



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Fayetteville Group Practice, Inc.
File: B-226422
Date: May 26, 1987

DIGEST

Contracting officer's decision to procure medical services on an unrestricted basis, rather than through a small business set-aside, is not an abuse of discretion where the activity had not previously procured such services from a contractor and the contracting officer reasonably concluded that there was no reasonable expectation that offers would be received from two or more responsible small businesses. An expression of interest from a small business, received after issuance of a solicitation, does not demonstrate the unreasonableness of the determination or require the contracting officer to amend the solicitation so as to restrict it to small business concerns.

DECISION

Fayetteville Group Practice, Inc. protests the decision of the United States Army Health Services Command, Fort Sam Houston, Texas, not to set aside for small business a procurement for medical services under request for proposals No. DADA10-87-R-0009. We deny the protest.

The solicitation, issued January 30, 1987, requested proposals to establish and operate a Primary Care for the Uniformed Services (PRIMUS) clinic at Fort Bragg, Fayetteville, North Carolina. The Fort Bragg clinic will be one of the first six PRIMUS clinics that the Army expects to have in operation by the fall of 1987. Under the PRIMUS program, government contractors will establish and operate dedicated, free-standing clinics, providing primary health care for military personnel, their dependent families, and eligible retirees. The clinics are intended to alleviate the backlog at government medical facilities. At Fort Bragg, for example, the contracting officer reports that the average waiting time for acute care is 2 to 3 hours, and the average waiting time for routine referral to internal medicine for the type of treatment that would be given at a PRIMUS clinic is 3 to 4 months.

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The solicitation requires the contractor to furnish the personnel, equipment, and supplies to operate a PRIMUS clinic at a location apart from that of any other health facility and not on government property. It contemplates an indefinite-quantity contract for a base year plus 4 option years. The contractor will provide medical services--including physician, nursing, laboratory, radiology, and pharmacy services--for a minimum of 24,000 clinic visits a year and a maximum of 30,000 visits a quarter (or 120,000 visits a year). These services will be provided "primarily on a walk-in basis" for 13 hours each weekday and 9 hours a day on weekends and holidays.

In deciding to solicit on an unrestricted basis, the contracting officer concluded that there was no assurance of receiving reasonable offers from two or more responsible small business concerns. Before the April 17 closing date for receipt of initial proposals, however, Fayetteville Group Practice filed this protest with our Office, alleging that both it and another small business, Doctors Urgent Care Center of Fayetteville, are interested in providing the required services.

As a general rule, the decision as to whether to set aside a particular procurement is within the discretion of the contracting officer. See International Technology Corp., B-222792, June 11, 1986, 86-1 CPD ¶ 544; Winfield C. Towles M.D. & Associates, B-219180, July 5, 1985, 85-2 CPD ¶ 28. With one exception that is not relevant here,^{1/} nothing in the Small Business Act, 15 U.S.C. § 631 et seq. (1982), makes it mandatory that any particular procurement be set aside for small business.

The protester relies instead on a regulatory exception, the so-called "rule of two," which states that an acquisition shall be set aside for exclusive small business participation if the contracting officer determines that there is a

^{1/} The statutory exception, set forth at 15 U.S.C. § 644(j), as amended by the Defense Acquisition Improvement Act of 1986, Pub. L. 99-661, 100 Stat. 3910, 3932, provides that a procurement for goods and services which has an anticipated value of less than \$25,000 and is subject to small purchase procedures shall be reserved exclusively for small business unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive in terms of price, quality, and delivery. See also Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.501(f) (1986). Here, however, the contracting officer estimates the cost of the services being procured to be substantially in excess of \$25,000.

reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a reasonable price. Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502-2 (1986).2/

The contracting officer responds that in finding that there was no such reasonable expectation here, she considered the nature of the services being procured and the lack of either relevant procurement history or expressions of interest from at least two responsible small businesses. She states that "the required services--providing management of a medical clinic employing a substantial number of physicians, nurses and other medical personnel--are being offered in the private sector by large, labor intensive medical management firms." Moreover, a large business is operating the four PRIMUS clinics for which contracts have already been awarded. The contracting officer points out that while small business concerns participated in the competition for these clinics (in Fairfax, Woodbridge, and Burke, Virginia and Savannah, Georgia), she believes the firms were only interested in operating in those geographical areas.

In addition, the medical services for Fort Bragg have not previously been procured from a government contractor. The bidders' list that was available when the set-aside determination was made was a general one, based on responses to all prior solicitations for personal services that had been issued by the contracting activity. Thus, the list did not provide an indication that the three small businesses on it would be interested in establishing and operating a PRIMUS clinic. Moreover, these firms were located in New York, Ohio, and Virginia, and the contracting officer reports that the Army was considering a default termination for one of them.

Further, the intent to procure the services had been synopsized in the Commerce Business Daily on November 17, but, according to the contracting officer, when the solicitation was issued there had been no expression of interest from the protester or from the other small business concern that the protester alleges is interested in competing. In this regard, the record indicates that although a representative of the protester attended a pre-proposal conference on February 5, that firm had not

2/ The FAR provides an additional exception where the services previously have been acquired successfully by the contracting office through a small business set-aside. 48 C.F.R. § 19.501(g). Here, however, the contracting activity has not previously awarded a contract for medical services of the type covered by the PRIMUS program.

requested a copy of the solicitation by that date. The contracting officer states that in response to the protest, filed March 4, she sent copies to both the Fayetteville Group Practice and Doctors Urgent Care Center.

In view of the lack of a directly relevant prior procurement history and the uncertainty as to whether at least two responsible small businesses would propose reasonable prices for the establishment and operation of a clinic capable of providing for up to 120,000 walk-in visits a year, we cannot conclude that the contracting officer abused her discretion in not setting aside the procurement for small businesses. We give great weight to the fact that the contracting officer's determination was made with the concurrence of the small and disadvantaged business utilization specialist, whom the record indicates was aware of the scope of work and of the awards in other geographic areas to a large business. See Service Ventures, Inc., B-221261, Apr. 16, 1986, 86-1 CPD ¶ 371; Winfield C. Towles M.D. & Associates, supra.

Finally, the protester maintains that the contracting officer is now aware of at least two small businesses-- Fayetteville Group Practice and Doctors Urgent Care Center--which are interested in providing the required services,^{3/} and argues that it is not too late to restrict the procurement. The FAR, however, specifically states that without the expectation of offers from at least two responsible small businesses, a procurement should not be set aside. 48 C.F.R. § 19.502-2. Information that first becomes available after issuance of a solicitation does not demonstrate the unreasonableness of a contracting officer's prior determination not to set aside. Nor does it demonstrate the unreasonableness of a contracting officer's refusal to amend the solicitation so as to restrict the procurement to small businesses. Good procurement policy generally dictates that a set-aside determination should be made before the issuance of a solicitation. See National Steel and Shipbuilding Co. et al., B-202399 et al., Dec. 15, 1981, 81-2 CPD ¶ 471. Although such a determination is permissible after a solicitation is issued, id., nothing in the procurement regulations require the contracting officer to cancel or amend the solicitation when that official subsequently learns of interested, responsible small businesses. In any event, the record does not establish that prior to receipt of proposals, the contracting officer knew of two small businesses available to compete for this

^{3/} The contracting officer states that she believes that Fayetteville Group Practice and Doctors Urgent Care Center may be affiliated firms. In view of our conclusion, however, we need not resolve this matter.

procurement. The protester has provided no support for its statement that Doctors Urgent Care Center is interested in competing, and that firm itself has not commented on the protest.

We conclude that the "rule of two" does not require that this procurement be set aside. The protest is denied.

Ronald Beyer

h Harry R. Van Cleve
General Counsel