showing of bad faith on the part of government officials or that regulations may have been violated.

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### DECISION

The Writing Company protests certain terms of request for quotations (RFQ) No. TIRN0-00-Q-00083, issued under simplified acquisition procedures by the Department of the Treasury, Internal Revenue Service (IRS) for the redesign and rewriting of certain taxpayer notices. The Writing Company protests that the RFQ was improperly issued on an unrestricted basis, instead of being issued as a section 8(a) set-aside<sup>1</sup> or as a small business set-aside.

We deny the protest.

On March 3, 1998, the IRS awarded a time-and-materials contract (No. TIRNO-98-W-00001) for the rewriting and redesign of certain IRS taxpayer notices to the Small

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<sup>1</sup> Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994), authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns.

Business Administration (SBA) as the prime contractor, with The Writing Company as the performing subcontractor pursuant to section 8(a) of the Small Business Act. Under that contract, the redesign process required the vendor to confer with personnel from various IRS offices, who would review the draft revisions and provide technical and legal feedback; the contractor then had to compile the reviewers' feedback under a four-tier review process, and reach agreement at all tiers before the notice could be presented to IRS executives for acceptance. The agency found that this process required the contractor to spend a disproportionate amount of time managing the project. Agency Report at 2. Because of this and other cumbersome processes and administrative problems, the contracting officer determined to terminate the contract for the convenience of the government on February 24, 1999, and notified SBA of this decision.

The IRS subsequently attempted to negotiate a partial reinstatement of the contract, but could not reach agreement with The Writing Company regarding the contract's scope. *Id.* Thereafter, the agency sought to restructure the solicitation in a manner that better addressed its current requirements and would diminish the manageability problems it had encountered under the prior contract, and drafted the RFQ at issue here. The RFQ reflected a variety of changes in the requirement, including the following: the type of contract was changed from time-and-materials to fixed-price; the process for reviewing the notices was changed from tier review to a team approach; a requirement for the contractor to have an established documentation/writing methodology was added; the volume of the initial award was changed to 25 notices, with additional notices to be awarded as options, and with notices grouped by similarity of issues; independent testing of notices was replaced by reliance on the contractor's internal quality control system; and the government cost estimate was increased from \$1.2 million to \$3 million. Agency Report at 2; Contracting Officer's Statement at 2.

The agency report also indicates that the IRS had initially added a requirement for the contractor to train agency personnel in the contractor's redesign methodology, but that this requirement was deleted before the RFQ was released. The contracting officer prepared a Small Business Review form proposing to issue the RFQ on an unrestricted basis, in which she cited "a change in strategy and approach to redesigning and rewriting notices" and described differences between the two procurements, and submitted it to the SBA. Because the changes were viewed as sufficiently great that this could be considered a new requirement and because the record indicated that there was no reasonable expectation that more than one small business was likely to compete for the requirement, the form was accepted and signed by the agency's Small Business Specialist and by the SBA Representative. Agency Report, Tab K, Department of the Treasury Small Business Review Form.

Thereupon, the RFQ was issued on an unrestricted basis on February 1, 2000 to 33 vendors that had expressed an interest in the procurement. The RFQ called for offerors to submit past performance information by March 13, and to submit written offers by March 30. The protester and one large business submitted past

performance information by the established deadline. Contracting Officer's Statement at 1.

The Writing Company protests the agency determination to issue the RFQ on an unrestricted basis, arguing that the agency should have again set it aside as an 8(a) procurement, or, at a minimum, should have set it aside for exclusive small business participation.<sup>2</sup> Protest at 3.

Because the Small Business Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program, our Office will not question the decision whether to procure under the 8(a) program absent a showing of bad faith on the part of government officials or that specific regulations have been violated. S&K Elecs., B-282167, June 10, 1999, 99-1 CPD ¶ 111 at 4. To establish bad faith, the protester must present convincing evidence that the officials involved had a specific and malicious intent to harm the firm. Kinross Mfg. Corp., B-234465, June 15, 1989, 89-1 CPD ¶ 564 at 2.

The protester cites a letter from the SBA to IRS as "request[ing] that this procurement be set aside for the 8(a) program," and asserts that "IRS did not honor SBA's request." Protest at 3. However, the cited letter dates from February 1999 and primarily concerns the termination of the prior contract, Protest, attach. VII, Letter from SBA to IRS, Feb. 26, 1999; in fact, by the time the RFQ was released in February 2000, the SBA had approved the requirement (in July 1999) for release on an unrestricted basis.<sup>3</sup> Agency Report, Tab K, Small Business Review Form.

While the protester does not allege a violation of any specific regulation, the crux of The Writing Company's argument is that the agency was required to issue the RFQ as an 8(a) set aside. There is no such requirement in either the Federal Acquisition Regulation (FAR), see FAR 19.804-4, or in the SBA Regulations, see 13 C.F.R. § 124.503(f) (1999), both of which require a procuring activity's contracting officer to submit a new offering letter to SBA for review where he or she intends to award a follow-on or repetitive contract as an 8(a) award; neither regulation requires a

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<sup>2</sup> The Writing Company raised a number of additional protest bases in its initial protest, such as objections to certain evaluation criteria, a requirement to list key personnel being proposed, and the issuance of the RFQ under a test program for commercial item acquisitions. The agency responded to those issues in its protest report, and the protester did not rebut those issues in its comments on that report. Therefore, we dismiss these allegations as abandoned. Commercial Energies, Inc., B-243616, Aug. 15, 1991, 91-2 CPD ¶ 152 at 2 n.1.

<sup>3</sup> Although the record shows that SBA initially stated an intention to file an administrator's appeal of the solicitation, it later informed IRS that it had decided against such an appeal. Letter from IRS to GAO (Mar. 29, 2000).

follow-on procurement to be conducted as an 8(a) set aside. No firm has a right to have the government satisfy a specific procurement need through the 8(a) program or award a contract to that firm, since the contracting officer is authorized “in his discretion” to let the contract to SBA upon terms and conditions to which the agency and SBA agree. Electronic Sys. and Assoc., Inc., B-244878, Nov. 13, 1991, 91-2 CPD ¶ 456 at 4.

We do note, while neither party has framed the issue in this manner, that the Department of the Treasury Acquisition Regulation (DTAR) provides that

[o]nce a product or service has been acquired successfully by an acquisition office on the basis of an 8(a) set-aside, all future requirements of that office for that product or service shall be acquired using 8(a) set-aside procedures.

DTAR § 1019.800(c).

That regulation applies to a follow-on procurement of the same product or service that has been acquired successfully on the basis of an 8(a) set-aside. Here, the agency asserts that the RFQ represents a new acquisition rather than a follow-on to The Writing Company’s prior contract, based on the changes described above. The SBA Regulations provide that

[t]he expansion or modification of an existing requirement will be considered a new requirement where the magnitude of change is significant enough to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

13 C.F.R. § 124.504(c)(1)(ii)(C).

Since the government estimate for the prior contract was \$1.2 million, while the estimate for the current requirement is \$3 million, in addition to the substantial changes in the requirement cited by the agency, there is no basis to conclude that this procurement is for the same successfully acquired product or service for which DTAR § 1019.800(c) would require a continued 8(a) set-aside.

While the protester also alleges that the agency improperly terminated its prior contract, and cites that termination as racially motivated and evidence of bad faith, we do not believe that it provides such evidence.<sup>4</sup> The agency explains that the

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<sup>4</sup> The propriety of the termination itself involves a matter of contract administration, which we do not review as part of our bid protest function, Bid Protest Regulations, 4 C.F.R. § 21.5(a) (2000), as we explained in our February 10, 2000 dismissal of The  
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decision to terminate that contract was based on its conclusion that certain processes were cumbersome and resulted in administrative problems, so that the contract as written was unmanageable. Agency Report at 2. Further, since the record establishes that the changes that are cited in the agency report reasonably support the agency's assertion that it was attempting to create a more manageable contract, the record provides no basis to impute bad faith as the agency's motivation in terminating the contract or in determining not to issue the current solicitation as an 8(a) set-aside.

The protester asserts that "[i]mmediately before the Notice Redesign contract was signed, The Writing Company received a call from IRS personnel advising that Treasury did not want this procurement assigned to an 8(a) firm," Protest at 3; however, this assertion alone--without identifying any of the actual agency personnel allegedly involved, and which concerns a purported conversation occurring approximately a year before the instant RFQ was issued--does not rise to the level of credible evidence of bad faith or bias. Because government officials are presumed to act in good faith, we do not attribute unfair or prejudicial motives to them on the basis of mere inference or supposition. See Lancaster & Co., B-254418, Dec. 14, 1993, 93-2 CPD ¶ 319 at 7.

The protester also asserts that it performed acceptably under the prior contract, and concludes from this that "IRS's sole goal was to rid itself of the minority contractor." Protester's Comments at 2. We see no merit to this argument. The fact that the protester's performance may have been acceptable within the framework or terms of that contract does not invalidate the agency's conclusion that the contract itself was structured in an unmanageable way. From our review, there is simply no evidence of bad faith, as alleged by the Writing Company, reflected in the IRS's decision to issue and structure the RFP as it did.<sup>5</sup>

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Writing Company's protest against the termination; we consider it here only in the context of the allegation of bad faith.

<sup>5</sup> The protester's alternative assertion that, at a minimum, IRS should have issued the solicitation as a total small business set-aside is likewise without merit to the extent that it is premised on alleged bad faith. Further, while FAR § 19.502-2(b) requires that a procurement with an anticipated value of greater than \$100,000 be set aside for exclusive small business participation where there is a reasonable expectation of receiving offers from at least two responsible small business concerns and that award will be made at a fair market price, the use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. PR Newswire, B-279216, Apr. 23, 1998, 98-1 CPD ¶ 118 at 1. Notwithstanding the protester's unsupported "estimate" that there are "many" small firms that can perform the services in question, Protest at 3-4, the decision whether to set aside

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In its comments on the agency report, The Writing Company raises for the first time its objections to the type of contract to be awarded, arguing that a fixed-price contract is inappropriate for the scope of work involved. Because these new protest grounds have been raised in a piecemeal manner, we will not consider them. From the date of issuance, this solicitation clearly contemplated the award of a fixed-price contract. The Writing Company has offered no explanation, nor do we see one, as to why this issue could not have been raised in its initial protest. The protest system established by the Competition in Contracting Act of 1984 and implemented by our Regulations is designed to provide for expeditious resolution of protests with only minimal disruption to the procurement process. See 31 U.S.C. § 3554 (1994). That system cannot tolerate piecemeal protest filings that further disrupt the process. See Source AV Inc., B-244755.2, B-244755.3, Sept. 10, 1991, 91-2 CPD ¶ 237 at 2. In any event, since the protester's comments were filed in our Office after the closing time for receipt of quotations, these new bases of protest alleging improprieties in the solicitation are untimely filed. 4 C.F.R. § 21.2(a)(1).

The protest is denied.

Comptroller General  
of the United States

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may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists and market surveys . Because a set-aside decision is a matter of business judgment within the contracting officer's discretion, our review is generally limited to ascertaining whether that official abused his or her discretion. PR Newswire, supra. Here, in view of the changed requirements and the agency's assessment that there was not a reasonable expectation of offers from at least two responsible small business concerns, Contracting Officer's Statement at 1, 3, with which the agency small business specialist and the SBA concurred, we see no basis to question the determination not to issue the requirement as a small business set-aside.