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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: Metasoft, LLC

File: B-402800

Date: July 23, 2010

Andrew J. Mohr, Esq., and William J. Bainbridge, Esq., Cohen Mohr LLP, for the protester.

Sandra C. Cain, Esq., Department of the Navy, for the agency.

Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency improperly failed to set aside acquisition for exclusive small business competition is denied where the record supports agency's determination that it could not expect to receive offers from at least two responsible small businesses capable of providing at least 50 percent of the services.
 2. Protest alleging that agency improperly failed to set aside a portion of its requirement for small business competition is denied where agency reasonably determined that requirement was not severable.
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DECISION

Metasoft, LLC, of San Diego, California, a veteran-owned, 8(a) certified, small disadvantaged business, protests the decision by the Department of the Navy not to set aside request for proposals (RFP) No. N66001-10-R-0057 for exclusive small business participation. The solicitation is for support services, including software maintenance and upgrades, for the Joint Tactical Radio System (JTRS) Link 16 waveform software.

We deny the protest.

Prior to issuing the RFP under protest, the agency issued a sources sought notice to identify qualified small business sources interested in competing for the requirement. The notice invited interested firms to furnish "white papers" summarizing their

experience, knowledge, and capabilities in eight areas pertaining to support of the JTRS Link 16 software.¹

Eight firms, five small and three large, submitted responses to the notice. The agency evaluated the responses and determined that each of the large firms was capable of providing the services sought, but that none of the small firms was capable of providing at least 50 percent of the services itself.² Based on the results of this evaluation, the contracting officer recommended that the acquisition be conducted on the basis of full and open competition, and both the agency small business specialist and the local district office of the Small Business Administration concurred in the recommendation. On April 26, 2010, the agency issued the solicitation, which contemplates the award of a single indefinite-delivery/indefinite-quantity contract, on an unrestricted basis.³

The protester argues that the agency should have set aside the acquisition, either totally or in part, for exclusive small business participation.

Under FAR § 19.502-2(b), a procurement with an anticipated dollar value of more than \$100,000 must be set aside for exclusive small business participation when there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. That is, an acquisition must be set aside where there is a reasonable

¹ Specifically, the notice asked interested firms to describe their (1) process to investigate and validate problem reports with JTRS Link 16 software; (2) experiences/capabilities with development, enhancement, and maintenance of JTRS and Link 16 waveform software; (3) experiences/capabilities in porting and porting support of the above; (4) experiences in conducting Formal Qualification Testing of the above; (5) experiences in support of National Security Agency Information Assurance assessment of the above; (6) capabilities to identify, provide, and maintain a suitable waveform development and test environment; (7) experiences writing test procedures, developing and updating test emulators, simulators and other test support software and hardware for testing the above; (8) knowledge of certain specified JTRS standards, guidelines, and requirements; and (9) experience with certain Link 16 message types and net structures.

² 13 C.F.R. § 125.6(a) provides that in order to be awarded a full or partial small business set-aside contract for services (except construction), a small business concern must agree that the concern will perform at least 50 percent of the cost of the contract incurred for personnel with its own employees. This requirement is implemented through Federal Acquisition Regulation (FAR) § 52.219-14, which, under FAR § 19.508(e), must be included in solicitations set aside for small business.

³ The closing date for receipt of proposals was July 9.

expectation that two or more acceptably priced offers will be received from small business concerns that are capable of performing the contract. ViroMed Laboratories, B-298931, Dec. 20, 2006, 2007 CPD ¶ 4 at 3. A partial set-aside must be made if a total set-aside is not appropriate, the requirement is severable into two or more economic production runs or reasonable lots, and one or more small business concerns are expected to have the technical competence and productive capacity to satisfy the set-aside portion at a reasonable price. FAR § 19.502-3(a). While the use of any particular method of assessing the availability of small businesses is not required, the agency must undertake reasonable efforts to locate responsible small business competitors. ViroMed Laboratories, *supra*, at 3-4. Because a decision whether to set aside a procurement (either totally or partially) is a matter of business judgment within the contracting officer's discretion, our review is limited to determining whether that official abused his or her discretion. Ceradyne, Inc., B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4; Vox Optima, LLC, B-400451, Nov. 12, 2008, 2008 CPD ¶ 212 at 5.

Here, while the protester challenges at length the contracting officer's conclusions regarding its own capability to perform at least 50 percent of the services in question, it has not challenged the contracting officer's conclusions regarding the capabilities of the other small business respondents, other than to assert that (1) the Navy's assessment was based on incomplete information because none of the small businesses had access to the software source code at the time they responded to the sources sought notice and (2) the agency evaluated responses to the notice on the basis of overstated technical requirements not included in the RFP itself.⁴

In response to the first allegation, the agency explained that access to the source code was not required for a firm to respond to the sources sought notice because the notice focused primarily on fundamental capabilities and experience developing, testing, porting, and certifying, rather than on actual technical approaches or solutions. Agency Report at 15-16. We think that the agency's explanation is reasonable; moreover, the protester did not take issue with or otherwise seek to rebut it in its comments.⁵ We will not consider the protester's second argument because it was not raised in a timely manner. That is, the argument, which was not raised until June 7, is based on information furnished to the protester at its April 9 debriefing and on the contents of the RFP, which was issued on April 26 and

⁴ None of the other small businesses has contested the agency's technical evaluation or the issuance of the RFP on an unrestricted basis.

⁵ The agency also noted that the pre-solicitation notice had placed prospective sources on notice that documentation pertaining to the source code would not be furnished until after issuance of the RFP, and that no source had contacted the contracting officer to object prior to submitting its response to the sources sought notice.

amended on May 20 and May 25. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2010) (protests based on other than a solicitation impropriety must be raised within 10 days after the basis of protest is, or should have been, known).

In sum, because the record fails to demonstrate that small business concerns were denied access to information necessary for the preparation of responses to the sources sought notice, and the protester has not raised any other timely challenges to the agency's findings pertaining to small businesses other than itself, Metasoft has not shown that the contracting officer abused his discretion in concluding that offers from at least two capable small business offerors could not be expected.

Metasoft further argues that even if the agency did not have a reasonable expectation of offers from two or more capable small business concerns (and thus was not required to set the total requirement aside for small businesses), it did have a reasonable expectation of an offer from one capable small business firm (*i.e.*, itself) and thus should have set aside a portion of the acquisition. We need not determine whether the protester's complaints regarding the assessment of its own capabilities are valid given that FAR § 19.502-3 requires an agency to set aside a portion of an acquisition for exclusive small business participation only when the requirement is severable. Here, the agency determined that the requirement was not severable "because the delivery orders under the contract are so integrally related that only a single source can reasonably perform the work." The agency further explained as follows:

The delivery orders under this anticipated contract will consist of interrelated and complex software coding that is crucial to the performance of multiple programs within the JTRS Enterprise. Having more than a single vendor performing these multiple delivery orders to maintain, enhance and update the same baseline version of software would increase to an unacceptable level the complexity and risk in Software Communications Architecture (SCA) and Application Programming Interface (API) standardization compliance efforts. In addition, configuration management control and processes would experience significant negative impacts if delivery orders under this contract were awarded to multiple sources, partially due to the introduction of different test environments.

Government Technical Evaluation of Industry Responses to Sources Sought Notice, Mar. 18, 2010, at 4 n.1, quoting Determination and Findings (D&F) for Link 16 SwISS, Approval to Exclude Multiple Award Preferences. While the protester contends that the foregoing analysis is inapplicable because it was undertaken in response to a different question (*i.e.*, whether the agency was justified in failing to adhere to the preference for multiple awards) and prior to receipt of the responses to the sources sought notice, we think that the D&F demonstrates a reasonable basis for the contracting officer's determination that the requirement is not severable.

The protester argues that it is apparent from the fact that the agency was able to define certain services for inclusion in the initial task order to be issued under the contract that these services are severable from the remainder of the services. We disagree. In determining whether a requirement is severable, it is reasonable for agency contracting officials to consider not simply whether the services may be defined in a way that would permit them to be awarded separately from other services, but also whether it is in the government's best interest to award them separately. See EAI Corp., B-283129, Oct. 7, 1999, 99-2 CPD ¶ 69 at 3 (agency reasonably determined that requirement was non-severable where it concluded that there was a significant benefit from having a single contractor perform all tasks).

Metasoft also objects to the terms of the RFP, arguing that the solicitation unduly restricted competition by providing for evaluation of an offeror's previous experience in developing software "of the same nature" as that being acquired under this solicitation. RFP, amend. 0002, at 11. The protester contends that the provision essentially eliminated from the competition firms lacking Link 16 specific experience [deleted]. In response, the agency maintained that the language did not restrict offerors to furnishing evidence of Link 16 experience--it permitted offerors to furnish information regarding efforts that they considered to be of the same nature as the Link 16 software. We agree with the agency that the RFP language on its face provides for evaluation of experience with software similar, but not necessarily identical, to the Link 16 software.⁶

The protest is denied.

Lynn H. Gibson
Acting General Counsel

⁶ In its initial protest, Metasoft also alleged that the agency had failed to furnish it with access to the source code that it needed to prepare a proposal in response to the RFP. In response, the agency furnished the protester with additional documentation. In its final submission to our Office, the protester acknowledged that the agency had furnished it with the documentation that it required and indicated that it would not pursue this issue.