



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kato Corporation

File: B-237965

Date: April 3, 1990

Karl Dix, Jr., Esq., Smith, Currie & Hancock, for the protester.

Millard F. Pippin, Office of the Assistant Secretary, Department of the Air Force, for the agency.

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DIGEST

Agency decision not to set aside procurement for small disadvantaged business (SDB) concerns is unreasonable where agency made no effort to ascertain SDB interest and capabilities and it appears that the agency reasonably should have expected to obtain offers from at least two responsible SDBs and make award at a price not exceeding the fair market price by more than 10 percent.

DECISION

Kato Corporation protests the Department of the Air Force's decision to issue invitation for bids (IFB) No. F32604-89-B-0038, for maintenance of family housing at Minot Air Force Base in North Dakota, on an unrestricted basis. Kato contends that under Department of Defense (DOD) Federal Acquisition Regulation Supplement (DFARS) § 219.502-72(a), the agency was required to issue the solicitation as a small disadvantaged business (SDB) set-aside.

We sustain the protest.

SDB set-asides serve a purpose similar to small business set-asides by ensuring equitable opportunities for SDB participation in government acquisitions. This special category of small business set-asides was established to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973 (1986), which also established a goal of awarding

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SDBs five percent of the dollar value of DOD contracts, beginning in fiscal year 1987. Commercial Energies, Inc., B-237879, July 12, 1989, 89-2 CPD ¶ 40.

Family housing maintenance services at Minot Air Force Base have previously been procured by means of small business set-asides. The most recent contract, for a base period of December 30, 1988 to September 30, 1989, plus option years, was awarded to Kato, which had represented itself to be an SDB. However, on April 27, 1989, the Small Business Administration (SBA) determined Kato to be other than small due to its affiliation with Emerald Maintenance, Inc., and DESCO, Inc., with which it had entered into a joint venture to compete for the family housing maintenance contract at Grand Forks Air Force Base in North Dakota. The Air Force reports that this determination was a factor in the agency's subsequent decision not to exercise the options under Kato's contract. Accordingly, in a June 6 synopsis in the Commerce Business Daily, the agency publicized a small business set-aside procurement for the Minot Air Force Base services in issue.

Subsequently, on August 28, the SBA determined that Kato was not affiliated with Emerald or DESCO, and therefore recertified Kato as a small business.^{1/} According to Kato, it furnished this information to the contracting office at Minot Air Force Base in an August 31 letter requesting that its option be exercised.

However, as a result of the Small Business Competitiveness Demonstration Program Act of 1988, Pub. L. No. 100-656, 102 Stat. 3889, 3892 (1988), contracting officials determined that family housing maintenance services, including those at Minot, should not be set aside for small business, but instead should be procured on an unrestricted basis. In this regard, the Act designates four industry groups, including construction (which encompasses base housing maintenance), for which acquisitions are not to be considered for small business set-asides unless otherwise

^{1/} Notwithstanding the recertification, the SBA ultimately ruled on Kato's previously filed appeal of the April 27 determination, holding on September 21 that Kato had not shown that the SBA was in error in finding Kato to have been other than small as of April 27. Again, however, at this juncture the SBA had recertified Kato as small (as of August 28), so this decision on appeal really had no practical effect.

required. *Id.* §§ 713 and 717; Federal Acquisition Regulation § 19.102; DFARS § 219.1070-1; see W.M. Marable, Inc., B-234987 et al., May 3, 1989, 89-1 CPD ¶ 425. Since the Act now precluded the setting aside of the Minot procurement for small businesses, the Air Force synopsized the procurement anew, on September 8, advising offerors that the procurement would be conducted on an unrestricted basis. On September 26, the agency issued the solicitation. Kato filed this protest prior to the bid opening, contending that the procurement should have been included under the DOD SDB set-aside program.

The regulations implementing the DOD SDB program, set forth in the DFARS, part 219, provide that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a). The regulations also provide that the contracting officer should presume that these requirements are met if the acquisition history shows that: (1) within the past 12-month period a responsive offer from at least one responsible SDB concern was within 10 percent of the award price on a previous procurement of similar supplies or services, and (2) the contracting officer has reason to know (from the activity's relevant solicitation mailing list, response to presolicitation notices, or other sufficient factual information) that there is at least one other responsible SDB source of similar supplies or services. DFARS § 219.502-72(c).

Kato contends that, under the DFARS, the contracting officer was required to set aside this procurement for SDBs because there was a reasonable expectation that offers would be obtained from at least two responsible SDB concerns. In this regard, Kato points to the August 28 SBA determination that Kato was not affiliated with Emerald or DESCO and the subsequent recertification of Kato as a small business, and also notes that the agency's bidders mailing list for this solicitation includes approximately 24 firms, not including Kato, which were designated "SD" for small disadvantaged business.

The Air Force concedes in its report that the Small Business Competitiveness Demonstration Program Act does not preclude the use of SDB set-asides when the designated industries are

involved, as the contracting officer initially determined.^{2/} The Air Force seems to argue preliminarily, however, that regulations implementing the Act--stating that acquisitions shall be "considered . . . for" SDB set-asides (see footnote 2, above)--confer discretion upon the agency in this regard. Thus, it apparently is the agency's position that there is never a requirement to set aside a particular procurement for SDBs; the contracting officer need only "consider" the possibility of an SDB set-aside where the conditions specified in the DFARS exist.

We do not agree. The language in question appears only in regulations implementing the Small Business Competitiveness Demonstration Program Act. DFARS § 219.1079-1(a). This provision in no way purports to reduce the requirement for SDB set-asides under the circumstances specified under DFARS § 219.502-72(a), i.e., where offers from two responsible SDB concerns are expected and the agency expects a contract within 10 percent of the fair market price. Indeed, the Air Force's view would seem to be inconsistent with section 601 of Public Law 100-656 (the statute which includes the Small Business Competitiveness Demonstration Program Act), which amended the Small Business Act to require contracting officials to "increase, insofar as possible, the number" of procurements under the SDB set-aside program. We therefore think it is clear that this provision was intended merely to clarify that the prohibition on the use of small business set-asides in the designated industry groups did not also amount to a prohibition on the use of SDB set-asides; it was not intended to alter the SDB program.

The Air Force primarily argues that the circumstances specified in DFARS § 219.502-72(a) as warranting an SDB

2/ We agree with the Air Force's position. The Small Business Competitiveness Demonstration Program Act expressly provides that the requirement for unrestricted competition does not apply to procurements "set-aside pursuant to . . . section 1207 of the National Defense Authorization Act for Fiscal Year 1987," section 713(a), while DOD's implementing regulations provide that acquisitions in the designated industry groups "shall continue to be considered . . . for small disadvantaged business set-asides." DFARS § 219.1070-1(a). It follows from these provisions that the Small Business Competitiveness Demonstration Program Act did not relieve the agency of the obligation to procure services or supplies by means of an SDB set-aside where otherwise required by statute or regulation.

set-aside did not exist here, since the contracting officer was unaware of any SDBs "with the necessary experience to handle a contract of this magnitude." The agency does not dispute Kato's ability to perform, but points to the April 27 SBA determination, upheld on appeal on September 21, that Kato was other than small, and concludes that Kato was not an eligible SDB. The Air Force further notes that only one of the 13 bids received under the fiscal year 1989 solicitation was submitted by an SDB (we presume the agency is referring to a firm other than Kato).

Applying the DFARS standard, we find that contracting officials should reasonably have expected that offers would be obtained from at least two responsible SDB concerns, and that award would be made at a price not exceeding the fair market price by more than 10 percent. First, we think it is clear that contracting officials should have been aware that Kato, the incumbent contractor, was a potential SDB source for this procurement. In this regard, we note that the Air Force (1) has not disputed Kato's assertion that it informed contracting officials at Minot of the August SBA recertification of Kato as a small business; (2) has not questioned Kato's self-certification in its prior bid that Kato itself, in the absence of affiliation, is an SDB; and (3) has not argued that Kato, the incumbent contractor, was other than a responsible concern.

Second, we find that contracting officials reasonably should have expected to obtain additional offers from other responsible SDB concerns. Although the Air Force claims it was unaware of any additional potential SDB sources, it has failed to explain why it did not consider the numerous SDB concerns on its own mailing list to be qualified potential sources. (Indeed, the agency does not even address this point.) In fact, the record contains no evidence that contracting officials even attempted to contact any of the approximately 24 SDBs on the mailing list to ascertain their interest in, and qualifications for, this procurement. Nor is there any indication that contracting officials had otherwise concluded all of the listed SDBs were uninterested in competing. Five of the listed small SDB concerns have submitted affidavits to us stating they were interested in competing if the procurement were set aside for SDBs; four of these firms state that they have satisfactorily performed housing maintenance services similar in scope to those solicited here. We conclude from these affidavits that a number of SDB firms may have been both interested and responsible sources.

In the analogous situation of determining whether a small business set-aside is required (FAR § 19.502-2 requires such

set-asides where the agency determines that offers will be obtained from at least two responsible small business concerns and that award will be made at a reasonable price), a contracting office must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small business concerns with the capability to perform the work. It therefore is unreasonable for an agency to issue a solicitation on an unrestricted basis where the determination not to set the procurement aside was based on outdated or incomplete information. See The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129.

We believe the same rule should apply under the SDB program regulations. Certainly, having reason to know that the incumbent contractor was an SDB concern, which had received award for the same services in the last year, the agency could not, as it apparently did here, simply dismiss the possibility of obtaining at least one additional offer from a responsible bidder among the 24 SDBs on its mailing list without undertaking some investigation of the potential sources. See generally DFARS § 219.502-72(c).

We conclude that the Air Force failed to consider the apparent potential for SDB participation in the procurement. As the agency also never determined, and has presented no evidence suggesting, that acceptable prices would not be received if the procurement were set aside, we find unreasonable the determination to issue the solicitation on an unrestricted basis.^{3/}

3/ We recognize that DFARS § 219.502-72(b)(1) provides that a total SDB set-aside shall not be conducted where, as here, the product or service has been previously acquired successfully on the basis of a small business set-aside. However, in the Small Business Competitiveness Demonstration Program Act of 1988, Congress determined that small business concerns in the industry group at issue do not need special protection; furthermore it indicated that the consequent mandate for unrestricted competition remains subject to the implementation of the policy in favor of SDB set-asides. Sections 713 and 717. Since a small business set-aside is no longer appropriate, we do not believe the fact that the base housing maintenance services had previously been procured on the basis of a small business set-aside invokes the subsection (b)(1) exception to the general requirement for the contracting officer to consider an SDB set-aside here.

The protest is sustained.

By separate letter to the Secretary, we are recommending that the procurement be set aside for SDB concerns unless adequate investigation clearly demonstrates that no responsible, potential source in addition to Kato is likely to submit an offer that would result in award at a price not exceeding the fair market price by more than 10 percent. In addition, we find that Kato is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1989); see Falcon Carriers, Inc., 68 Comp. Gen. 206 (1989), 89-1 CPD ¶ 96.

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