

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

50982

FILE: B-183773

DATE: August 18, 1975

97484

MATTER OF: Development Associates, Incorporated
Kinsey, Pinkard & Associates
Pharos, Incorporated

DIGEST:

1. Protest by large business against issuance of solicitation as total small business set-aside denied where it was determined pursuant to FPR 1-1.706-5(a) that there existed reasonable expectation that proposals would be obtained from sufficient number of responsible small business concerns to permit award at reasonable prices, and record does not indicate that such determination constituted abuse of agency discretion.
2. Although 1 week after issuance of RFP notice in Commerce Business Daily (CBD) erroneously stated that due date for receipt of proposals under RFP had been extended, two proposals submitted on date specified in CBD but after date specified in RFP are late since notice in CBD did not constitute amendment of RFP.
3. Where notice in Commerce Business Daily (CBD) erroneously stated that due date for receipt of proposals under RFP had been extended and that RFP had been amended to include state of Delaware in scope of contract, fact that Delaware was already included in RFP scope of work as issued should have alerted potential offerors to possibility that information contained in CBD notice as to due date for receipt of proposals was erroneous.

Solicitation No. 5-36467 was issued April 4, 1975, by the U.S. Department of Commerce, Research and Technical Assistance Contracts Branch, as a 100 percent small business set-aside, seeking proposals from eligible offerors for a cost-plus-fixed fee contract for professional consultant services to minority business concerns under the jurisdiction of the Commerce Department's Office of Minority Business Enterprise (OMBE), Region 2. Three protests have been filed under the subject solicitation.

Development Associates, Incorporated (Development), not a small business and therefore ineligible for participation in the procurement, has objected to the restriction of the procurement to small business concerns, contending that the decision to change

the procurement this year from an unrestricted basis to a small business set-aside was arbitrary and capricious and had the effect of eliminating several fully qualified (except for size status) minority contractors such as itself whose past performance has been highly rated. It is argued that the size restriction, by eliminating minority contractors which are not small businesses under the applicable size standards, is contrary to national OMBE minority business policy, including OMBE's alleged policy of consolidating available resources to provide a wider and higher quality range of services. Accordingly, Development requests withdrawal of the small business set-aside and the resoliciting of competition on an unrestricted basis in accordance with Federal Procurement Regulations (FPR) § 1-1.706-3(b) (1973 ed.).

Kinsey, Pinkard and Associates, and Pharos Incorporated, have protested the rejection of their proposals (submitted on May 2, 1975) as late, having been received after the exact date and time specified in the solicitation for receipt of proposals: 3:00 p.m., April 30, 1975. Both of those firms refer to an insertion in the Commerce Business Daily edition of April 11, 1975, referring to the procuring activity and stating:

"Amendment RFP 5-36467 ACK to include State of Delaware for OMBE Region 2 and change due date to 2 May 75."

Both firms contend that the foregoing provision constituted a published amendment to the solicitation upon which they were fully justified in relying in submitting their offers on May 2, 1975.

With regard to Development Associates' protest, the record indicates that the contracting agency made its determination to set the procurement aside for exclusive small business participation pursuant to FPR § 1-1.706-5(a) (1973 ed.), permitting the set-aside of an entire procurement or class of procurements for exclusive small business participation where there is a reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that awards may be made at reasonable prices. The determination of whether there is a reasonable expectation of receiving a sufficient number of bids or proposals under a total set-aside to assure reasonable prices is within the ambit of sound administrative discretion and this Office will not substitute its judgment for that of the contracting officer in the absence of a clear showing of abuse of that discretion. 45 Comp. Gen. 228, 230-231 (1965).

In this regard, the record states that there existed such an expectation since under 1974 procurements in several regions for identical requirements involving unrestricted competitive proposals, most of the proposals considered technically acceptable were from small business concerns, and in the case of the Washington, D.C. Regional Office procurement, six of the 1974 proposals (including two of the acceptable proposals) were from small business concerns. Under the present solicitation, eight proposals were received by April 30, 1975, and the contracting agency advises that on the basis of preliminary evaluations, it appears that an award can be made at a reasonable price. Under the foregoing circumstances, we are unable to conclude that the contracting agency abused its discretion in setting the procurement aside for total small business participation.

Furthermore, we do not agree with Development's contention that the set-aside should be withdrawn pursuant to FPR § 1-1.706-3(b) (1973 ed.). That provision permits the contracting officer to withdraw a set-aside when he considers that procurement from a small business concern would be "detrimental to the public interest (e.g., because of unreasonable price)." We find no basis to conclude that the contracting officer should have withdrawn the set-aside because of unreasonable price or because procurement from a small business would be otherwise detrimental to the public interest.

Accordingly, the protest of Development Associates is denied.

Concerning the protests of Kinsey and Pharos, the contracting agency has provided us with the following chronology of events. The original synopsis of the procurement appeared in the Commerce Business Daily (CBD) issue of April 4, 1975, setting forth an "estimated" due date for proposals of April 21, 1975. Shortly before its appearance in the CBD, the contract specialist realized the state of Delaware had been inadvertently omitted in the RFP from the geographical coverage of Region 2. It was further determined that a delay in the reproduction and distribution of the solicitation itself would require extension of the due date. Accordingly, the insertion published in the April 11, 1975, CBD issue, set out above, was prepared to correct the erroneous exclusion of Delaware and to change the proposal due date to May 2, 1975.

In the meantime, reproduction of the solicitation was accomplished earlier than anticipated, and the solicitation was issued April 4, 1975, stipulating a due date of April 30, 1975, and

including Delaware within the coverage of Region 2. No amendment to the solicitation itself was ever issued, and the record states that no inquiries were received prior to the April 30, 1975, due date from any potential offerors as to the inconsistency between the April 30, 1975, due date set out in the solicitation, and the May 2, 1975, due date included in the amended CBD notice published April 11, 1975. (The contracting agency cannot account for its failure to cancel the amended CBD notice once the solicitation itself was issued.)

It is reported that eight proposals were received by the April 30, 1975, due date set out in the solicitation. The proposals of Kinsey and Pharos, submitted on the May 2, 1975, due date referenced in the amended CBD notice, were rejected pursuant to paragraph 20 of the solicitation entitled "Late Proposals, Modifications of Proposals and Withdrawals of Proposals." Both of these offerors were advised by the contracting officer that their proposals would not be opened or considered due to their late submission. The record indicates that the proposals are being retained unopened by the contracting agency.

The Commerce Department concedes that the April 11, 1975, CBD publication could have given rise to a belief on the part of a prospective offeror that an amended due date to that set forth in the solicitation was intended. However, the agency points out that the RFP was never officially amended, and takes the position that the CBD is not intended to substitute for the solicitation or any amendments thereto.

The situation here involved, conflicting due dates in the request for proposals and in a subsequently issued CBD insertion, is not covered by applicable procurement regulations. FPR § 1-3.802(c) (1973 ed.) states only that requests for proposals shall specify a date and time for submission of proposals and that the extension of time granted to one prospective offeror shall be granted uniformly to all. Moreover, the RFP provided on page 18 in the "Instructions For Proposal Preparation" section that proposals must be submitted by the closing time and date specified on page 1 of the RFP.

We recognize that the primary purpose of synopsis in the CBD is to provide the general public with information concerning current Government contracting, including dates for receipt of proposals. FPR § 1-1.1003-1(b) and 1-1.1003-7(b)(4) (1973 ed.).

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However, these regulations do not provide that solicitations may be amended by public notice in the CBD. Rather, as provided in FPR 1-2.207 (1975 ed.) and FPR 1-805-1(d) (1964 ed.), a solicitation change is to be accomplished by issuance of a formal amendment to the solicitation. Therefore, we do not agree with the protesters that the CBD notice constituted a formal amendment to the RFP.

Although the protesters insist that based on the CBD notice they were justified in submitting their respective proposals on May 2, we do not agree. The fact that the CBD notice also stated the RFP had been amended to include Delaware within Region 2, while the RFP as issued (on page 1) already included Delaware within the coverage should have alerted the protesters to the possibility that the information contained in the CBD notice was erroneous. Under the circumstances, we believe that the protesters at least should have requested an explanation from the procuring activity as to the inconsistency between the RFP and the CBD notice.

Therefore, we believe the proposals in question are late and should not be considered. Accordingly, the protests are denied.


Acting Comptroller General
of the United States