

Gary 149930



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Holmes & Narver Construction Services, Inc.

File: B-252321.2

Date: August 9, 1993

Leif T. Erickson for the protester.

Charles D. Shults, Esq., Department of the Army, for the agency.

Stephen J. Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In procurement for repair and maintenance services, agency decision to restrict competition to small disadvantaged business (SDB) concerns is unobjectionable where a market survey resulted in expressions of interest and statements of qualifications from seven SDBs previously awarded similar contracts in SDB set-asides; since agency reasonably presumed that prior contracts had been awarded at prices no more than 10 percent above the fair market price, as required by regulations governing such set-asides, there was a reasonable expectation that this procurement also would result in prices within that range.

DECISION

Holmes & Narver Construction Services, Inc. (HN) protests the Department of the Army's decision to issue request for proposals (RFP) No. DABT47-93-R-0004 as a total small disadvantaged business (SDB) set-aside. HN contends that the solicitation, issued to provide maintenance and repair services at Fort Jackson, South Carolina, should not be set aside for SDB firms, since award will be made at a price greater than 10 percent above the fair market price (FMP) for such services, contrary to applicable regulations.

We deny the protest in part and dismiss it in part.

In January 1993, the Army issued and synopsized the solicitation in the Commerce Business Daily (CBD) as an unrestricted procurement for Job Order Contracting (JOC) repair and maintenance tasks. Subsequently, an SDB concern protested that the procurement should be conducted as a 100-percent SDB set-aside, pursuant to regulations which provide that a procurement generally shall be reserved for

exclusive SDB participation if the contracting officer determines 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 FMP by more than 10 percent. See Defense Federal Acquisition Regulation Supplement (DFARS) S 219.502-72(a).

As a result of the protest, the Army conducted a market survey to determine whether the regulatory requirements could be met and, on March 5, published a revised CBD synopsis inviting interested SDB concerns to describe their qualifications for performing the work. In response, the agency received expressions of interest from 10 SDB firms, 7 of which had current or recently-completed JOC contracts with other Department of Defense (DOD) installations. Based on this response, the Army concluded that both of the regulatory requirements had been met and decided to conduct the procurement as an SDB set-aside. On April 6, the agency issued the solicitation to 15 SDB concerns and, on April 12, HN protested the Army's SDB determination to our Office.

HN asserts that this procurement cannot properly be conducted as an SDB set-aside because the agency has conducted no market analysis that would support a reasonable expectation that award will be made at a price not exceeding the FMP by more than 10 percent. To the contrary, according to HN, JOC procurements such as this, when conducted as SDB set-asides, invariably result in awards which exceed the allowable 10-percent price premium; consequently, there can be no reasonable expectation that this procurement will result in an award price that is not in excess of that premium. In support of its position, HN states it has knowledge of the contract prices awarded in prior procurements at an Army depot and an Air Force base in Utah. According to HN, the Air Force procurement, which was conducted as an SDB set-aside, resulted in a contract price 15 percent higher than the Army contract, which was awarded under unrestricted competition. HN concludes that this procurement also will result in a price premium in excess of 10 percent, and that the Army therefore is precluded from conducting it as an SDB set-aside.

In considering a protest that a determination to conduct a procurement as an SDB set-aside is contrary to the applicable regulatory provisions, our Office will determine whether that decision has a reasonable basis. The W.H. Smith Hardware Co., B-250028, Dec. 30, 1992, 92-2 CPD ¶ 454. The decision here was reasonable.

The Army's market survey resulted in expressions of interest from 10 SDBs, and the agency mailed the solicitation to a total of 15 such firms. HN does not dispute the status or

the qualifications of these SDBs and, based on the number of firms involved, we see no basis to question the contracting officer's decision that at least two responsible SDBs could be expected to submit offers. See The W.H. Smith Hardware Co., supra; Tumpane Servs. Corp. and Phillips Nat'l, Inc., B-242788.3; B-242788.4, June 10, 1991, 91-1 CPD ¶ 553.

Concerning HN's contention that the agency lacked a reasonable basis for expecting an award price within the permissible range, we addressed such an allegation in Alpha Bldg. Corp., B-242576, Apr. 23, 1991, 91-1 CPD ¶ 402. In that case, 15 SDBs responded with expressions of interest and statements of qualifications to a CBD synopsis of the type published in this case; 4 of the SDB firms were performing or had performed JOC-type contracts at other DOD installations. We concluded from this response that the contracting officer had a reasonable expectation that offers received from responsible SDBs would not exceed the FMP by more than 10 percent. Id. Since the interested SDBs were performing JOC-type contracts at other DOD installations, and award cannot be made to an SDB at a price exceeding the FMP by more than 10 percent, the contracting officer had "sufficient information to expect that offers from SDBs under this procurement will also not exceed" the FMP by more than 10 percent. Id.; see also Tumpane Servs. Corp. and Phillips Nat'l, Inc., supra.

We reach the same conclusion here since seven of the SDBs that responded had been awarded similar contracts under SDB set-asides at other DOD installations. Because such awards should not have been made to an SDBs at a prices exceeding the FMPs by more than 10 percent, the market survey provided sufficient information to support the Army's price expectations. Alpha Bldg. Corp., supra; Tumpane Servs. Corp. and Phillips Nat'l, Inc., supra.

HN's assertion that SDB set-asides "invariably" result in excessively high prices that violate the regulatory requirements essentially anticipates an improper award on the basis of price. Under DFARS § 219.506, 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. Id. The Army has advised our Office that, although it has received nine proposals, the agency's final price evaluation has been postponed pending our decision on this protest. Accordingly, to the extent that HN anticipates an improper award on the basis of price, its protest

is premature and not for consideration. The W.H. Smith
Hardware Co., supra.¹

The protest is denied in part and dismissed in part.

Robert P. Murphy
for James F. Hinchman
General Counsel

¹The agency's preliminary evaluation indicates that the prices of at least four offerors are lower than HN's prior contract price for similar services, as cited by the protester.