

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Belleville Shoe Manufacturing Company; Altama Delta Corporation; Wellco Enterprises, Inc.

File: B-287237; B-287237.2; B-287237.3

Date: May 17, 2001

Thomas C. Wheeler, Esq., and Sheila C. Stark, Esq., Piper Marbury Rudnick & Wolfe, for Belleville Shoe Manufacturing Company; David P. Metzger, Esq., Holland & Knight, for Altama Delta Corporation; and James J. McCullough, Esq., and Steven A. Alerding, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Wellco Enterprises, Inc., the protesters.

Deniz H. Hardy, Esq., Grayson & Kubli, for McRae Industries, Inc.; and Barbara A. Duncombe, Esq., Porter, Wright, Morris & Arthur, for Rocky Shoes and Boots Inc., intervenors.

Sharif T. Dawson, Esq., Defense Supply Center Philadelphia, and Laura Mann Eyester, Esq., Small Business Administration, for the agencies.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where, although agency reasonably determined that small total business set-asides were not appropriate for more than one portion of boot manufacturing requirement, it improperly failed to consider whether non-set-aside portions should be partially set-aside.
2. Where procuring agency treats each of three contracts to be awarded under single solicitation as separate requirements, it is appropriate to perform a small business set-aside determination for each requirement, rather than a partial set-aside determination for the solicitation as a whole.
3. Solicitation providing for best value evaluation, with technical factors more important than price, is subject to the regulations requiring agency to determine whether requirement should be partially set-aside for small business.
4. In considering whether a small business concern is a responsible prospective offeror for purposes of a small business set-aside determination, agency properly

considered that the concern had never mass-produced the item, and that another generally capable small business had experienced problems on a prior similar contract.

5. Agency reasonably declined to set aside a second portion of boot manufacturing requirement for small business, where each awardee can receive only one contract, and there are only two prospective responsible small business concerns likely to compete, so that, after award of the first set-aside portion to one of the small businesses, there would not be two small business offers left to be considered for a second set-aside award.

DECISION

Belleville Shoe Manufacturing Company, Altama Delta Corporation and Wellco Enterprises, Inc. protest the terms of request for proposals (RFP) No. SP0100-01-R-0001, issued by the Defense Supply Center, Philadelphia (DSCP) for infantry combat boots for the Marine Corps and the Army. The protesters complain that DSCP improperly failed to set aside the appropriate portion of the requirement for small business concerns.

We sustain the protests.

BACKGROUND

The boots are a defense mobilization item--in the event of troop mobilization, there must be a sufficient boot supply to meet troop needs--and a sufficient number of contractors therefore must be kept in production to ensure that surge requirements can be met. Agency Report (AR) at 3-4. The Army has not yet decided whether it will meet its requirement for combat boots through this solicitation. DSCP determined that, if the Army decided to do so, three contracts would have to be awarded to different firms because no one or two producers would have sufficient capacity to meet the surge requirements (provision for which was included in the solicitation, RFP at 78). *Id.* Consequently, the solicitation provided for the award of three indefinite-delivery, indefinite-quantity (ID/IQ) contracts if the Army's requirement is included, with no contractor able to receive more than one award. Request for Proposals (RFP) at 6. Alternatively, the RFP provided that, if the Army decides prior to award not to have its requirement included, only one contract--for the Marine Corps requirement only--will be awarded. *Id.* The multiple contract alternative divides the required quantities into three "scenarios." Scenario 1 contains the Marine Corps requirement and part of the Army's. Scenarios 2 and 3 each contain half of the remainder of the Army's requirement. For each scenario, the minimum quantity is 144,593, and the maximum 298,505, pair per year. RFP at 7-11. The single award alternative (the Marine Corps requirement alone) provides for a minimum of 43,950, and a maximum of 73,255, pair per year. *Id.* at 7.

In structuring the multiple contract alternative, DSCP determined to compete scenarios 1 and 2 using full and open competition, and to set aside scenario 3 for small business concerns. Under the single contract alternative, a contract will be awarded on the basis of full and open competition. Id. at 5.

The protesters raise several arguments challenging the agency's determination to set aside only one of the three scenarios for small business concerns and, alternatively, its failure to partially set aside scenarios for which a total set-aside was not appropriate. We find that the agency reasonably determined that it was appropriate to totally set aside only one scenario, but that the agency improperly failed to consider whether partial set-asides for the remaining scenarios were required. We discuss each of the protesters' arguments below.

PARTIAL SET-ASIDE OF SINGLE REQUIREMENT

Contracting officers generally are required to set aside for exclusive small business participation all procurements exceeding \$100,000 where 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. If the agency determines that it is not appropriate to issue a solicitation as a total small business set-aside, the agency must determine if a partial set-aside is appropriate. FAR § 19.502-3.

The protesters maintain that, since the agency did not set aside the entire boot requirement for small business, the setting aside of one-third of the total requirement essentially constituted a partial set-aside determination. They then assert generally that this determination should have included two--instead of only one--of the scenarios or, at minimum, one-half of the total requirement.

This argument is without merit. First, we find no basis for the protesters' assertion that a partial set-aside would have to include one-half to two-thirds of the requirement; nothing in the applicable regulations requires that a partial set-aside include a certain portion of a requirement. See FAR § 19.502-3(b). In any case, this argument is based on the incorrect premise that the agency made, or was required to make, a partial set-aside determination. Where a solicitation is issued as a partial set-aside, the agency divides a single requirement into a set-aside and a non-set-aside portion. FAR § 19.502-3(b). A small business offeror is eligible to receive an award under the set-aside portion only if it submits an acceptable offer under the non-set-aside portion. FAR § 19.502-3(c)(2)(i). The RFP here was not structured in this manner. The agency did not treat the entire requirement as a whole by dividing it into set-aside and non-set-aside portions; rather, based on defense mobilization needs, the agency divided the contract into three scenarios (portions) and provided for the award of one contract for each scenario to a firm offering on that scenario. Further, small businesses were not required to submit an acceptable offer for the non-set-aside portion of the requirement to be eligible for the set-aside award; rather,

they were permitted to offer on only the set-aside scenario. Under these circumstances, the three scenarios were in the nature of independent requirements, rather than a single requirement. See Aalco Forwarding, Inc., et al., B-277241.20, B-277241.21, July 1, 1998, 98-2 CPD ¶ 1 at 8; Aalco Forwarding, Inc., et al.—Recon., B-277241.26, Jan. 6, 1999, 99-1 CPD ¶ 1 at 3. It follows that it was appropriate for the agency to make a separate total set-aside determination for each scenario, and that its decision to set aside one scenario did not constitute a partial set-aside determination.

NON-SET-ASIDE DETERMINATION

The protesters challenge the agency's determination not to totally set aside scenario 2—in addition to scenario 3—for small business. In deciding whether to set aside a requirement, the contracting officer must make reasonable efforts to ascertain whether it is likely that fair market price offers from two responsible small business concerns will be received. Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3. However, the set-aside determination ultimately involves a business decision within the broad discretion of contracting officials, and our review is generally limited to assessing whether that discretion has been abused. Id.

DSCP was aware of three small businesses which might respond to this procurement—Belleville, Wellco and Altama. The agency believed that Belleville and Wellco were capable of meeting its needs at fair market prices, but that Altama was not. It therefore set aside scenario 3 based on the finding that there were two prospective responsible small business offerors. The agency did not set aside a second scenario since, once either Belleville or Wellco was awarded a contract for scenario 3, there would be only one small business offer remaining to be considered for award under the second scenario (since, as indicated above, the agency had determined that, due to the surge requirements, none of the firms could receive a contract for more than one scenario); the agency concluded that it would not have offers from two responsible small business offerors at the time of the award of scenario 2. AR at 8.¹

DSCP's approach was unobjectionable. We have recognized that, in determining whether a small business firm is a responsible concern for purposes of a set-aside determination, an agency properly may consider the firm's capacity in light of its

¹ Continuing their argument discussed above, the protesters assert that, under the partial set-aside rules, DSCP's determination of how many small businesses were available to compete should have been based on the requirement as a whole, rather than on three separate contracts. As discussed, the agency did not issue the solicitation as a partial set-aside, and properly made separate set-aside determinations for each scenario. See Aalco Forwarding, Inc., et al., supra.

obligations under current contracts. See MVM, Inc., et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270 at 4-5. This is essentially what DSCP did here, the only difference being that it projected ahead to the point after which either Belleville or Wellco would receive award under scenario 3. This difference is not meaningful. Again, the agency had determined that, due to its need to have three contractors available to meet its surge requirements, no firm could be awarded more than one contract. Therefore, at the time of award under a second set-aside scenario, after the first set-aside award, there would remain only one offer from a small business concern available for award. The agency thus correctly determined that the conditions for a second set-aside were not met, and properly declined to set aside a second scenario for small business.

The protesters argue that the agency improperly determined that Altama was not a responsible small business contractor. They conclude that DSCP was required to set aside scenario 2 because there were three responsible small business contractors, two of which would remain available for award after the award was made under scenario 3.

The boots being purchased differ from other combat boots used by the services. Specifically, while other boots are water resistant, the boot here is lined with a stitched waterproof bootie. AR at 5. In addition, the boot has a three-layered sole system comprised of solid midsole, cushioned polyurethane midsole, and a rubber outsole. Id. The boots can be constructed using either the welt, stitchdown, modified direct molded sole (DMS), or littleway method. Id. at 6; RFP amend. 1.

DSCP was primarily concerned that Altama would not be able to produce the required quantity of boots—18,000 pairs per month—because it had never done so before with a boot that had a three-layered sole, or a waterproof bootie. Supplemental Agency Report (SAR) at 12. In this regard, the agency reports that, during discussions with Altama regarding its ability to meet the agency's needs, the agency learned that Altama had produced only 1,000-1,500 pairs of boots using the modified DMS method, AR at 9-10, and only about 600 pairs using welt construction. Id. at 10.² The agency also learned that Altama had produced only about 3,000 pairs with waterproof booties, and that the test samples failed the Walking Simulator test. Id. at 12. In addition, the agency was concerned that Altama initially had resisted producing the boots using either the modified DMS or the welt process, and instead wanted to use the littleway method, which was not permitted under the solicitation as issued. (Subsequently, the agency amended the solicitation to allow use of the littleway method.) During a telephone conference, Altama indicated that in the past

² In a telephone conference held on April 12, 2001 with the GAO attorney assigned to the case and the parties to the protest, Altama stated that it has not produced any boots using the modified vulcanization method, and that in its communications with the agency it was referring to the welt method.

6 months it had produced between 2,000 and 6,000 pairs of three-layered sole boots using the littleway method. However, the agency considered this quantity—at most, 1,000 per month—inadequate to show that Altama would be able to produce 18,000 pairs, and viewed Altama’s production experience more “made to order” than mass production. The agency also considered the fact that Wellco, another generally responsible boot contractor, had trouble meeting the requirements of an earlier solicitation for boots using the modified DMS method. AR at 12-13. The Small Business Procurement Center Representative (PCR) concurred in the agency’s decision concerning Altama.³

In determining the availability of responsible small business concerns for set-aside purposes, the contracting agency’s investigation goes not only to the existence of the businesses, but also to their capability to perform the contract. Information Ventures, Inc., supra. The record supports the agency’s finding that Altama had never produced boots of the type required here in the large quantities required, and it was this consideration that led to the agency’s conclusion. We see nothing unreasonable in the agency’s being concerned that a contractor lacking this experience, even though generally responsible and capable in the field, would encounter a learning curve that would potentially result in substantial delays and administrative burdens for the agency. This is particularly the case given the problems previously experienced by Wellco—another experienced, generally responsible small business—in producing the boots. See Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297 at 3. Based on this record, the agency reasonably determined that Altama was not capable of meeting its needs and that there thus was no basis for issuing scenario 2 as a total small business set-aside.⁴

PARTIAL SET-ASIDES

The protesters assert that, even if total small business set-asides were not required for more than one scenario, the agency was required to consider partial set-asides

³ While at the time the PCR concurred, the littleway method had not yet been approved as a construction method, the PCR was aware that the agency’s primary concern was Altama’s lack of experience in mass producing waterproof boots with three soles. Since, as indicated by Altama during a conference call, Altama had not mass-produced three-layered waterproof boots with the littleway method, there is no reason to believe the PCR’s position would change.

⁴ In determining not to set aside scenario 1 (the combination Marine Corps and partial Army requirements) for small businesses, DSCP relied on FAR § 19.502-5(b), which provides that agencies shall not totally set aside an item listed under the industrial readiness planning program where a large business planned emergency producer has conveyed a desire to supply some or all of the required items. AR at 3. The protesters do not challenge this decision.

for the non-set-aside scenarios, that is, scenarios 1 and 2. DSCP raises several arguments to the effect that it was not required to make partial set-aside determinations for any of the scenarios. We find the agency's arguments unpersuasive and conclude that it was required to consider partial set-asides for scenarios 1 and 2. We discuss each of the agency's arguments below.

Planned Producer

Under FAR § 19.502-3, where an agency determines that it is not appropriate to issue a procurement as a total small business set-aside under FAR § 19.502-2, it must decide whether to issue the procurement as a partial small business set-aside if it expects one or more small business concerns to have the ability to satisfy its requirements at a fair market price.

Although the agency was aware that there would be one small business--the one that did not receive award under set-aside scenario 3--available to meet its needs, DSCP asserts that it did not partially set aside scenario 1 due to the expression of interest in the requirement by a large business planned producer. However, we find nothing in the FAR, or elsewhere, and the agency has pointed to nothing, that excuses an agency from determining whether to partially set aside a requirement for small business where a large business planned producer intends to participate in the procurement. This argument therefore is without merit.

Best Value

DSCP argues that it was not required to consider a partial small business set-aside, because partial set-asides are not relevant to procurements such as this one, where proposals are to be evaluated on a best value basis, and price is not the most important evaluation factor. To support this position, DSCP cites the following language in FAR § 52.219-7 which, pursuant to FAR § 19.508(d), must be included in a solicitation conducted as a partial small business set-aside:

(4) The contractor(s) for the set-aside portion will be selected from among the small business concerns that submitted responsive offers on the non-set-aside portion. Negotiations will be conducted with the concern that submitted the lowest responsive offer on the non-set-aside portion.

According to the agency, since this provision refers to conducting negotiations with the small business offeror that submitted the lowest responsive price, and not the best value offer, the partial set-aside provisions apply only where award is to be made to the low offeror.

We disagree. While FAR § 52.219-7 indeed refers to negotiations with the lowest priced small business concern, as the Small Business Administration (SBA) points out (in response to our request for its views), SBA Comments at 5-8, the partial

set-aside provisions in FAR part 19 contain no such reference. In this regard, FAR § 19.502-3(c)(2)(i) provides:

After all awards have been made on the non-set-aside portion, the contracting officer shall negotiate with eligible concerns on the set-aside portion, as provided in the solicitation, and make award. Negotiations shall be conducted only with those offerors who have submitted responsive offers on the non-set aside portion. Negotiations shall be conducted with small business concerns in the order of priority as indicated in the solicitation. The set aside portion shall be awarded as provided in the solicitation.⁵

In considering the effect of the language in these provisions, we think it is significant that nothing in the provisions—or elsewhere in the FAR—expressly precludes partial set-asides under best value solicitations. Further, we see nothing inherently inconsistent in applying the partial set-aside rules to best value procurements, and the agency offers no explanation as to why it believes this would be the case. Given these considerations, which are consistent with SBA’s view, we conclude that these procurements are not exempt from the partial set-aside requirements.⁶

ID/IQ Contract

The protesters argue that the RFP should provide for a partial set-aside of the Marine Corps portion of scenario 1, in the event that the Army opts not to meet its requirement under this solicitation. The agency responds by citing FAR § 16.504(c), which states that the government’s preference is to make multiple awards under ID/IQ contracts, but also provides that, if the agency determines that it will get better terms by awarding only one contract, it need not make multiple awards. FAR § 16.504(c)(1)(ii). The agency concludes that, since it will receive better pricing with a single award for the Marine Corps requirement, the partial set-aside rules—which would result in more than one award—do not apply.

A partial set-aside is not a multiple award within the meaning of FAR § 16.504(c). Where an agency awards multiple contracts for an ID/IQ requirement, each awardee receives a contract covering the entire requirement. Subsequently, when orders are to be placed for specific tasks under the contract, the agency chooses from among

⁵ We also note that FAR § 19.502-4 states that partial set-asides may be conducted using sealed bids or competitive proposals, with no mention of any limitation on the evaluation method used.

⁶ By letter of today, we are recommending to the FAR Council that it reconcile the language in FAR §§ 19.502-3(c)(2)(i) and 52-219-7.

the multiple contractors based on criteria established in the solicitation. FAR § 16.504(a)(4)(iv). In contrast, under a partial set-aside, a portion of the requirement is set aside for small business concerns and a portion is not, and each of the resulting two contracts covers a specific portion of the requirement, with no subsequent selection of a contractor for tasks when they arise. FAR § 19.502-3(b). Beyond these practical differences, the agency's argument fails to take into account the purpose of the small business set-aside rules. Set-asides are designed to promote small business viability, see 15 U.S.C. § 631(a), with no requirement that award result in the best price for the government; rather, the only relevant constraint as to price is that it not exceed the fair market price for the goods or services ordered. See FAR § 19.501(h). Given these considerations, and the absence of any regulation expressly excluding ID/IQ contracts from the set-aside requirements, FAR § 16.504(c)(1)(ii) did not provide a valid basis for DSCP's failing to consider a partial set-aside.

We conclude that DSCP improperly failed to determine—on the basis of the criteria set forth in FAR § 19.502-3—whether scenarios 1 and 2 should have been partially set-aside for small business, and sustain the protest on this basis.

RECOMMENDATION

We recommend that the agency determine, in accordance with this decision, whether scenarios 1 and 2 should have been conducted as partial small business set-asides. If set-asides are found to be appropriate, the agency should amend the RFP accordingly. We also recommend that the protesters be reimbursed the reasonable costs of filing and pursuing the protests, including attorneys' fees, in so far as those costs relate to the partial set-aside issues decided here in their favor. 4 C.F.R. § 21.8(d)(1) (2001). The protesters should submit their certified claims for those costs, detailing the time expended and costs incurred, directly to the contracting agency within 60 days after receipt of this decision.

The protests are sustained.

Anthony H. Gamboa
General Counsel