



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Philips Electronic Instruments Company;
Diano Corporation

File: B-249823; B-249823.3

Date: December 15, 1992

Karen Knizek for Philips Electronic Instruments Company, and Robert M. Weaver for Diano Corporation, the protesters. William P. McGinnies, Esq., Department of the Treasury, for the agency. Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly decided to set procurement aside for small business concerns is denied where the agency reasonably concluded that it would receive bids from at least two small business concerns in response to the solicitation.
2. Protest that specifications for a theta/theta goniometer and a solid-state detector to be used in an X-ray diffractometer for analyzing various substances are unduly restrictive of competition is denied where the record shows that the requirements are necessary to meet the agency's minimum needs.

DECISION

Philips Electronic Instruments Company and Diano Corporation protest the terms initially included in invitation for bids (IFB) No. CS-92-067, and subsequently included in request for proposals (RFP) No. CS-92-067, issued by the Department of the Treasury, United States Customs Service, for an X-ray powder diffraction system for the identification of rocks, minerals, and articles of stone. Philips contends that the agency improperly issued the solicitations as total small business set-asides. Diano contends that the specifications are overly restrictive of competition.

We deny the protests.

BACKGROUND

The agency initially issued IFB No. CS-92-067 as a total small business set-aside. The contracting officer's decision to restrict the procurement was based on a computer-assisted search in the Small Business Administration's (SBA) Procurement Automated Source System data base which focused on small businesses in the X-ray industry. Of the 44 small businesses referenced, the contracting officer determined that 14 were potential bidders under the solicitation. In this regard, 11 firms had general experience in connection with X-ray systems and 3 firms had experience specifically with X-ray diffraction. Prior to the August 21, 1992, bid opening date, Philips filed a protest with our Office principally challenging the agency's decision to set the procurement aside. Diano filed an agency-level protest dated August 6 objecting to the agency's decision to require a theta/theta goniometer and a Germanium detector.

Following its receipt of the Philips protest, the agency decided that bids still should be submitted by the August 21 bid opening date; however, bid opening should be postponed until the agency had a chance to review the protests. On August 26, the agency publicly opened the three bids it received earlier. The contracting officer reviewed the bids and subsequently determined that they were nonresponsive. As a result, the contracting officer canceled the IFB and converted the sealed bid procurement into a negotiated procurement by issuing an RFP to the three bidders. The RFP modified the specifications by deleting the requirement for a Germanium detector.

PHILIPS PROTEST

Philips contends that the agency's decision to set the procurement aside for small business concerns was improper. To support its allegation, Philips asserts that there are four major X-ray powder diffractometer manufacturers, none of which is a small business. As a result, the protester states that it does not believe that there are two diffraction companies that can meet the requirements for a small business set-aside. The protester also argues that the fact that the agency received three nonresponsive bids from small businesses establishes that the agency abused its discretion when it issued the set-aside.

An acquisition is to be set aside exclusively for small business participation if the contracting officer determines that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.502-2(a).

Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb unless it had no reasonable basis. RBC, Inc., B-233589; B-233589.2, Mar. 28, 1989, 89-1 CPD ¶ 316. An agency must make reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses with the capabilities to perform the work, and we will review a protest to determine whether the agency has done so. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

The use of any particular method of assessing the availability of small businesses is not required so long as the agency makes reasonable efforts to locate responsible small business competitors. See id. Here, there is adequate evidence to support the agency's decision to set the procurement aside.

The protester argues that the three bids that were submitted show that the set-aside decision was improper because the bids were found nonresponsive; in addition, the protester contends that two of the three bidders are not qualified for award under a small business set-aside, one because it is not small and the other because its product is not manufactured in the United States.

The actual bidding results are not dispositive of whether the contracting officer reasonably decided to set the procurement aside; rather, the propriety of the set-aside decision is determined by whether the contracting officer had a reasonable expectation, at the time the set-aside decision was made, that bids would be received from at least two small business bidders. As explained in the agency report, the agency conducted a computer-assisted search in SBA's data base using the Standard Industrial Classification code designated for the X-ray industry. This approach was reasonably designed to identify potential small business competitors under the solicitation. Contrary to the protester's suggestion that the agency's approach was flawed because the "product involved is very specialized and there are only a few companies with expertise to provide the product," the search resulted in the identification of 3 small businesses that specifically engage in the sale of X-ray diffraction equipment and 11 small businesses that deal generally with non-medical X-ray systems. In light of the substantial numbers of small businesses involved in the field and, in particular, the three firms which deal in the specific type of equipment required, the agency reasonably concluded that there was a likelihood that it would receive bids from at least two small business bidders under the solicitation.

DIANO PROTEST

Diano contends that the specifications in the solicitation are unduly restrictive of competition. In this regard, the protester argues that the solicitation's requirement for a theta/theta goniometer¹ is not necessary because Diano's theta/non-theta goniometer will also meet the agency's needs.² Diano also alleges that while the solicitation requires a high resolution solid state detector system, the agency's needs may be fulfilled with either a proportional or a scintillation detector.

In preparing a solicitation for supplies or services, a contracting agency must specify its needs and solicit offers in a manner designed to achieve full and open competition. 41 U.S.C. § 253(a)(1)(A) (1988), and include restrictive provisions or conditions only to the extent necessary to satisfy the agency's needs. 41 U.S.C. § 253(a)(2)(B). Where a protester alleges that a requirement is unduly restrictive, we review the record to determine whether the requirement has been justified as necessary to satisfy the agency's minimum needs. See, e.g., PHH Homeequity Corp., B-240145.3; B-241988, Feb. 1, 1991, 91-1 CPD ¶ 100. Here, based on the record, we find that the solicitation's specifications are reasonably related to the agency's minimum needs.

As explained in the solicitation, the agency needs a diffractometer to aid in the identification of rocks, minerals, articles of stone, inorganic and organic chemicals, and ceramic products in Chapters 25, 26, 28, 68, and 69 of the Harmonized Tariff Schedules, as well as for analyzing illegal narcotics and precursor chemicals. The agency states that its decision to require a theta/theta configuration rather than the protester's proposed configuration was based in part on the fact that theta/theta configuration prevents the risk that the sample being analyzed will spill or fall out during testing, since it holds the sample being analyzed in a stationary horizontal position while the analyzer moves in an arc above the sample; Diano's proposed configuration uses a vertical mount. The agency also

¹According to Webster's Third New International Dictionary, a goniometer is an instrument used in the field of mineralogy for measuring angles.

²Initially, Philips also argued that the theta/theta diffractometer specification in the solicitation was unduly restrictive of competition; however, in its comments on the agency report, Philips stated that "the Customs Service does indeed require a theta/theta diffractometer for its application."

reports that it specifically required the theta/theta configuration because it is the only configuration that accurately analyzes powdered or slurred specimens and the commodities listed in Chapters 25, 26, 28, 68, and 69.

The protester challenges the agency's representation that the horizontal placement of the sample that is associated with the theta/theta goniometer has advantages over the vertical placement associated with its goniometer. The protester claims that horizontal placement of the theta/theta goniometer has a drawback when used to analyze liquids because, according to the protester, since the "liquid holding cup must be filled to the very top to present the surface exactly to the X-ray beam," there is an increased likelihood that the liquid will spill. The protester has not presented any data to support this assertion, and has failed to respond to the agency's assertion that the likelihood of a liquid spilling out of a vertical mount is much greater than the likelihood of liquid spilling out of a horizontal mount.

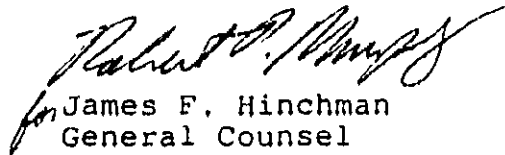
The protester also objects to the theta/theta requirement on the basis that, in its opinion, the use of a horizontal mount increases the likelihood of an inaccurate analysis of liquids if a transparent X-ray film is used to cover the sample. In response to the protester's speculation concerning the use of an X-ray film with a theta/theta goniometer, the agency explains that the problems associated with the use of X-ray film when analyzing minerals and compounds do not exist with a system using a horizontal mount, since X-ray film is used only when a sample is tilted on a vertical plane, not when it is stationary on a horizontal plane. The protester has failed to demonstrate that the agency's requirement for a theta/theta goniometer is unreasonable.

The protester also challenges the agency's requirement for a high resolution solid state detector system. According to the protester, the addition of a high resolution detector to a diffractor "adds expense, system complexity, and maintenance concerns, without providing performance benefits for the stated routine diffraction analyses." The protester states that the agency's needs may be met with either a proportional or a scintillation detector system.

While the protester clearly disagrees with the agency's determination that a non-solid state detector will not meet its minimum needs, the protester has not shown that such determination was unreasonable or overly restrictive of competition. As explained in the agency report, the agency's experience with non-solid state detectors, such as the one Diano proposes, has demonstrated that they are incapable of satisfactorily meeting the agency's needs.

Contrary to the protester's suggestion that the type of analyses that the agency will undertake will be limited to routine studies, the agency report also establishes that the increased sensitivity associated with the solid-state detector is especially helpful in analyzing the complex variety of samples it receives on a daily basis, namely, the commodities listed in Chapters 25, 26, 28, 58, and 69 of the Harmonized Tariff Schedule in addition to the samples analyzed in connection with forensic and narcotics work. In light of the reasonable, well-documented justification for the specification, and the absence of any evidence from the protester to show otherwise, there is no basis to conclude that the specification is unduly restrictive.

The protests are denied.


for James F. Hinchman
General Counsel