



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jands, Inc., and Columbia Graphics Corp.

File: B-226983, B-226983.2

Date: July 7, 1987

DIGEST

Agency's determination that it could not expect to receive offers from two responsible small business concerns, and therefore not to set the procurement aside, was an abuse of discretion where the qualifications set forth in a Commerce Business Daily synopsis issued to determine small business interest and availability were more restrictive than those needed to meet the agency's needs as reflected in the solicitation subsequently issued. Since the solicitation qualifications presumably reflect the agency's needs, small businesses that can meet those needs but could not meet the synopsis criteria improperly were discouraged from responding to the synopsis.

DECISION

Jands, Inc., and Columbia Graphics Corp., protest the decision of the National Aeronautics and Space Administration (NASA) not to set aside for small business concerns request for proposals (RFP) No. W-10-38403/HWC, issued to procure services (including non-technical writing, technical editing, and design) for the production of scientific and technical documents, books, reports, conference proceedings and reference materials.

We sustain the protests.

Pursuant to Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.502 (1986), a contracting officer is required to set aside a procurement for exclusive small business participation if he determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and an award will be made at a reasonable price. NASA reports that the past two procurements for production services were issued as small business set-asides and three contracts were awarded to small businesses in each case. The agency contemplated conducting the present procurement on an unrestricted basis, however,

because of problems during the performance of these contracts in quality, timeliness of delivery and the ability of one contractor to respond to the volume of NASA's requirements.

Before issuing the solicitation, NASA published a synopsis in the Commerce Business Daily (CBD) to determine if there were any interested small businesses qualified to meet NASA's needs. The synopsis requested firms to submit capability statements demonstrating that they possessed (1) at least 3 years of corporate experience in performing the requested services, producing high quality scientific and technical books; (2) senior editors with at least 5 years professional experience in technical editing; and (3) in-house capability for book design and graphic arts. NASA evaluated the responses received from seven small and two large businesses, and found that only one large business met the qualification criteria. The contracting officer therefore decided that based on the past procurement history and the responses to the synopsis there was no reasonable expectation that two responsible small businesses would submit offers, and issued the solicitation on an unrestricted basis.

Jands and Columbia, neither of which responded to the CBD synopsis, protest that NASA improperly determined that there was not a sufficient number of responsible small businesses to require setting aside the procurement. The protesters first assert that NASA's dissatisfaction with the prior small business contractors is not a sufficient justification to issue the solicitation on an unrestricted basis. The protesters note in this regard that the one small business contractor that could not meet NASA's volume requirements had problems in that respect because of an unanticipated workload increase, and did perform, according to NASA, otherwise satisfactorily.

The protesters also contend that NASA improperly relied on the responses to the CBD synopsis in determining whether there were two responsible small business concerns that could meet its needs. Specifically, Jands and Columbia complain that neither of the first two capability criteria stated in the synopsis appears in the RFP. Instead, the RFP provides generally for the evaluation of the offeror's past performance and experience "from a technical and business viewpoint," and for evaluation of the offeror's proposed personnel (without making any specific reference to the senior editor). The protesters conclude that it therefore is evident that the criteria in the synopsis are not necessary to meet NASA's minimum needs, so that the responses to the synopsis were not an accurate representation of the qualified small businesses available i.e., firms that could

meet the RFP requirements, but did not have the requisite number of years experience required by the synopsis, did not respond to the synopsis. Finally, the protesters argue that three of the firms disqualified on the basis of the synopsis did in fact meet the stated criteria.

The judgment as to whether there is a reasonable expectation that offers will be received from at least two responsible small business concerns basically involves a business decision within the discretion of contracting officials, and our review generally is limited to ascertaining whether those officials have abused that discretion. J.M. Cashman, Inc., B-220560, Nov. 13, 1985, 85-2 C.P.D. ¶ 554. In the present case, we find that NASA abused its discretion in determining that it could not expect offers from two responsible small business concerns.

A CBD synopsis is a proper means by which an agency can identify the availability of firms qualified to meet its needs, see Masstor Systems Corp., 65 Comp. Gen. 118 (1984), 84-2 C.P.D. ¶ 598, and, thus, we believe also is a proper means by which an agency may determine if there are a sufficient number of qualified small businesses to warrant setting aside a procurement. If the agency is going to use a synopsis to identify qualified small business concerns, however, it is incumbent on the agency to make its essential requirements clear to potential offerors. Id. Here, the RFP does not require offerors to meet the criteria stated in the synopsis, so that, in addition to inviting offers from large businesses, it effectively invited competition from a larger universe of small business concerns than did the CBD synopsis. It thus seems that NASA overstated its minimum needs in the synopsis, and that small businesses that meet the RFP requirements may have chosen not to reply to the synopsis because they could not demonstrate compliance with the required minimum number of years experience stated there.

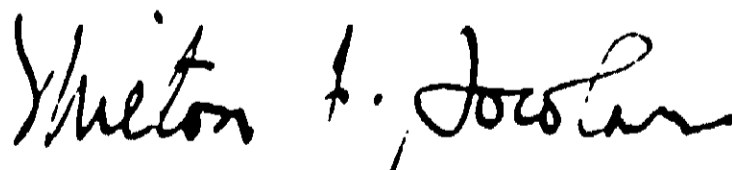
NASA attempts to justify its actions on the basis that once the agency determined not to set aside the procurement for small business concerns, the expectation of increased competition obviated the need for the minimum qualifications stated in the synopsis. The issue in the protests, however, is defined and governed by the regulations on small business set-asides: whether NASA could rely on the CBD synopsis to determine whether it reasonably could expect offers from two responsible small business concerns that could meet its minimum needs, and award at a reasonable price. The increased competition NASA expects in an unrestricted procurement would include small businesses, as well as large ones, that do not meet the synopsis criteria, and NASA will judge them and their proposals on their relative merits;

that judgment, as stated in the RFP, will involve, but clearly will not be totally dependent on, experience and personnel-related factors. NASA thus has based its decision not to set the procurement aside on an evident overstatement of its needs in the CBD synopsis, i.e., on an absolute standard it does not otherwise intend to apply to any size business, and which discouraged responses from potential small business firms that NASA's RFP is permitting to participate. We simply do not see how NASA's decision can be viewed as reasonable in these circumstances. Accordingly, we sustain the protest on this issue.

Jands and Columbia also protest that in the event this procurement should be set aside for small business concerns NASA used the incorrect Standard Industrial Classification (SIC) code to determine the applicable size standard for small businesses eligible to compete for the procurement. The protesters raised this issue with the Small Business Administration (SBA) but the SBA dismissed the matter because the procurement was issued on an unrestricted basis and the SIC code thus had no impact on any small business.

We will not consider this issue. The initial determination of the appropriate SIC code is for the contracting officer, with affected firms having the right to appeal to the SBA, whose determination on such matters is conclusive. Consequently, our Office will not consider what SIC code should be included in a small business set-aside. Swan Industries, B-217199 et al., Mar. 25, 1985, 85-1 C.P.D. ¶ 346.

The protest is sustained. By separate letter to the Administrator of NASA, we are recommending that NASA cancel the solicitation and determine, through a new CBD synopsis or otherwise, whether there is a reasonable expectation of competition to meet NASA's actual needs as reflected in the RFP from at least two responsible small business concerns, and of award at a reasonable price. If that expectation exists, NASA should issue the procurement as a small business set-aside.

for 
Comptroller General
of the United States