



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Holmes & Narver Construction Services, Inc.

File: B-253148

Date: August 24, 1993

Leif T. Erickson for the protester.
Timothy A. Beyland, Department of the Air Force, for the agency.
Christina Sklarew, Esq., and Linda C. 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 Air Force's decision to set aside for small disadvantaged business (SDB) concerns request for proposals (RFP) No. F09607-93-R0026 for maintenance, repair, and minor construction services referred to as Simplified Acquisition of Base Engineering Requirements (SABER) for Moody Air Base, Georgia. 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 more than 10 percent.¹

We deny the protest.

¹Holmes's protest, filed on April 16, actually was based on the Air Force's Commerce Business Daily (CBD) announcement that it was considering setting the procurement aside, and preceded the agency's set-aside determination, which was made on May 4. While the Air Force argues that Holmes's protest is therefore prematurely filed, we decline to dismiss the protest on that basis because it had matured by the time the agency report was submitted.

By CBD synopsis of March 22, 1993, the Air Force announced that it was considering setting the procurement aside for SDB concerns, and requested interested SDB firms to submit evidence of their ability to perform the SABER contract. The Air Force received responses from 17 SDB concerns, whose qualifications were then evaluated by contracting and engineering personnel and by the small disadvantaged business utilization (SADBUS) coordinator. The agency determined that between four and seven of these responses were acceptable and that offers could be expected from at least two responsible SDB concerns, with award to be made at an amount that did not exceed the fair market price by more than 10 percent, and that the procurement should therefore be set aside.

The regulations implementing the Department of Defense (DOD) SDB program, set forth in the Defense Federal Acquisition Regulation (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 technical talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a). We review a decision to conduct a procurement as an SDB set-aside to determine if the contracting agency had a reasonable basis to restrict competition. John Bowman, Inc., B-239543, Aug. 28, 1990, 90-2 CPD ¶ 165.

Under a SABER 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 SABER 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.

In support of its protest, Holmes has compiled a list of the price coefficients under which the firm was awarded a number of recent SABER contracts (under unrestricted competition), and a list of the price coefficients under which SDB firms were awarded SDB set-aside SABER contracts. Holmes compares these two groups of price coefficients and contends that they demonstrate that when SABER 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 Air Force 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 Air Force challenges Holmes's analysis, arguing that a comparison of the price coefficients from a variety of different contracts, awarded in different geographic locations, at different times and under different 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, including such variable expenses as mobilization, demobilization, overhead, profit, bond premiums, and insurance. In addition, the agency states that while the line items in any UPB will be computed on the basis of the agency's assessment of such matters as local labor and materials costs, the coefficients that are offered will reflect such variables as the offerors' perception of the accuracy of the UPB. 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. A fair market price for any SABER 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.

We believe the record supports the agency's decision to set the procurement aside in this case. After carefully reviewing the qualifications of the 17 firms that had submitted responses to the CBD notice, the contracting officer consulted with officials and technical personnel from the Contracting and Civil Engineering Squadrons, the SADBUS, and officials in Headquarters Air Combat Command regarding the likelihood that more than two firms had the requisite qualifications and would submit prices within 10 percent of the fair market price for this work. Based on the number of firms that responded, the extensive analysis of their qualifications, and personal knowledge of several of the contractors and awareness of the local conditions, the contracting officer determined that the level of competition that would be available among SDB concerns that were interested and qualified could reasonably be expected to provide an award price that met the 10 percent standard.

Holmes's protest is not based on any knowledge of the particular firms that responded to the synopsis or the actual basis for the agency's determination that adequate competition would exist and could be expected to result in a fair and appropriate price in this case, under a set-aside procurement. Under Holmes's analysis, based solely on prices obtained under unrelated solicitations, a SABER procurement could not be set aside for SDB participation no matter what responses were submitted to the agency's announced intention to set the procurement aside.


As the Air Force points out, for each of the awards to an SDB 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 there is nothing in the record to show that these SABER contracts for other bases were improperly awarded, the coefficients cited by Holmes actually lend further support to the agency's argument that a particular coefficient may represent an acceptable price in relation to one procurement but an unacceptable price in relation to another. This of course supports the Air Force's basic contention that coefficients from different contract awards cannot meaningfully be compared to each other and cannot be used to establish the fair market price in a separate procurement.

Also, Holmes's premise--that award to various SDB concerns in the past has resulted in unreasonably priced contracts and that competition among other SDBs 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 the agency has paid 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.

Based on our review of the record, we conclude that the contracting officer has a reasonable expectation that offers will be received from at least two responsible SDB concerns at a price not exceeding the fair market price by more than

10 percent. There is no basis to conclude that the Air Force is acting unreasonably in conducting the current procurement as a total SDB set-aside.

The protest is denied.


for James F. Hinchman
General Counsel