



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Wind Gap Knitwear, Inc.

File: B-251411; B-251413

Date: March 31, 1993

Dennis J. Riley, Esq., and Joseph G. Billings, Esq., Elliott, Vanaskie & Riley, for the protester. Michael Trovarelli, Esq., Defense Logistics Agency, for the agency. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision to conduct procurements on an unrestricted basis and not as small business set-asides is improper where the contracting officer did not investigate the performance capabilities of at least four small businesses that had bid on the prior set-asides of these requirements and therefore could not reasonably conclude that a reasonable expectation did not exist that offers could be obtained from at least two responsible small businesses.

DECISION

Wind Gap Knitwear, Inc., a small business, protests the decision of the Defense Personnel Support Center, Defense Logistics Agency (DLA), to issue request for proposals (RFP) No. DLA100-92-R-0289, for cold weather drawers, and RFP No. DLA100-92-R-0292, for cold weather undershirts, as unrestricted solicitations, rather than as small business set-asides. The protester contends that the procurements should have been set aside because there are at least two responsible small businesses that would have submitted fair market prices for the requirements.

We sustain the protests.

The contracting officer determined that the procurements should not be set aside for small businesses because a reasonable expectation did not exist that (1) offers would be obtained from at least two responsible small business

concerns offering the products of different small business concerns and (2) awards would be made at fair market prices. ~~The~~ Federal Acquisition Regulation (FAR) §§ 19.501(g) and 19.502-2.

The record shows that the contracting officer's determination, dated June 25, 1992, was based on a review of the last procurement for each item, which had been set aside for small business. The agency had received 11 bids on the prior set-aside for undershirts and 12 on the set-aside for drawers. Wind Gap received the award under both solicitations. Of the small business bidders that had submitted bids on each of these two procurements, the contracting officer found that two firms had been determined in January 1991, and July 1991, respectively, to be nonresponsible on the basis of negative preaward surveys and that another firm's prices for both solicitations had been considered unreasonable. The contracting officer also found that a fourth firm could not compete because it was already operating its plant at full capacity. The contracting officer also considered two other firms ineligible for award because their previous bids showed they could not meet the "Limitations on Subcontracting" clause (FAR § 52.219-14) which requires the contractor to perform at least 50 percent of the cost of the work. The contracting officer found that the remaining firms, except for Wind Gap, had no record of government contracting experience. The contracting officer stated that he had no basis for concluding that these remaining firms with no government contracting experience were responsible bidders. Finally, the contracting officer concluded that Wind Gap, the incumbent, was not a "responsible" firm for the purpose of setting aside these requirements because of delivery problems during performance of the two prior contracts which indicated that the firm would be unable to meet the increased production requirements of the current RFPs. The contracting officer's decision to issue each RFP on an unrestricted basis were submitted to, and concurred in by, the Small Business Administration procurement center representative.

Wind Gap argues that the contracting officer's determinations were unreasonable since they were based on outdated and incomplete information. For example, Wind Gap points out that the contracting officer ignored current information showing that Wind Gap had the capability to furnish the monthly delivery requirements of the protested RFPs. Wind Gap explains that the delays under its prior contracts were due to events beyond its control--a change in Environmental Protection Agency (EPA) standards on the pigment/polymer for the yarn used in production, a fact which the agency apparently recognized since it awarded Wind Gap the option quantities under the contracts. Also, Wind Gap submits a declaration from a company official stating

that he advised an agency industrial specialist, who ~~inquired~~ whether Wind Gap would be interested in competing ~~of these RFPs~~, that it could meet the RFPs' delivery ~~schedules~~ since Wind Gap would use its plant entirely for the government work (and another plant for its commercial work). This conversation occurred significantly prior to the contracting officer's decision. Wind Gap also argues that the agency's information was incomplete for the bidders under the previous set-asides which allegedly did not have government contracting experience. Wind Gap asserts that these firms' current status should have been investigated by the agency to determine whether they could perform the work and whether they would compete on the RFP. Wind Gap also believes that the contracting officer should have updated the 12- and 18-month old negative proaward surveys to determine if these firms had subsequently successfully performed any contracts.

An acquisition is required to be set aside for exclusive 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 fair market prices. FAR § 19.502-2(a). An agency is also required to continue setting aside acquisitions for a particular product or service where it has previously been the subject of a successful set-aside and where, as here, agency regulations so require, unless the contracting officer determines that there is not a reasonable expectation of receiving offers from at least two responsible small businesses at fair market prices. FAR § 19.501(g); Defense Federal Acquisition Regulation Supplement § 219.501(g). That determination itself must be reasonable. Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

In this regard, a contracting officer must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work, Stav, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248; we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. See The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129.

We conclude here that the agency did not reasonably determine that there was no likelihood of receiving offers from at least two responsible small businesses. First, four small business concerns without prior government contracting experience submitted acceptable bids on both of the prior

small business set-asides.¹ The record fails to show that the agency ever contacted any of these small businesses to determine if they were capable of meeting the delivery requirements under these RFPs or would be interested in competing. The contracting officer rejected these firms as potential small business offerors for the current RFPs solely because of their lack of prior government contracting experience. One of the goals of federal procurement, however, is to increase small business participation. See FAR §§ 19.201, 19.202-2. To allow agencies, in making a set-aside determination, to eliminate from consideration small businesses with no record of sales to the government would defeat the purpose of the small business set-aside to encourage and permit these firms to participate in government procurements. Therefore, the fact that a small business has made no sales to the government does not excuse an agency from considering it as a potential supplier. See Bell & Howell; Topper Mfg. Corp., 61 Comp. Gen. 595 (1982), 82-2 CPD ¶ 224.

Here, the firms without prior government contracting experience lost the competition for the prior set-asides because their prices simply were not low;² there is no evidence in the record that these small business bidders were not capable of meeting the agency's current requirements, and the contracting officer offers no reason for rejecting them other than their lack of government contracting experience.

Moreover, it does not appear that the determination as to the capability of Wind Gap and two other firms to perform these contracts was based on current and complete information. The record shows that while Wind Gap did experience production delays under the prior contracts, these production delays were due in large part to a change in EPA standards which affected a color shade of the yarn used in production and were, therefore, beyond its control. Wind Gap apparently subsequently overcame its production problems, as DLA ultimately exercised options for additional quantities under those contracts significantly prior to DLA's issuance of these current solicitations. Also, while the new solicitations call for production of quantities greater than those under the prior solicitations, the agency does not explain why it ignored Wind Gap's statement to the agency industrial specialist that it could meet the current requirements by using its plant solely for government work

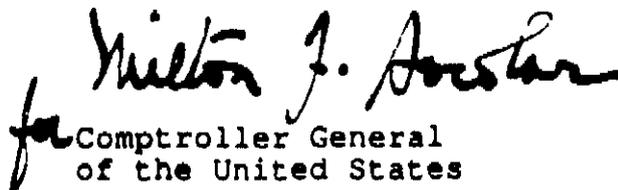
¹A fifth bidder with no government experience bid on the prior set-aside for drawers.

²The agency does not argue that the prices submitted by these bidders were not reasonable.

and that its prior delivery difficulties were due to a circumstance beyond its control. As for the two other potential small business offerors, the contracting officer relied on preaward surveys which were 12 and 18 months old, respectively. There is nothing in the record which shows that those preaward surveys reflect the current capabilities of these two firms. As the protester points out, these firms may have more recently performed other contracts successfully or otherwise addressed the survey concerns. As stated above, a decision to issue a solicitation on an unrestricted basis cannot be based on outdated or incomplete information. The Taylor Group, Inc., supra. Based on this record, it appears that the contracting officer's decision was not based on current and complete information.

In light of the above, we find unreasonable the contracting officer's determination that there was no reasonable expectation that at least two responsible small businesses would submit offers at fair market prices. Although, as DLA points out, we give significant weight to a small business representative's position in these matters, see Neal R. Gross and Co., Inc., Capital Hill Reporting, Inc., supra, where the representative's judgment is based on agency representations which themselves are based on inadequate or incomplete information, the small business representative's concurrence, as here, is not controlling. See The Taylor Group, supra. We therefore conclude that the agency's determinations not to set the requirements aside were improper. Stav, Inc., supra; The Taylor Group, Inc., supra. We sustain the protests.

By letter of today, we are recommending that the contracting officer adequately investigate the current capabilities of Wind Gap, the small business bidders under the prior solicitations with no government contracting experience, and the other two firms discussed above. Although the agency recently has received offers under the RFPs, unless the contracting officer now determines, after a proper review of the capabilities of interested small businesses, that there is not a reasonable expectation of receiving offers from at least two responsible small businesses at fair market prices, the contracting officer should cancel these RFPs and reissue them as set-asides for small businesses. We also find that Wind Gap is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1992).


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