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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Holmes & Narver Construction Services, Inc.

File: B-251470.2

Date: August 24, 1993

Leif T. Erickson for the protester.
Jose Aguirre, Esq., and Paul M. Fisher, Esq., Department of the Navy, for the agency.
Christina Sklarew, Esq., and Linda Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision to set procurement aside for small disadvantaged business (SDB) concerns was proper where contracting officer determined there was a reasonable expectation that offers would be received from at least two responsible SDB firms at prices that will not exceed the fair market price by more than 10 percent.

DECISION

Holmes & Narver Construction Services, Inc. protests the Department of the Navy's decision to set aside for small disadvantaged business (SDB) concerns request for proposals (RFP) No. N62474-93-R-8600. The solicitation is for a job order contract (JOC) for construction, alteration, and repair services at the Naval Air Weapons Station, China Lake, California. Holmes, a large business concern, contends that the SDB set-aside is improper because the contracting officer had no basis to conclude that at least two responsible SDB concerns would submit offers at a price not exceeding the fair market price by 10 percent.

We deny the protest.

The solicitation was synopsized in the Commerce Business Daily (CBD) on October 20, 1992, as an unrestricted procurement. After a bid protest was filed, contending that the procurement should be set aside for SDB concerns, the Navy reviewed the procurement and determined, with the concurrence of the agency's small business specialist, that restricting the procurement to SDB firms would be appropriate under the Defense Federal Acquisition Regulation Supplement (DFARS) part 219. The Navy announced this change in the CBD on January 29, 1993. Holmes protests the Navy's set-aside determination, alleging that its analysis of recent SDB set-aside acquisitions demonstrates that the agency could not reasonably expect to receive offers from at least two SDB firms that would be within 10 percent of the price that would be obtained under unrestricted competition.

The regulations implementing the Department of Defense (DOD) SDB program, set forth in the DFARS part 219, provide that a procurement shall be set aside 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, (2) award will be made at a price not exceeding the fair market price by more than 10 percent; and (3) scientific and/or technological talent consistent with the demands of the acquisition will be offered; DFARS § 219.502-2-70(a) (1991 ed.); A.W. & Assocs., Inc., B-243289, July 10, 1991, 91-2 CPD ¶ 40. We will not disturb a contracting officer's set-aside determination unless the determination is unreasonable. Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354.

Under a JOC contract, services are accomplished by the use of individual delivery orders. The cost of an individual project is computed by using prices from a unit price book (UPB), which lists 25,000 line items of pre-priced construction tasks. The appropriate line items required for completing the project are added together and multiplied by a coefficient that represents the contractor's overhead and profit. Offerors competing for a JOC contract submit their prices as coefficients, which are percentage factors representing an increase or decrease to the UPB prices. For example, a coefficient of 1.0 would represent a price that matches the UPB price; a coefficient of 1.2 represents a price that is 20 percent higher than the UPB's unit prices. An offeror's price coefficient covers such expenses as the prime contractor's and any subcontractors' overhead, profit, bond premiums, social security contributions, workman's compensation insurance, liability insurance, state unemployment insurance, Federal unemployment insurance, incidental engineering and planning, ADP support, and all related contingencies.

In support of its protest, Holmes has compiled a list of the price coefficients under which the firm was awarded a number of recent JOC contracts (under unrestricted competition), and a list of the price coefficients under which SDB firms were awarded SDB set-aside JOC contracts. Holmes compares these two groups of price coefficients and contends that they demonstrate that when JOC contracts have been awarded to SDB firms, the prices paid to the SDB concerns have been more than 10 percent higher than the fair market price that results under unrestricted competition. The protester argues therefore that the Navy had no reasonable basis to expect that an award could be made to an SDB concern at a price not exceeding the fair market price by 10 percent.

The Navy points out, however, that the current JOC contract for this installation was awarded to an SDB concern under an unrestricted procurement, at a fair and reasonable price. That contract was for the same services being procured under the RFP at issue here, and thus provides prior procurement history that is directly relevant, supporting the set-aside decision. In addition, the Navy challenges Holmes's analysis, and argues that a comparison of the price coefficients from a variety of different contracts, awarded in different geographic locations and at different times under a variety of conditions does not support the protester's conclusion. The agency contends that the coefficient is unique to each contracting location, since it includes all of the contractor's costs, many of which vary according to specific local conditions, and because the coefficients that are offered under each competition will reflect such variables as the offerors' perception of the accuracy of the UPB and the competitive environment of the procurement. Thus, the agency maintains that an offeror, large or small, disadvantaged or not, may offer a completely different coefficient in response to one solicitation than it would in response to another, in order to produce the same profit margin. The Navy also maintains that fair market price for any JOC contract is determined by multiplying the locally determined coefficient times that particular location's UPB, both of which will depend on a variety of conditions in the particular area and at that particular time; thus, a particular coefficient might represent a fair market price in response to one procurement but not in response to another. Moreover, the Navy points out that Holmes's analysis of coefficients is based on figures that were selected to support its position. Holmes has omitted, for example, the coefficient of 1.31 with which the current contract was awarded, under an unrestricted procurement.[1]

We believe that there is adequate evidence to support the agency's decision to set the procurement aside. Here, the RFP seeks offers to continue the services currently provided by Childers Construction Company, an SDB concern, pursuant to a contract the Navy awarded under an unrestricted solicitation at what was determined to be a fair and reasonable price. Further, for each of the awards to an SDB

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[1]It is notable that although Holmes competed for that contract, it did not win, and that the winning offer was from an SDB firm.

concern cited by the protester, the agency had to determine prior to award that the contract was being awarded at a fair market price. Since, as pointed out by the protester, there are several SDB concerns currently performing JOC contracts at military facilities, and, as previously stated, award cannot be made to an SDB under a set-aside at a price exceeding fair market price by 10 percent, we believe the contracting officer had sufficient information to expect that offers from SDB concerns under this procurement would also not exceed fair market price by 10 percent.

Moreover, Holmes's premise--that award to various SDB concerns in the past has resulted in unreasonably priced contracts and that competition among other SDB concerns for this contract can therefore not be expected to produce any reasonably-priced offer--rests on an erroneous understanding of the applicable standard. A "fair market price" is based on "reasonable costs under normal competitive conditions and not on lowest possible cost." Federal Acquisition Regulation § 19.001. Not only may DOD pay up to 10 percent more than the fair market price for an item purchased from an SDB concern, but that fair market price may be more than the lowest price obtained through open competition. Thus, 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 an impropriety in a contracting officer's SDB set-aside determination.

Given the procurement history at hand in this case, we find that the Navy has reasonably supported its decision to set this procurement aside. While Holmes argues that it would be more appropriate to allow SDB firms to have a 10 percent price advantage under an unrestricted procurement, because competition allegedly would result in lower prices, the fact remains that the regulatory requirement expressed in the DFARS provides for a set-aside. See DFARS § 219.502-2-70 (a).

The protest is denied.

Robert P. Murphy

for James F. Hinchman
General Counsel