



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FKW Incorporated

File: B-249189

Date: October 22, 1992

David Tolman for the protester.
William A. Roberts III, Esq., and Lee Curtis, Esq., Howrey & Simon, for Jones Operations & Management Co., Inc.;
William J. Place for Midland Service Corp.; James J. Griffin for Griffin Services, Inc.; and Derrick R. Merck for Merck, Sons and Associates, interested parties.
Michael L. Palensky, Department of Agriculture, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's determination not to set aside a procurement for small business concerns is reasonable where the agency concluded from a thorough consideration of relevant factors including past procurement history and the complex nature of the requirement that it could not reasonably expect to receive proposals from at least two responsible, small business offerors.

DECISION

FKW Incorporated protests the issuance of request for proposals (RFP) No. 24-3K06-92 by the Department of Agriculture, Agricultural Research Service for operations, maintenance and support services for the Athens Area Research Facilities, Athens, Georgia. FKW asserts that the procurement should have been set aside for small business.

We deny the protest.

The Athens Area Research Facilities were converted from government-operated facilities to contractor-operated facilities in 1983. At that time, the only two proposals submitted were by large businesses. The requirement was recomputed in 1987 and, again, two large businesses submitted the only proposals.

Agriculture published a synopsis of the protested procurement in the Commerce Business Daily (CBD) on April 1, 1992. Agriculture received 85 responses to the synopsis, of which approximately half were from small businesses. The contracting officer investigated whether the procurement should be restricted to small business in accordance with Federal Acquisition Regulation (FAR) § 19.502-2 and determined that a set-aside was not feasible. Agriculture issued an unrestricted RFP on May 8 contemplating the award of a cost-plus-award-fee, level-of-effort contract. Agriculture held a pre-proposal conference on May 20 that was attended by 19 firms, 7 of which were small businesses.

On June 22, prior to the July 9 revised closing date for receipt of proposals, FKW requested that the contracting officer set aside the RFP for small businesses, and on June 23 FKW protested to our Office. FKW asserts that the contracting officer unreasonably determined that the RFP should not be a total small business set-aside under FAR § 19.502-2.

Generally, we regard a contracting officer's decision determining whether to set aside a procurement as a matter of business judgment within the contracting officer's discretion, which we will not disturb absent a clear showing that it has been abused. Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203; MVW, Inc. et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270.

Under FAR § 19.502-2, a procurement is required to be totally set aside for small business when there is a reasonable expectation of receiving proposals from at least two responsible small business concerns and the award can be made at a reasonable price; conversely, unless such a determination can be made, a total small business set-aside should not be made. The contracting officer must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals and may not merely rely upon the past acquisition history in the face of evidence that responsible small business concerns will submit proposals. Raven Servs. Corp., supra; MVW, Inc. et al., supra. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. Raven Servs. Corp., supra. Factors that may constitute adequate grounds for not setting aside a procurement include prior procurement history, nature of contract, type of contract, market surveys, and/or advice from the agency's technical specialists. Id.

The record shows that Agriculture relied upon a number of factors that suggested that responsible small businesses would not submit proposals on this RFP, including: (1) the prior procurement history; (2) the nature and magnitude of the services to be provided; and (3) the administrative burden associated with the contract type. Based on this review, Agriculture reasonably determined that there was no reasonable expectation that two or more responsible small businesses would submit proposals.

In reviewing the procurement history, the contracting officer noted that an increasing number of small businesses have requested inclusion on the solicitation mailing lists for all the Agricultural Research Service's contractor-operated facilities. Despite this increasing interest, Agriculture has received only one proposal from a small business throughout the history of this and similar procurements. That single proposal was received just this year on a similar procurement but was not included in the competitive range. Moreover, several interested small businesses advised the contracting officer that their interest on the protested procurement was limited to subcontracting opportunities. Thus, the contracting officer found that the number of small businesses responding to the CBD synopsis would not necessarily translate into at least two responsible small business competitors.

In considering the nature and magnitude of the services to be procured, the contracting officer noted a high degree of complexity and a large volume of work. The work involves 14 broad, construction-related, functional areas. The three research centers possess 451 types of complex mechanical, electrical, and computerized systems requiring monthly preventive maintenance. The centers generate an average of 100 to 200 work orders each month. Beyond servicing the routine daily support work requests, the contractor must be capable of performing special tasks, including the alteration of structures, minor construction on laboratory facilities, working with the federal engineer on design phases, and fabricating replacement parts. In addition, a responsible contractor must perform the work that requires continuous monitoring and maintenance of air handling and temperature control systems to ensure the success and quality of scientific research projects. The contracting officer searched the Procurement Automated Source System (PASS)¹ database for small businesses with experience in the various functional areas covered under the RFP; no companies were found with experience in a number of the

¹PASS is a Small Business Administration (SBA) database with descriptions of firms permitting the user to conduct market searches for firms possessing desired characteristics.

relevant areas. The contracting officer concluded that the sensitive and complex nature of the services solicited, as well as the apparent need for a large staff, and a high level of managerial oversight, required a contractor with expertise and resources not normally found in small business concerns.

The contracting officer also considered that the awardee must possess a government-approved cost accounting system in order to accurately track costs and to permit accurate cost allocations and chargebacks to the individual research centers. The agency found that it was important that the contractor be able to control costs, keeping them to a minimum to permit the agency to channel a maximum amount of its funds to its primary function of scientific research. The contracting officer also noted that, under this labor-intensive, cost-type contract, the contractor must possess substantial capital in order to cover the start-up costs. The contracting officer concluded that a small business is unlikely to have the accounting and financial resources needed to satisfactorily perform this cost-type contract.

After completing the foregoing investigation, the contracting officer concluded that he could not reasonably expect to receive proposals from at least two responsible small businesses. The contracting officer also sought the advice of the agency's Office of Small and Disadvantaged Business Utilization (OSDBU) coordinator. The coordinator reviewed the contracting officer's justifications and concurred with the contracting officer's conclusion that this requirement should not be set aside.²

From our review, we find that the information available to the contracting officer, as discussed above, provided a reasonable basis for the determination to issue an unrestricted solicitation, particularly in view of the concurrence of the OSDBU coordinator. Raven Servs. Corp., supra.

FKW asserts that information that it has provided as part of this protest demonstrates that it has the necessary resources to satisfy the contracting officer's concerns regarding the capability of small businesses to be responsible offerors on this RFP. FKW thus argues that the

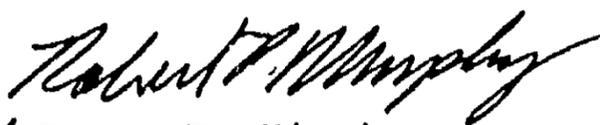
²The OSDBU coordinator also consulted SBA. SBA did not recommend a set-aside; however, it did wish to provide additional names of small businesses as prospective offerors. Agriculture waited approximately 6 weeks to receive the names from SBA but, due to a special assignment at SBA, the names were not provided. After contacting SBA, the OSDBU coordinator advised the contracting officer to proceed with the procurement.

RFP should be amended and set aside for small business. We disagree.

Information that first becomes available after issuance of a solicitation does not demonstrate that the contracting officer's prior determination not to set aside the procurement was unreasonable. Fayetteville Group Practice, Inc., 66 Comp. Gen. 489 (1987), 87-1 CPD ¶ 541. Although it is permissible for a contracting officer to change his determination after a solicitation is issued, nothing in the procurement regulations requires the contracting officer to cancel or amend the solicitation when that official subsequently learns of interested, responsible small businesses, assuming that the contracting officer had conducted a reasonable investigation regarding the possibility of two or more responsible small businesses competing on the procurement. Id.

Here, FKW's protest allegations that it would be a responsible offeror, and that it is aware of other responsible small businesses that could perform the work, came well after the contracting officer's determination not to set aside this requirement. Therefore, FKW has not demonstrated that the contracting officer's determination was unreasonable; nor do its post-determination allegations require Agriculture to change the procurement to a set-aside. Furthermore, even if we assume that FKW would be a responsible, small business offeror, the record does not establish that the contracting officer could reasonably expect to receive proposals from at least two responsible, small business offerors.

The protest is denied.


for James F. Hinchman
General Counsel