



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Perdomo & Sons, Inc.

File: B-240436

Date: November 19, 1990

Samuel Perdomo for the protester.
Lt. Colonel William J. Holland, Department of the Air Force,
for the agency.
Amy M. Shimamura, Esq., and James A. Spangenberg, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest that agency was required to apply small disadvantaged business (SDB) evaluation preference in protester's favor in accordance with solicitation's inadvertently included SDB preference clause is denied where the procurement was conducted on an unrestricted basis pursuant to the Small Business Competitiveness Demonstration Program Act of 1988, 15 U.S.C. § 644 note (1988), and the agency regulatory implementation of the Act prohibits the application of the SDB preference where a procurement falls under the demonstration program and where the protester had reasonable notice from the solicitation and applicable regulations that the small disadvantaged business evaluation preference would not be applied.

DECISION

Perdomo and Sons, Inc., a self-certified small disadvantaged business (SDB) and the incumbent contractor, protests the evaluation of bids under invitation for bids (IFB) No. F04609-90-B-0011, issued by the Department of the Air Force, George Air Force Base, California, for refuse collection and disposal services. Perdomo contends that the agency improperly evaluated bids under the IFB by failing to apply the IFB's SDB evaluation preference in its favor.

We deny the protest.

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The IFB, issued on May 23, 1990, as a total small business set-aside, included the SDB evaluation preference clause. Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007 (July 1989). Under the SDB preference clause, a factor of 10 percent is added to bids from concerns that are not SDB concerns and to bids from those SDB concerns which elect to waive the SDB evaluation preference by checking the appropriate box in the clause.

The contracting officer subsequently determined that the requirement was required to be procured on an unrestricted basis under the Small Business Competitiveness Demonstration Program (SBCDP) Act of 1988. 15 U.S.C. § 644 note (1988). One of the purposes of the SBCDP is to test the ability of small businesses in certain designated industry groups to retain a fair proportion of procurement awards in unrestricted competition in those industry groups. Since "refuse collection services" is one of the designated industry groups, on June 19, the contracting officer issued amendment No. 1 which changed the IFB from a small business set-aside to an unrestricted procurement. This amendment inserted a new clause in the IFB, "Small Business Concern Representation for the Small Business Competitiveness Demonstration Program (Dec 1988) (AFAC 89-6)," and extended the bid opening date to July 10. However, the amendment failed to delete the SDB evaluation preference clause prescribed by DFARS § 252.219-7007. Two bids were received by the bid opening date. Victorville Disposal, a self-certified small business, is the proposed awardee with a low bid of \$924,595.47 for the base year and 1 option year. Perdomo's bid is second low at \$925,816.00 (without the application of the 10 percent SDB evaluation preference).

Perdomo contends that, in evaluating bids, the agency was required by the IFB's SDB preference clause to apply the 10 percent SDB preference factor to Victorville's bid, and that Perdomo's bid was low with the application of the SDB preference.

The Air Force, while conceding that the SDB preference clause should have been deleted from the IFB, maintains that the 10 percent evaluation factor could not be applied in Perdomo's favor because DFARS § 219.1070-1(c)(3), which implements the SBCDP, prohibits the application of the evaluation preference where procurements are conducted on an unrestricted basis under the demonstration program.

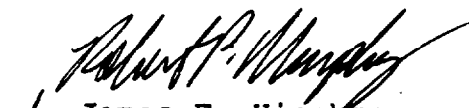
As a general rule, the evaluation of bids must be conducted in accordance with the evaluation provisions of the IFB. Basic Supply Co., Inc., B-239267, June 1, 1990, 90-1 CPD ¶ 522. However, where a procurement is conducted on an unrestricted

basis under the SBCDP, DFARS § 219.1070(c)(3) prohibits the application of the SDB preference. Therefore, the contracting agency properly did not apply the preference, notwithstanding the inadvertent inclusion of the SDB preference clause in the solicitation. See Freddie Oliver Contractor, B-235255.2, Sept. 28, 1989, 89-2 CPD ¶ 278; W.M. Marable, Inc., B-234987 et al., May 3, 1989, 89-1 CPD ¶ 425.

Here, the amendment to the IFB, in addition to withdrawing the small business set-aside status of the procurement, required bidders to execute either a "small business" or an "emerging small business" concern representation for the SBCDP. Bidders were therefore reasonably alerted to the applicability of the demonstration program to the procurement. Freddie Oliver Contractor, B-235255.2, supra. Additionally, DFARS § 219.1070-1(c)(3) was published in the Federal Register for public comment on January 27, 1989, 54 Fed. Reg. 4247, and was incorporated in the DFARS on January 30, 1990 (DAC 88-13), and potential bidders were therefore constructively aware of its contents. Since, as indicated above, the regulation precludes the use of the SDB preference, Perdomo had sufficient notice, from reading the solicitation in its entirety and from the published regulations, of the inapplicability of the SDB preference. The Air Force therefore properly did not apply the preference in this case, notwithstanding the inadvertent inclusion of the SDB evaluation preference clause in the solicitation. Id.

Since the protester should have been aware that the SDB preference would not be applied, there is no requirement that the competition be reopened because of the inadvertent inclusion of the SDB evaluation preference clause.

The protest is denied.


James F. Hinchman
General Counsel