



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The W.H. Smith Hardware Company

File: B-250028

Date: December 30, 1992

W.V. Rathbone, Jr., for the protester.
Jeffrey I. Kessler, Esq., and Cay A. Newhouse, Esq.,
Department of the Army, for the agency.
Behn Miller, Esq., and Christine S. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. The Department of Defense (DOD) Federal Acquisition Regulation Supplement provision implementing a repetitive small business set-aside rule only applies to those repetitive procurements conducted by the same contracting office; accordingly, a protest that a contracting activity was required to conduct its first procurement for an item as a small business set-aside based on the fact that another DOD agency had previously procured the same item under a series of small business set-asides is denied.

2. Protest challenging small disadvantaged business set-aside determination on the ground that procuring activity failed to consult with another contracting office regarding item's pricing history is denied where procuring activity's fair market price estimate was reasonably based on a government-issued catalog containing current reliable pricing information.

DECISION

The W.H. Smith Hardware Company (Smith) protests the Army's decision to issue request for proposals (RFP) No. DAAE07-92-R-J132 as a total small disadvantaged business (SDB) set-aside; the solicitation was issued by the agency's Tank-Automotive Command (TACOM) for 16,422 front-lifting truck shackles. Smith contends that the Army's decision to conduct this procurement as an SDB set-aside is improper since those small business firms--including the protester--which have provided this item to another Department of Defense (DOD) agency, and which have invested in the tooling necessary to manufacture the shackle, are improperly being denied the opportunity to compete. As relief, Smith

requests that the Army cancel the current SDB set-aside and reissue the solicitation as a small business set-aside.

We deny the protest.

BACKGROUND

On February 12, 1992, TACOM initiated a repair program to retrofit its M939 5-ton trucks; the shackle being procured under this solicitation is considered a critical safety item necessary to enable TACOM to perform these overhaul tasks.¹ The technical data package (TDP) for the M939 and its accessory parts--including the shackle--was originally developed by TACOM. In 1985--as part of an ongoing effort to simplify the DOD acquisition process and lower DOD's acquisition costs--responsibility for procuring the M939 shackle was transferred to the Defense Logistics Agency (DLA) for administration by that agency's Defense Industrial Supply Center (DISC) under the National Stock Number (NSN) program.²

In performing the February M939 retrofit operations, TACOM discovered that several of the new M939 truck parts required material modifications in order to be functionally compatible with the shackle; since these truck part modifications would "involve intensive item management, close monitoring of stock levels, and material release orders," by correspondence dated March 26, TACOM requested that DISC transfer procurement responsibility for this item back to TACOM. This transfer took place on May 22; in this regard, the record shows that DISC apparently determined that it was unnecessary for the item to be managed under the NSN inventory program since--in relation to other DOD agency needs--the shackle is not a commonly required item given its unique application to the M939 vehicles.

In early July, the contracting officer provided a copy of the acquisition package for this requirement to the Small Business Administration procurement center representative for "presolicitation document review." On July 15, the

¹The shackle is attached to the front bumper of the trucks and is used to lift and secure the trucks during transport and/or repairs by the agency.

²The NSN program refers to a national catalog inventory system maintained by the General Services Administration and DOD. See 40 U.S.C. § 487(a) (1988). DISC is the DOD manager for most NSN items; under the NSN program, any DOD agency requiring a particular NSN item--such as the shackle--issues a request to DISC to procure the item on its behalf.

Small and Disadvantaged Business Utilization Specialist (SADBUS)³ recommended an SDB set-aside; the SADBUS also provided the contracting officer with a list of nine SDBs considered capable of producing the shackle.

On July 22, the contracting officer contacted the TACOM Small Business Office Technical Advisor and requested verification of each identified SDB's technical capabilities; the advisor confirmed each identified source's qualifications and further advised the contracting officer that "they will provide adequate, competitive prices." Based on the SADBUS and Technical Advisor's recommendations, the contracting officer issued this solicitation as an SDB set-aside on August 17.⁴ On August 24, Smith filed this protest.

DISCUSSION

Application of Repetitive Small Business Set-Aside Rule

The SDB set-aside program set forth at DOD FAR Supplement (DFARS) part 219 implements legislation which establishes an objective for DOD to award 5 percent of DOD contract dollars to SDB concerns. See 10 U.S.C. § 2301 note (1988 and Supp. III 1991); DFARS § 219.000. In order to implement the 5 percent SDB dollar objective, DOD has established the following set-aside program order of precedence:⁵

- "(i) Total set-aside for [SDBs];
- (ii) Total set-aside for small business concerns;
- (iii) Partial set-aside for small business concerns with preferential consideration for [SDBs]." DFARS § 219.504(b).

³The Small Business Act requires each agency with contracting authority to establish an Office of Small and Disadvantaged Business Utilization. See Federal Acquisition Regulation (FAR) § 19.201(c); 13 C.F.R. § 125.4(g)(7) (1992). This office is charged with making recommendations as to whether a particular acquisition should be placed under section 8(a) of the Small Business Act or conducted as a set-aside for small businesses or SDBs. See FAR § 19.201(c)(9).

⁴On September 14, the agency issued amendment No. 0001 which extended the proposal closing date to October 2.

⁵DOD's set-aside priorities are different from those set forth in the FAR for non-DOD agencies. See FAR § 19.504.

With regard to total SDB set-asides, the DFARS provides that a procurement shall be reserved for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that (1) offers will be obtained from at least two responsible SDB concerns; and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-2-70(a). However, DFARS § 219.502-2-70(b)(1) instructs contracting officers that they should not set aside acquisitions for SDBs when:

"The product or service has been successfully acquired as a small business set-aside (see FAR § 19.501(g))."

In this case, the record shows that prior to the May 1992 transfer of procurement responsibility for the shackle to TACOM, DISC made awards under five small business set-asides for various quantities of the shackle. Relying on these prior small business set-asides, Smith--which was awarded one of these contracts--contends that DFARS § 219.502-2-70(b)(1) prohibits the Army from conducting the current procurement as an SDB set-aside. We disagree.

DFARS § 219.502-2-70(b)(1) directs contracting officers to FAR § 19.501(g), which sets forth the following rule:

"Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall, if required by agency regulations, be acquired on the basis of a repetitive set-aside." (Emphasis added.)

DFARS § 219.501(g) provides that this FAR repetitive set-aside provision is applicable to DOD.

We think it clear, given the specific reference to the repetitive set-aside provision of the FAR, that DFARS § 219.502-2-70(b)(1) applies only where a procurement is being conducted by the same contracting office that successfully utilized a small business set-aside to acquire the identical item or service. In fact, the prior version of the DFARS explicitly stated that "[t]otal SDB set-asides shall not be conducted" where "[t]he product or service has been previously acquired successfully by the contracting office on the basis of a small business set-aside (see FAR § 19.501(g))." DFARS § 219.502-72(b)(1) (1988 ed.). In 1991, the Defense Acquisition Regulatory (DAR) Council reorganized and rewrote the DFARS in an effort to clarify and eliminate redundant terms and definitions. During this

revision process, the DAR Council determined that the FAR § 19.501(g) reference in the quoted provision provided sufficient clarity as to the exact circumstances when this regulation would apply; accordingly, the reference to "contracting office" was deleted since it was considered by the DAR Council to be redundant.⁶

Since DISC and TACOM constitute separate agency contracting offices, see DFARS § 202.101, and TACOM is conducting its first acquisition for this item, we find that the repetitive small business set-aside rule set forth in DFARS § 219.502-2-70(b)(1) does not prohibit an SDB set-aside. See Curl's Bldg. Maint., B-237012, Dec. 1, 1989, 89-2 CPD ¶ 509.

TACOM's SDB Set-Aside Determination

Individual acquisitions must generally be considered for exclusive SDB participation where the contracting officer determines that there is a reasonable expectation that offers will be received from at least two SDB concerns and those offers will be within 10 percent of the fair market price (FMP) for the requirement. DFARS § 219.502-2-70(a). We review a decision to conduct a procurement as an SDB set-aside to determine if the contracting officer's decision to restrict competition was reasonable. Tumpane Servs. Corp. and Phillips Nat'l Inc., B-242788.3; B-242788.4, June 10, 1991, 91-1 CPD ¶ 553.

⁶We reviewed the DAR Council's regulatory history on this provision, and discussed the purpose of the 1991 language revisions with the DAR Council staff. There is no evidence in the regulatory history to suggest that the deletion of the "contracting office" language from the 1988 regulation was intended to change the meaning of the provision; moreover, the DAR Council has confirmed that DFARS § 219.502-2-70(b)(1) is intended to apply only to those repetitive procurements conducted by the same contracting office.

⁷As noted above, the SADBUS provided the contracting officer with a list of nine SDBs considered capable of producing the shackle. The protester does not dispute the existence of these SDBs; rather, the protester's complaint focuses on the contracting officer's determination regarding the anticipated award price. Under these circumstances, we see no basis to question the contracting officer's decision that an adequate number of responsible SDBs could be expected to submit offers.

Smith argues that the contracting officer's decision to conduct this procurement as an SDB set-aside was improper since--according to the protester--purchasing this item from an SDB concern "will cost substantially more" than purchasing the item under a small business set-aside. Smith also contends that the contracting officer's decision was improper since the record shows that TACOM never consulted the DISC contracting office regarding the shackle's acquisition history. In essence, Smith appears to be arguing that without the DISC contracting office's pricing information, the TACOM FMP estimate for this item is defective.⁸

Because DOD may pay up to 10 percent more than the FMP for items purchased from SDB concerns, the fact that an agency knows that it may pay a higher price for an SDB-furnished item does not by itself provide a basis for finding any impropriety in a contracting officer's SDB set-aside determination. With respect to preparing the FMP estimate necessary to evaluate whether a particular requirement must be conducted as a total SDB set-aside pursuant to DFARS § 219.502-2-70(a), contracting agencies are expected to gather reliable, accurate, and current information upon which they may reasonably base an estimate of the prices at which the required services could be obtained from commercial sources. See Government Contracting Resources, B-243915, Aug. 15, 1991, 91-2 CPD ¶ 153. In this case, we find TACOM's FMP estimate for the shackle, and the resulting decision that an SDB set-aside was appropriate, to be reasonable.

The record shows that the TACOM cost analysts took the following steps in calculating this item's FMP estimate. First, the cost analysts prepared their own estimate of the item's FMP based on the Army's in-house history of the item; although the shackle had never been purchased by TACOM, the activity apparently kept files--including price lists--of prospective vendors for this item. Next, the cost analysts compared their in-house FMP estimate to the shackle item's \$14.12 unit price set forth in the

⁸In its comments on the agency report, Smith has erroneously concluded that a dollar amount set forth on the agency's procurement work directive--\$564,095.70--constitutes TACOM's aggregate FMP estimate for this requirement. In fact, this amount merely represents the amount of funding designated for the TACOM M939 retrofit operation.

"Management List-Consolidated" (ML-C), a statutorily-authorized,⁹ government-wide catalog used by contracting agencies as a source of unit pricing for NSN items. The ML-C is published by DLA and sets forth a consolidated, cumulative listing of NSNs, and related supply management information including pricing data; as the procurement history of a particular item develops, its unit price is adjusted on the ML-C to reflect current procurement costs as well as other factors such as inflation. After comparing their in-house FMP estimate with the ML-C figure, the TACOM cost analysts adopted an FMP estimate which is substantially close to the ML-C figure.¹⁰

Under these circumstances, we find that the FMP estimate is reasonably based and that TACOM's failure to consult with the DISC contracting office does not provide a basis for objecting to the SDB set-aside. While we agree with the protester's assertion that the DISC contracting office is a reliable source of information regarding this item's FMP, we do not believe that the DISC contracting office is the only source of information from which this figure can be reasonably determined. Rather, the ML-C--the source on which TACOM relied--constitutes one of the most reliable sources for an NSN item's FMP since the catalog is specifically designed to provide agencies with precise statistics for budgeting and financial accounting purposes. See Logics, Inc., B-237412, Feb. 13, 1990, 90-1 CPD ¶ 189. Moreover, because the ML-C is published by DLA, and is updated on a monthly basis, the pricing data set forth in it would necessarily encompass any pricing history maintained by the DISC contracting office regarding its previous acquisitions for the shackle.

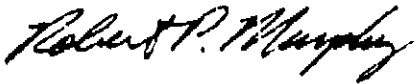
In sum, since the FMP estimate itself is reasonable, and since the contracting officer's small business advisors reported that they expected TACOM to receive competitively priced offers from at least two SDBs, we find that the contracting officer had a reasonable expectation that offers would be received from at least two responsible SDBs at a

⁹The Defense Cataloging and Standardization Act, codified at 10 U.S.C. §§ 2451 et seq. (1988), authorizes the Secretary of Defense to develop a single supply catalog system for the DOD.

¹⁰Because no award has yet been made, the Army has asked this Office not to disclose TACOM's in-house estimate.

price not exceeding the FMP by 10 percent. There thus is no basis to conclude that TACOM acted unreasonably in conducting the current procurement as a total SDB set-aside.¹¹

The protest is denied.


for James F. Hinchman
General Counsel

¹¹Under the DFARS, a contract may not be awarded under an SDB set-aside where the low SDB offer exceeds the FMP by more than 10 percent; in such cases, the contracting officer is directed to initiate a withdrawal of the set-aside. See DFARS § 219.506; Government Contracting Resources, *supra*. Here, the record shows that although the agency proceeded to receive proposals by the solicitation's October 2 closing date, evaluation of the offers has been postponed pending our decision on this protest. Accordingly, to the extent Smith anticipates an improper award on the basis of price, its protest is premature. See General Elec. Canada, Inc., B-230584, June 1, 1988, 88-1 CPD ¶ 512.