

Maeder



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ann Riley & Associates, Ltd.

File: B-245149

Date: December 16, 1991

Joseph Gallo, Esq., for the protester.
Ronald K. Henry, Esq., and Sue Ann Dilts, Esq., Baker & Botts, for Ace-Federal Reporters, Inc., an interested party.
Denise M. O'Brien, Esq., and David R. Dickey, Esq., Federal Energy Regulatory Commission, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision not to set aside procurement for small business concerns is improper where record establishes that the contracting officer should reasonably have expected that offers would be obtained from at least two small business concerns and that award could be made at a fair market price.

DECISION

Ann Riley & Associates, Ltd. protests the decision of the Federal Energy Regulatory Commission (FERC) to issue invitation for bids (IFB) No. DE-FB39-91-RC00002 for stenographic reporting services on an unrestricted basis. Riley argues that the solicitation should have been issued as a small business set-aside.

We sustain the protest.

BACKGROUND

After the services sought under this solicitation had been performed for approximately 8 years by Ace-Federal Reporters, Inc., a large business, FERC decided not to exercise the option to renew Ace's contract. Instead, on August 28, 1990, FERC issued an interim solicitation for

[Protest to FERC S.A. ... Reporting ...]

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these same services to six small businesses on its mailing list for such solicitations. The interim solicitation was for a 4-month period with a 1-month option to cover the time it would take FERC to solicit for and award a new long-term contract. This solicitation was issued on a small business-small purchase set-aside basis pursuant to Federal Acquisition Regulation (FAR) § 13.105. Three small businesses responded and FERC awarded a contract to Executive Court Reporters. On September 2, Ace protested this award to our Office, arguing, among other things, that FERC improperly set the procurement aside for exclusive small business participation. Ace also filed suit in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief. The court granted Ace a preliminary injunction "to maintain the status quo so as to allow GAO to render a decision" Ace Federal Reporters v. Federal Energy Regulatory Comm'n, No. 90-2396, Memorandum Op. at 10 (D.D.C. Oct. 16, 1990). In a decision issued on December 14, our Office found that the agency properly set aside the procurement for small businesses because the contracting officer had correctly determined that there was a reasonable expectation of receiving offers from two or more small businesses at fair market prices. Ace-Fed. Reporters, Inc., B-241309, Dec. 14, 1990, 91-2 CPD ¶ , recon. denied, B-241309.3, Jan. 17, 1991, 91-1 CPD ¶ 54.

On July 12, 1991, FERC issued the long-term solicitation on an unrestricted basis for 1 year with four 1-year options. On August 9, Ann Riley protested to our Office, arguing that FERC knew or should have known, based on the recent history of these procurements, that there was a reasonable expectation that offers would be received from at least two small business concerns and that award could be made at reasonable market prices. Riley points to three previous FERC procurements where, in each instance, two or more small businesses submitted bids and award was made to two of the small businesses. FERC has postponed bid opening pending the resolution of this protest.

The agency contends that it properly issued the solicitation on an unrestricted basis because it reasonably determined that it would receive bids from fewer than two capable small businesses and that prices from small businesses would not represent a fair market price.

FERC historically has received stenographic services at no cost, the contractor instead being reimbursed through charges to the public for copies of transcripts. Additionally, in three instances, bidders have offered FERC a "bonus" bid of a set amount per page; that is, the bidders would make these payments to FERC.

Because FERC had previously failed to consider bonus bids as responsive to its needs, in FERC's 1991 appropriation, Congress required FERC to allow for "the submission of bids offering to pay the government to perform stenographic services; that is, bonus bids" Energy & Water Development Appropriations Act, 1991, Pub. L. No. 101-514, Title III, 104 Stat. 2074, 2093 (1990). FERC points out that only one small business has ever offered a bonus bid and that "Riley, which has participated in every recent [FERC] procurement, has never submitted a bonus bid." As a result, FERC argues that because it is required to solicit for bonus bids, "it is in the best interests of the government to proceed with an unrestricted procurement." In essence, FERC's position is that the quoted appropriation language requiring it to consider bonus bids precludes a small business set-aside because it has no reasonable assurance that it will be able to obtain bonus bids from at least two small businesses and because in the absence of a bonus bid it will not obtain a fair market price.

FERC also points out that, in response to congressional concern over FERC's prior reluctance to accept bonus bids, FERC's Chairman, in a September 11, 1990 letter to Senator Howard Metzenbaum, stated that: "the Commission will be soliciting proposals for a new contract for stenographic reporting services . . . on a full and open competition basis." FERC asserts that this statement directs the agency to conduct a full and open competition which in this context "is synonymous with unrestricted competition."

Finally, FERC says that the number and complexity of its hearings--FERC may conduct as many as seven hearings a day with at least 10 parties but, on occasion, with as many as 100 or more parties--preclude small business participation.

ANALYSIS

As a general rule, a procurement must be set aside for small businesses where the contracting officer determines that there is a reasonable expectation of receiving offers from at least two responsible small business concerns and that award will be made at a fair market price. FAR § 19.502-2(a).

Here, we find that the agency improperly issued the solicitation on an unrestricted basis. Essentially, the agency has reversed its position of 10 months ago regarding the appropriateness of a set-aside because it has been instructed to permit bonus bids. The record does not support FERC's belief, however, that such bids are unlikely from at least two small businesses. Three small businesses have submitted no-cost offers to FERC in the past and one

offered a bonus bid. FERC's argument that Riley never previously submitted a bonus bid is without probative value since, prior to the subject solicitation, no FERC solicitation provided for the consideration of bonus bids. Riley has stated that it would have submitted a bonus bid under the August 28 interim solicitation had it known that such bids were acceptable, Ann Riley & Assocs., Ltd., B-241309.2, Feb. 8, 1991, 91-1 CPD ¶ 142, and in its comments on this protest, Riley states that "it intended to submit a bonus bid under the [s]olicitation, and intends to do so in the future." The agency does not explain why it believes Riley or any other firm, in response to a solicitation explicitly allowing bonus bids, is unlikely to offer one. Thus, from this record it appears that at least two small business firms are interested sources that could be expected to offer bonus bids.

FERC contends that the FERC Chairman's statement that the agency would use "full and open" competition constitutes a "deviation" from the FAR requirements with respect to small business set-aside requirements, as allowed under FAR § 1.403. However, under this section, such a deviation requires special authorization from the head of the agency or his designee and a copy of the approved deviation must be furnished to the FAR Secretariat. Here, the alleged "deviation" by FERC consists merely of the Chairman's September 11 letter to Senator Metzenbaum. The record does not show that the agency head ever issued a written deviation or followed the FAR § 1.403 requirements for a deviation. While we are aware of no legal basis for FERC violating FAR § 19.502-2(a) arising from the Chairman's letter concerning the use of full and open competition, the Competition in Contracting Act of 1984, as amended, specifically provides that small business set-asides are competitive procedures. See 41 U.S.C. §§ 253(b)(2) and 259(b)(4) (1988). Thus, the Chairman's reference to full and open competition is not inconsistent with a decision to set aside a procurement for small businesses. Ace-Fed. Reporters, Inc., B-241309, supra.

Finally, FERC's argument that a small business may not be able to handle the number and complexity of its hearings is without merit since the record does not show that the scope of the services being obtained has changed since the interim, small business-small purchase set-aside, which we determined had been properly set aside.

Accordingly, the protest is sustained.

By separate letter of today to the Chairman of FERC, we are recommending that the contracting officer convert the procurement to a set-aside for small business concerns. We also find that Riley is entitled to be reimbursed its protest costs, including reasonable attorneys' fees.
4 C.F.R. § 21.6(d)(1) (1991). ✓

for Milton I. Aorolar
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