Ms. Ahearn

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Racal Corporation

File: B-242133

Date: April 2, 1991

Robert G. Bugge, Esq., for the protester.
Alton E. Woods, Esq., and Justin P. Patterson, Esq., Department of the Interior, for the agency.
M. Penny Ahearn, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in preparation of the decision.

DIGEST

Protest that agency improperly determined under Federal Acquisition Regulation § 19.502.2 that offers would be received from two or more small businesses offering "the products of different small business concerns," and that total small business set-aside therefore was improper, is denied; although all small business offerors were expected to offer systems with the same major component, agency had reasonable expectation that small business offerors each would offer a different "product" by virtue of their assembly of component parts into an integrated system.

DECISION

The Racal Corporation protests the determination by the Department of the Interior to set aside for exclusive small business competition the procurement of an integrated hydrographic survey system, under invitation for bids (IFB) No. 0-SI-81-17280.

We deny the protest.

The survey system is for measuring underwater cross sections and mapping river channels and reservoirs. The IFB requires all labor, materials, equipment, transportation, and technical expertise necessary to install the required system aboard a survey vessel. Specifically, the solicitation requires integration into a system of various components, including microwave navigation positioning equipment, uninterruptible power supply, ruggedized computer, color monitor, software, plotter, and printer. The navigation positioning equipment is the system's major component, comprising 50 to 60 percent of

the total system cost according to the agency's estimate (70 percent according to the protester).

Under Federal Acquisition Regulation (FAR) § 19.502-2, the interpretation of which is at issue here, the entire amount of an acquisition shall be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns "offering the products of different small business concerns," and that award will be made at a fair market price.

Racal, a large business manufacturer of the navigation positioning equipment, contends that because only one small business firm (Del Norte Technology) produces the major navigation component of the survey system, the contracting officer could not properly have determined, as required under FAR § 19.502-2, that offers could be expected from two or more small businesses (rather than only Del Norte) offering the products of different small businesses. It is the protester's view that the regulation is not satisfied where the agency anticipates that two small business bidders will offer their products, where those products contain components manufactured by the same small business concern. Racal also maintains that Interior could not reasonably have expected to make award at an acceptable price since, with all small business firms offering the same subcontractor's major system component, there effectively would be no price competition. The protester concludes that the procurement should be conducted on an unrestricted basis.

Interior reports that the determination to set aside this procurement was based on information provided by a potential competitor, which it verified, and consultation with the Small Business Administration (SBA). Initially, notice of the requirement as an unrestricted procurement was placed in the Commerce Business Daily (CBD). In response, Innerspace Technology, Inc. requested that the procurement be set aside on the basis that itself, Del Norte, and MECCO, all small businesses, could either manufacture or supply the required system. Interior verified these firms' interest in bidding on the procurement if it was set aside, and also learned that all three firms likely would offer systems including the Del Norte navigation equipment. In assessing the effect of this latter fact on the propriety of a set-aside, Interior sought SBA's view. SBA responded that the "product" here for purposes of

the regulation would be the system1/ and that each small business could be considered to be offering a different small business product because each would be offering a different integrated end item system, even though all would contain the same major component. Based on this advice, Interior resynopsized the solicitation in the CBD as a total small business set-aside.2/

A determination under FAR § 19.502-2 that competitive offers from two or more small business concerns offering the products of different small business concerns may be expected is basically a business judgment within the discretion of the contracting officer; we will not disturb a contracting officer's set-aside determination absent a showing of an abuse of that discretion. See Litton Electron Devices, 66 Comp. Gen. 257 (1987), 87-1 CPD ¶ 164.

We find that Interior's and SBA's interpretation of the set-aside regulation is correct, and that the agency therefore had the requisite expectation of receiving offers from at least two small businesses. While the term "product" is not defined under the FAR set-aside provisions, we agree with the agencies that the most reasonable interpretation is that the term refers to the end product, in this case, the integrated system, even where the end products of different small businesses include the same significant component. We think other regulations are instructive in reaching this conclusion. For example, a related FAR provision concerning small business size determinations refers to the manufacturer

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1/ SBA's conclusion was based on its view that the potential small business offerors could qualify as small business concern manufacturers of the end item survey system under the terms of its own regulations dealing with the Walsh-Healey Act. See 13 C.F.R. § 121.906(b)(2). This regulation focuses on the "assembly of parts and components into the end item being acquired" and the "importance of the elements added by the concern to the function of the end item, regardless of their relative value" as a basis for considering a small business firm a manufacturer. Interior's interpretation reflected a similar view of the set-aside regulation.

2/ After the change of the solicitation to a small business set-aside, and receipt of Racal's agency-level protest, the agency again consulted with SBA and received its concurrence that the solicitation should be set aside for small business. Subsequent to Racal's protest to our Office, Interior received written confirmation of the SBA interpretation of the FAR set-aside standard, which the agency submitted as a supplemental statement to its report on the protest.

of the "end product" and the "end item" being procured, see FAR § 19.102(f)(1). Under this provision, "the manufacturer of the end item being acquired is the concern which with its own forces transforms . . . miscellaneous parts or components into [an] end item." Id. Similarly, as discussed above, the SBA regulations for qualification of a firm as a small business concern provide that the manufacturer of the "end product" or "end item" being acquired is the concern which performs "the assembly of parts and components into the end item being acquired." 13 C.F.R. § 121.906 (1990).

Consistent with the emphasis in these provisions on assembly of an end product as a basis for considering a firm eligible to compete as a small business, we think the set-aside regulation must be read as allowing agencies to consider firms as potential small business offerors of different small business products where it is determined they will offer their own integrated systems, even though the systems may contain some common components. It follows from this reading of the FAR that, contrary to the protester's contention, a set-aside determination is not precluded by the fact that all small business concerns may be expected to offer systems that contain a major component from the same manufacturer; each offered system still may be considered a different product. We thus find no basis for objecting to Interior's determination of an expectation of receiving offers for different products from at least two small businesses.

The protester cites Hein-Werner Corp., B-195747, May 2, 1980, 80-1 CPD ¶ 317, aff'd, B-195747.2, Aug. 19, 1980, 80-2 CPD ¶ 131, as support for its interpretation of the FAR clauses. There, as here, the protester argued that a set-aside was improper because there was only one manufacturer of the required item, and the agency therefore could not reasonably expect offers from two small businesses offering the products of different small business concerns. We denied the original protest on the ground that the agency had complied with the regulation applicable to the solicitation, Defense Acquisition Regulation § 1-706.5(a) (1976 ed.), which required only an expectation of a sufficient number of small business offerors to assure award at a reasonable price; it did not require that the contracting officer have an expectation that the products of more than one small business would be offered. We noted that the regulation recently had been changed to require an expectation of offers of different small business manufacturers' products (Defense Acquisition Circular 76-19, July 27, 1979), but we neither interpreted the new provision nor applied it to the facts of the case. Similarly, in our August 19, 1980, reconsideration decision, we noted the change in the regulation, but again did not interpret the new regulation; indeed, after reciting the change, we stated that

"we did not, as Hein-Werner asserts, base our conclusion on this point . . . ."

Given our conclusion that the agency properly determined that sufficient competition was expected to warrant the small business set-aside, the protester's contention that there would be no price competition to assure an acceptable price is without merit. Whether or not fair market prices ultimately are received, there simply was no reason to consider the competition between the different potential small business offerors insufficient to assure such prices. Consequently, we have no basis for determining that the agency could not expect to make award at a reasonable price. It follows that we have no basis to question the agency's set-aside determination.

The protest is denied.

for James F. Hinchman
General Counsel