

DOCUMENT RESUME

03612 - [A2593720]

[Limitation of Competition by Insisting on Unnecessary Requirements]. E-187560. September 14, 1977. 8 pp.

Decision re: Burton K. Myers and Co.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law II.
Budget Function: General Government: Other General Government (806).

Organization Concerned: Small Business Administration.

Authority: Small Business Act, sec. 7(i, j). 53 Comp. Gen. 522. 54 Comp. Gen. 294. 55 Comp. Gen. 366. 53 Comp. Gen. 102. 54 Comp. Gen. 606. 55 Comp. Gen. 432. 38 Comp. Gen. 190. 54 Comp. Gen. 445. 54 Comp. Gen. 452. 55 Comp. Gen. 1019. 55 Comp. Gen. 1024. E-184691 (1976). B-176420 (1973). B-187497 (1977).

The protester protested several aspects of a request for proposals, contending that the agency unduly limited competition by insisting on unnecessary requirements. It appears that the solicitation restriction based on area boundaries rather than on a specified number of miles from central points was more restrictive than the latter approach, and the agency needs could be met by the latter approach. The agency should examine the restriction prior to utilizing it in future procurements. The agency decision to procure by means of an overall package approach for a variety of services was not subject to objection. (Author/SC)

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DECISION



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

FILE: B-187960

DATE: September 14, 1977

MATTER OF: Burton K. Myers and Company

DIGEST:

1. Where it appears that RFP geographic restriction based on area boundaries rather than specified number of miles from central points is more restrictive; an latter approach and agency needs could be satisfied by latter approach, agency should examine restriction prior to utilizing it in future procurements.
2. Definition of "office" in RFP including requirement that offer have publicly listed telephone number in its name for at least 1 year prior to issuance of RFP is not unreasonable in view of agency's need to have contractor located in area long enough to be familiar with problems toward which its services will be directed.
3. Agency decision to procure by means of overall package approach for variety of services, rather than by procuring various distinct services separately, is not subject to objection absent clear showing that decision lacked reasonable basis.
4. RFP provisions which limit subcontracting to 50 percent of assigned tasks, even though tasks are assigned by agency during term of contract and contractor may not have in-house capability for certain tasks, appear to contemplate assignment of wide variety of tasks for 50 percent of which contractor is expected to have in-house capability, but should be clarified to make their meaning clear.
5. Agency is not required to equalize competition by taking into consideration advantage enjoyed by one offeror by virtue of its incumbency.
6. RFP provisions which require pricing of final report but do not take such pricing into account in evaluating proposals should not be used in future procurements since evaluation on such basis could result in distorted evaluation scores which would not indicate lowest probable cost to Government.

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Burton K. Myers and Company (Myers) has timely protested several aspects of request for proposals (RFP) RFP-SBA-7(1)-MA-77-1, issued by the Small Business Administration (SBA) on November 15, 1976. The RFP solicited offers for providing management and technical services in each of 43 specified geographic areas to individuals or enterprises eligible for such assistance under sections 7(i) and 7(j) of the Small Business Act. The procurement was a total small business set-aside. Myers did not submit a proposal in response to the RFP; awards have been made under this solicitation.

The protester's principal contention is that SBA unduly limited competition by insisting upon unnecessary requirements, thereby precluding or discouraging many firms from competing for award. Myers identifies two RFP requirements which it regards as unnecessary. They required offerors to (1) have an office in each geographic area for which it desired to submit a proposal and (2) submit a proposal to provide all of the technical/management services (tasks) specified in the RFP. Myers also asserts that certain other elements of the RFP are unfair or improper.

Myers objects to the geographic requirement on the ground that SBA has not shown that an office located in each geographic area is needed to perform the contract since it is Myers' understanding that all tasks are performed outside the offeror's office. In addition, Myers states that the restriction based on geographic boundaries as opposed to a specified number of miles from a central point may produce "absurd and unfair circumstances" in which firms located relatively far from the specific area in which the work will be performed may be eligible for the contract while those closer in miles may be ineligible. Myers also alleges that the definition of "office" in the RFP is arbitrary. Myers' position is that "these limits on bidding are artificial and serve no useful purpose except to exclude firms from the competitive process."

SE states that the restriction is valid because its experience with prior contracts indicates that its minimum needs can be satisfied only through attaining the "very real benefits" derived from requiring offerors to have an office in the geographic area to be serviced. Those benefits are reported to be an "on the scene" contractor who can more easily and effectively provide the services required and who is able to respond "quickly and effectively to the multitude of problems confronting socially or economically disadvantaged firms." It is further reported that an additional benefit is the savings to the Government of "

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considerable amount of money in travel costs." We are also advised that the restriction is framed in terms of geographic areas as opposed to miles from a central point because it would not be administratively practicable to do otherwise. According to SBA, the geographic boundaries utilized coincide with the areas of responsibility normally used by SBA regional and district offices to alleviate potential problems of overlapping SBA office jurisdictions and non-coverage of certain areas that might arise if "43 specified boundaries from 43 separate easily identifiable central points" were to be utilized.

We have recognized that geographic restrictions are not unduly restrictive of competition where they represent the actual needs of the contracting agency. See Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44; Plattsburgh Laundry and Dry Cleaning Corp., 54 Comp. Gen. 294 (1974), 74-2 CPD 27; Paul R. Jackson Construction Company, Inc., and Swindell-Dressler Company, a Division of Pullman, Incorporated, A Joint Venture, 55 Comp. Gen. 366 (1975), 75-2 CPD 220; Metal Trades, Inc., B-186098, August 3, 1976, 76-2 CPD 119. Here we do not question SBA's assertion that its minimum needs can be satisfied only by having a contractor located in the vicinity of contract performance. We do question, however, why the geographic restriction must be based on regional borders rather than on number of miles from a central point, which under the circumstances would appear to be less restrictive.

In Descomp, Inc., *supra*, we said that "a geographic restriction stated in terms of a certain radius of miles from a well-known point * * * represents a reasonable approach." 53 Comp. Gen. at 529, 530. We have also recognized that imposition of a geographic restriction on the basis of a specified area may also be proper under appropriate circumstances justifying such a restriction. See, e.g., Paul R. Jackson Construction Company, Inc., et al., *supra* (District of Columbia); 53 Comp. Gen. 102 (1973) (San Diego port area); Metal Trades, Inc., *supra* (Fifth Naval District); B-178600, August 16, 1973 (Metropolitan Washington, D.C. as defined); B-175408, June 28, 1972 (commercial geographic limits of Kansas City, Missouri).

Here, the only justification for the restriction is asserted to be administrative practicability. We have held, however, that restrictions on competition may not be imposed solely for administrative convenience. Department of Agriculture's Use of Master Agreement, 54 Comp. Gen. 606 (1975), 75-1 CPD 40. Moreover, we do not understand SBA's concern with respect to overlapping jurisdictions and non-coverage of areas since selection of contractors

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without strict regard to whether their offices are located within a given SBA region or district would not appear to affect either the administrative responsibility of individual SBA offices or the coverage provided by the contracts awarded.

SBA questions what is to happen to the prospective contractor not included within any geographic area if boundaries are to be based on distances from central points. We would anticipate that if SBA's minimum needs can be satisfied by a restriction based on regional and district boundaries (thereby qualifying a firm located at one end of the area so defined to provide services at the other end of that area), they can also be satisfied by boundaries based on the distance from the approximate center of the region or district to the most distant point of that region or district. If the geographic restriction is imposed in that manner, some firms may qualify for award of more than one contract, but no firm would be excluded from every area for which a contract is to be awarded.

We recognize that the type of geographic restriction used in this case has been utilized in past years by SBA, see Communication Products Company, et al., B-186353, December 21, 1976, 76-2 CPD 508; Donald N. Humphries & Associates, et al., 55 Comp. Gen. 432 (1975), 75-2 CPD 275; Stephen J. Hall & Associates, et al., B-180440; B-132740, July 10, 1974, 74-2 CPD 17; B-178295(1), October 18, 1973, without specific objection thereto being registered by this Office. However, we are recommending that the Administrator of SBA re-examine the restriction in light of the views expressed herein prior to issuing future solicitations containing a geographic restriction.

With regard to the definition of the term "office", the RFP provided:

"* * * For the purpose of this solicitation an OFFICE shall be defined as:

- "1. Offeror must be able to demonstrate that this location has been the focal point of consulting activity similar in nature to that required by this solicitation since at least November 15, 1975.
- "2. Offeror must be able to demonstrate that this location has operated under the same ownership or management since at least November 15, 1975.
- "3. Offeror must be able to provide evidence showing that at least one full-time (minimum 35 hour work week) staff member has been performing services similar in nature to those required by this solicitation since at least November 15, 1975. This staff

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member must have devoted at least 50% of his professional time to the performance of such consulting services through this location.

"4. Offeror must have had a publicly listed telephone number in the name of the Offeror's firm since at least November 15, 1975.

"5. Offeror must possess written evidence of ownership, rental lease or other arrangement indicating that this location has been operating since at least November 15, 1975."

Myers objects to the RFP definition of office. It states that "an office is not determined by the fact it has a publicly listed telephone number in the name of the offeror since November 15, 1975."

We agree that a publicly listed telephone number does not necessarily indicate the existence of a functioning place of business. However, the telephone listing is simply one of five elements of the definition contained in the RFP. It appears that the purpose of defining "office" as is done in the RFP is to insure that the contractor has been located in the area in which it will provide management services for a long enough period to have gained experience with the problems toward which its services will be directed and to have established a working relationship with the business community which it is to assist. We do not find that the RFP definition of office is unreasonable.

Myers also objects to the requirement that proposals must be submitted for all of the services specified in the RFP. Myers states that the grouping of accounting with production, engineering, technical, feasibility study, market analysis and other specialized services effectively eliminates 10,000 small CPA firms from competing. Myers believes that SBA should allow offers for only one kind of service, such as accounting. On the other hand, SBA states that the small business clients receiving the services called for in the RFP do not need just accounting services, but require, in varying degrees, all of the services provided for. SBA points out that the RFP allowed for subcontracting of up to 50 percent of the required work, and that several CPA firms submitted proposals based on that subcontracting provision.

The preparation and establishment of specifications to reflect the minimum needs of the Government are matters primarily within the jurisdiction of the procuring agency, since it is

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Government procurement officials who are familiar with the conditions under which similar services have been procured in the past and are generally in the best position to know the Government's needs and best able to draft appropriate specifications. 38 Comp. Gen. 190 (1958); B-176420, January 4, 1973; Paul R. Jackson Construction Company, Inc., et al., supra. Accordingly, we have recognized that the determination to procure by means of an overall package approach rather than by separate procurements for divisible portions of the total requirement is within the discretion of the contracting agency and will not be disturbed by our Office in the absence of a clear showing that it lacked a reasonable basis. Allen and Vickers, Inc.; American Laundry Machinery, 54 Comp. Gen. 445, 452 (1974), 74-2 CPD 303; Control Data Corp., 55 Comp. Gen. 1019, 1024 (1976), 76-1 CPD 276; Memorex Corporation, B-187497, March 14, 1977, 77-1 CPD 187; Capital Recording Company, B-188015, B-188152, July 7, 1977, 77-2 CPD ____. No such showing has been made in this case.

Myers also asserts that the 50 percent subcontracting limitation contained in the RFP coupled with the RFP provision that requires the contractor to cease subcontractor arrangements whenever the SBA Project Manager determines that more than 50 percent of the work assigned has been subcontracted, until the appropriate subcontracting levels have been reattained, is unfair. Myers states:

"This presumes the contractor can do any function for which tasks are written. The reason he subcontracts is because of lack of in-house capability. He does not write the tasks, so it is impossible to control in-house versus sub-contracting mix unless he does it all himself. This is a Catch-22 condition."

SBA's response is that one of the purposes of the provisions is to discourage "brokered" performance and that the agency's minimum needs require that fundamental reliance for contractual responsibility be placed upon the prime contractor.

We agree that a contractor may not have in-house capability to perform certain of the tasks which might be assigned under the contract and that those particular tasks may have to be subcontracted. It appears, therefore, that the provisions in question contemplate that the contractor will be assigned a wide variety

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of tasks, that the contractor is to have an in-house capability to perform at least 50 percent of those tasks, and that the subcontracting limitation is to be enforced, under those circumstances, when more than 50 percent of those tasks have been subcontracted. We are suggesting to SBA that these provisions be clarified to make their meaning clear.

Myers further objects to the provisions of the RFP which allows the contractor reimbursement for travel expenses and per diem in accordance with prescribed Government travel directives, but does not allow reimbursement for time in travel. Myers reasons that this gives "an unwarranted advantage to the incumbent contractor which has a good feel for both the location and mix of individual tasks." However, we have recognized that a firm may enjoy a competitive advantage by virtue of its contract incumbency and that there is no requirement for a procuring activity to equalize competition by taking into consideration this type of advantage. Birdsboro Corporation, B-184691, September 8, 1976, 76-2 CPD 226; Communication Products Company, et al., supra.

Myers also contends that one of the evaluation criteria is defective. The RFP provides that "Proposals will be evaluated on a point system pursuant to the following factors. * * *

Maximum Points

- "1. Quality, experience and capability of staff offeror intends to assign to this project.....40
- "2. Previous experience and effectiveness in performing services, indicated by prior work and demonstrated by ability to deal effectively with individuals and enterprises eligible to be served.....40
- "3. Man-Day Pricing (not to include travel and per diem or final report).....20

100"

Myers asserts that since the price of the final report is not considered in the man-day pricing element, the lowest offeror, based on total price, "might not get the most points."

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SBA advises that the final report is not considered in the man-day pricing element because, in SBA's experience, the cost of the final report is nominal. We think, however, that the protester has a point. Under this RFP, it would be possible for an offeror to propose unrealistically low man-hour rates, which would be evaluated in determining points to be awarded for cost, while proposing an unreasonably high price (which could not properly be taken into account in evaluating cost in light of the stated evaluation criteria) for the required final report. This, of course, could result in distorted evaluation scores which would not accurately indicate lowest probable cost to the Government. We are suggesting to SBA that future solicitations provide either that the cost of the report will be evaluated or that the report is to be furnished at no charge.

Deputy Comptroller General
of the United States



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

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SEP 14 1977

The Honorable A. Vernon Weaver
Administrator, Small Business
Administration

Dear Mr. Weaver:

Enclosed are copies of our decisions of today in response to protests of Burton K. Myers and Company and Decision Sciences Corporation regarding request for proposals RFP-SBA-7(1)-P-77-1.

As indicated in the decisions, we have several concerns regarding this solicitation. They are set forth briefly below:

1. The RFP imposes a geographic restriction on the basis of SBA regional and district boundaries. It appears that SBA's needs could be satisfied by a less restrictive geographic requirement, one based on a number of miles from a central point. See, in this regard, the discussion in the Burton K. Myers decision. It is therefore recommended that you review this geographic restriction prior to utilizing it in future procurements.

2. While in the Burton K. Myers decision we have upheld, in general, the reasonableness of the "office" requirement, the record in the Decision Sciences Corporation case suggests that the requirement may be drawn more strictly than is necessary. In that latter case, the protester was the highest rated offeror in 3 of the 43 geographic areas. As the incumbent contractor in all these areas, the protester was reported to have performed satisfactorily, but was found nonresponsible for failure to meet the RFP's "office" requirement. While we do not disagree with the responsibility determination, since the protester had demonstrated that acceptable performance may be achieved without an "office" as defined, in the geographic area, we suggest that a review be made of the necessity for the "office" requirement prior to issuing solicitations for future management assistance services.

3. The solicitation limits subcontracting to 50 percent of the tasks assigned. It appears to us that the solicitation provisions are intended to apply where a wide variety of tasks have been

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assigned to the contractor, and not to a situation where the contractor has been assigned primarily tasks for which it planned to subcontract because of a lack of in-house capability. We suggest clarification of these solicitation provisions to make their meaning clear in subsequent procurements.

4. The solicitation requires pricing of a final report, but excludes consideration of that pricing in proposal evaluation. As explained more fully in the Burton K. Myers decision, this could result in an inaccurate indication of which proposal would result in probable lowest cost to the Government. We suggest that in the future solicitations should provide for inclusion of the cost of the report in the evaluation or for furnishing of the report at no charge.

We would appreciate your advice with respect to the action taken in response to the recommendations and suggestions set forth above.

Sincerely yours,

R. F. KELLER

Deputy, Comptroller General
of the United States

Enclosures