



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Railroad Construction Company, Inc.

File: B-249748.3

Date: December 29, 1992

Theodore W. Geiser, Esq., and Peter J. Smith, Esq., Connell, Foley & Geiser, for the protester.
Joel R. Feidelman, Esq., and Ann B. Perry, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Metroplex Corporation, an interested party.
Lucie J. McDonald, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency is required to set aside procurement for small disadvantaged businesses (SDB) where the same contracting office had successfully acquired the required services under a predecessor solicitation set aside for SDBs, and the contracting officer reasonably concluded that conditions for an SDB set-aside continue to exist.

DECISION

Railroad Construction Company, Inc. (RCCI) protests the decision by the Department of the Navy to set aside for small disadvantaged business (SDB) concerns invitation for bids (IFB) No. N62472-92-B-4008, for railroad system maintenance at the Naval Weapons Station Earle, Colts Neck, New Jersey.

We deny the protest.

BACKGROUND

The agency synopsisized the procurement in the Commerce Business Daily (CBD) on July 7, 1992. That notice stated that the project was being considered for a total SDB set-aside, but that "[i]f adequate interest is not received from SDB concerns within 15 calendar days of this notice, the solicitation will be issued as unrestricted." Seven firms responded to the CBD announcement, six of which identified themselves as SDB concerns. Since the agency apparently received several of those letters more than 15 calendar days

after the CBD announcement was published, however, the contracting specialist determined that those expressions of interest were untimely. Following the contracting specialist's recommendation, the contracting officer then issued the IFB on an unrestricted basis.

Subsequently, Metroplex--the incumbent SDB contractor--and D & K Construction Co., Inc., protested the agency's decision to not set aside the IFB for SDBs. The Navy states that while preparing its administrative report in response to the protests, it realized that the IFB should have been issued as a total SDB set-aside, and on August 26 issued amendment No. 0002, setting aside the procurement exclusively for SDBs. Accordingly, since the agency granted the relief Metroplex and D & K had requested, we summarily dismissed the protests on August 31, without requiring the Navy to file an agency report.¹ This protest to our Office followed.

RCCI contends that the Navy improperly amended the IFB to set the procurement aside for SDBs because the agency did not receive timely expressions of interest from qualified SDBs, and because the agency had no reason to expect that award will be made at a price not exceeding the fair market price by more than 10 percent.

DISCUSSION

The regulations implementing the Department of Defense (DOD) SDB program, set forth in Department of Defense Federal Acquisition Regulation Supplement (DFARS) part 219, require that once a contracting office has successfully acquired services on the basis of an SDB set-aside, all future requirements of that office for that particular service be acquired on the basis of a repetitive SDB set-aside, where

¹RCCI, which filed a notice as an interested party in Metroplex's protest, contends that the Navy nevertheless should have provided it with a report explaining its decision to amend the IFB. Where we summarily dismiss a protest before the agency's administrative report is due, however, we notify the agency of the dismissal and that a report need not be filed. See 4 C.F.R. § 21.3(m) (1992). Since we dismissed Metroplex's protest on August 31, well before the September 15 report due date, the Navy was not required to file a report responding to Metroplex's protest.

the conditions for a set-aside continue to exist.² See DFARS § 219.501(g) (S-70).

Here, the IFB seeks bids to continue the services currently provided by the Metroplex Corporation pursuant to a contract the Navy awarded that firm on October 10, 1990, under an IFB set-aside for SDBs.³ The agency has thus successfully procured the required services under an IFB set aside for SDBs for the past 2 years. In addition, in response to the CBD announcement here, six firms, including Metroplex, identified themselves as SDB concerns interested in the procurement. Since several SDB firms, including Metroplex--the incumbent--expressed their interest in competing for the contract, the contracting officer reasonably concluded that bids would be obtained from at least two responsible SDB concerns at acceptable prices. See Tumpane Servs. Corp. and Phillips Nat'l, Inc., B-242788.3; B-242788.4, June 10, 1991, 91-1 CPD ¶ 553. Accordingly, in view of the fact that the services were successfully acquired previously under an IFB set aside for SDBs, and since the conditions for a set aside continue to exist, DFARS § 219.501(g) (S-70) requires the agency to set the procurement aside for SDBs.

RCCI argues that the set-aside decision is improper because the agency did not receive sufficient responses from qualified SDB concerns within the 15-day period stated in the CBD announcement. According to the protester, only one SDB firm, Metroplex, responded within that period, while the other firms responded after the 15 days.⁴ The protester relies upon our decision in A.W. & Assocs., Inc., B-243289, July 10, 1991, 91-2 CPD ¶ 40, to argue that it was improper

²That is, 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; see Grove Roofing, Inc., B-240743 et al., Dec. 10, 1990, 90-2 CPD ¶ 470.

³Although Thomas & Sons submitted the apparent low bid, the contracting officer rejected that bid as nonresponsive and awarded the contract to Metroplex.

⁴The protester also alleged in its protest that one firm's "belated expression of interest . . . raises at least an appearance of impropriety." RCCI did not explain or otherwise provide further information in support of its contention. An allegation of possible impropriety, unaccompanied by supporting evidence, amounts to mere speculation, Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588, and as such does not provide a basis for protest. Key Book Serv., Inc., B-226775, Apr. 29, 1987, 87-1 CPD ¶ 454.

for the agency to consider any expressions of interest it received after the 15 day-period expired.

The case cited by RCCI is inapposite here. In A.W. & Assocs., Inc., the CBD announcement instructed interested SDB concerns to provide the contracting officer, not later than 15 days after the announcement, with evidence of their capability to perform, including performance and credit references, previous contracts of similar size and complexity, and a positive statement of eligibility as an SDB concern. Only A.W. submitted the required information within the specified time. A.W. also provided the names of two other companies that were allegedly interested in competing for the procurement, and two additional companies requested copies of the solicitation after the specified 15-day period. The contracting officer reviewed those requests; determined that the additional two firms had submitted insufficient evidence to permit a finding that offers would be received from at least two responsible SDB concerns at acceptable prices; and issued the solicitation on an unrestricted basis.

In its subsequent protest to our Office, A.W. argued that the contracting officer's decision to not set the solicitation aside for SDBs was improper because A.W.'s submission, the names of the two companies it provided, and the letters submitted by the two other firms should have been sufficient to require the set-aside. We denied A.W.'s protest, stating that the fact that A.W. had submitted the names of two other companies allegedly interested in the procurement did not establish that those firms would likely compete for the contract. With respect to the two other companies that requested the solicitation after the 15-day period specified in the CBD, we found that the contracting officer had insufficient evidence from which to conclude that offers would be received from those two firms.

Nothing in our decision suggests that agencies are precluded from considering relevant information about potential offerors contained in expressions of interest, simply because that information is received after a specified period announced in a CBD synopsis. On the contrary, the contracting officer in A.W. & Assocs., Inc. considered the information contained in the "belated" expressions of interest. Similarly here, although several firms apparently submitted their expressions of interest after the 15-day response period specified in the CBD, the contracting officer was not precluded from considering those responses in determining whether the conditions for a set-aside continue to exist.

RCCI also argues that the agency could not have reasonably determined that there were a sufficient number of SDBs capable of successfully performing the contract. Specifi-

cally, the protester contends that of the firms that responded to the CBD synopsis, only Metroplex and another firm are "remotely qualified" to perform the contemplated contract, while the other companies are not "responsible SDBs." Agencies are not required, however, to make what amounts to a responsibility determination before deciding to set aside a procurement. See American Cyanamid Co., B-232200, Oct. 11, 1988, 88-2 CPD ¶ 338. While responsibility standards may be relevant in making a set-aside determination, the agency is obligated only to make an informed business judgment, as it did here, that there is a reasonable expectation of receiving acceptably priced offers from a sufficient number of responsible SDBs. Id.


The protester also argues that the agency could not reasonably expect to receive acceptably priced bids from SDBs (i.e., bids within 10 percent of the fair market price). In this connection, the protester states that its bid under the predecessor IFB, which allegedly was "improperly rejected," was 12 percent below the lowest SDB bid (submitted by Thomas & Sons), and 21 percent below Metroplex's award price. RCCI argues that based on that "historical information," the Navy could not reasonably expect to obtain acceptable SDB bids under the current IFB.

The agency denies having received a bid from RCCI in response to the prior IFB, and there is no evidence in the record that the protester submitted a bid that was "improperly rejected," as RCCI states.⁵ In response to our request that RCCI correct the record or provide evidence supporting its allegation, RCCI submitted a copy of a letter which it sent to the Navy, generally complaining about the set-aside program. In that letter, dated January 2, 1991, RCCI compares the prices submitted by Metroplex and Thomas & Sons at the December 20, 1990, bid opening on the prior IFB, to "[RCCI's] prices to perform the work if we were allowed to bid." Thus, contrary to the protester's earlier representations to our Office, RCCI did not compete under the predecessor IFB. Instead, RCCI apparently developed its prices--after full disclosure of the bids submitted by Metroplex and Thomas & Sons--and then claimed that had it submitted a bid under that IFB, it would have been low. Since RCCI did not submit its bid under the threat of competition, and since RCCI submitted its letter to the Navy

⁵The agency's facility support contracts manager, who served as a witness during the bid opening for the predecessor IFB, provided us a statement in which he affirms that "no bid was received prior to or after bid opening" from RCCI. The agency has also provided our Office a copy of the bid abstract for that IFB showing that the only bids recorded at bid opening were submitted by Metroplex and Thomas & Sons.

only after reaping the full benefits of knowing the prices submitted by Thomas & Sons and Metroplex under that IFB, the Navy was not required to consider the "historical information" in RCCI's January 2 letter in determining whether it would obtain acceptably priced SDB bids under the current IFB.

The protest is denied.


for James F. Hinchman
General Counsel