



Comptroller General  
of the United States

Washington, D.C. 20548

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## Decision

**Matter of:** J. Morris & Associates, Inc.

**File:** B-254093 et al.

**Date:** November 16, 1993

Lynn G. Morris for the protester,  
Joe E. Alford, Esq., and Captain Gerald P. Kohns, Department  
of the Army, for the agency,  
John L. Formica, Esq., and James A. Spangenberg, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Agency decision to conduct procurements for construction services at Fort Sill, Oklahoma, on an unrestricted basis and not as small disadvantaged business (SDB) set-asides is reasonable where the agency concluded, based on the consideration of the procurement history for similar services at Fort Sill, that it could not reasonably expect to receive bids from at least two responsible SDB concerns.

### DECISION

J. Morris & Associates, Inc. protests 22 invitations for bids (IFB) issued on an unrestricted basis by the Department of the Army for construction projects at Fort Sill, Oklahoma, and other installations in the Fort Sill area. Morris argues that the procurements should be set aside for small disadvantaged business (SDB) concerns.<sup>1</sup>

We deny the protests.

<sup>1</sup>B-254096; B-254099; B-254100; B-254101; B-254102; B-254103; B-254104; B-254105; B-254106; B-254108; B-254357; B-254358; B-254359; B-254360; B-254361; B-254362; B-254363; B-254364; B-254365; B-254366; B-254367.

<sup>2</sup>IFB Nos. DABT39-93-B-0036, DABT39-93-B-0004, DABT39-93-B-0040, DABT39-93-B-0052, DABT39-93-B-0011, DABT39-93-B-0055, DABT39-93-B-0039, DABT39-93-B-0021, DABT39-93-B-0031, DABT39-93-B-0006, DABT39-93-B-0057, DABT39-93-B-0041, DABT39-93-B-0059, DABT39-93-B-0047, DABT39-93-B-0018, DABT39-93-B-0046, DABT39-93-B-0064, DABT39-93-B-0070, DABT39-93-B-0065, DABT39-93-B-0068, DABT39-93-B-0069, DABT39-93-B-0072.

The regulations implementing the Department of Defense (DOD) SDB program, set forth at DOD Federal Acquisition Regulation Supplement (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); All Star Maintenance, Inc., B-249810.3, Nov. 24, 1992, 92-2 CPD ¶ 374. We generally view this determination as a business judgment within the contracting officer's discretion. McGhee Constr., Inc., B-249235, Nov. 3, 1992, 92-2 CPD ¶ 318. However, the contracting officer must undertake reasonable efforts to ascertain whether it is likely that offers will be received that would support a decision to set aside a procurement for SDB concerns, and we will review a protest to determine whether a contracting officer has done so. See Neil R. Cross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269.

The record here shows that the contracting officer undertook reasonable efforts to ascertain whether there would be two or more responsible SDB concerns that could submit bids that would result in contracts at reasonable prices in deciding not to set aside the procurements. The contracting officer relied upon procurement history and the advice of the Fort Sill Small and Disadvantaged Business Utilization Specialist (SADBUS), who has more than 20 years of contracting experience and has served in his current position for 5 years, in determining to issue the procurements on an unrestricted basis.

Specifically, the record shows that during fiscal years 1992 and 1993, 80 solicitations were issued by Fort Sill for construction services similar in scope to those required by the solicitations at issue here. The bid of an SDB concern was received in response to only 7 of the 80 solicitations, and there was not a single solicitation on which more than one bid was received from an SDB concern. The agency represents with regard to these 80 solicitations that the contract files contain "no letters of interest, no memorandums of telecon[ferences], no bid protests nor any other documents" that indicate any interest by SDBs in providing these services. The SADBUS concurred with the contracting officer's conclusions not to set aside the procurements for SDBs.

Morris contends that the agency's procurement history is misleading because all of the 80 solicitations that the agency refers to were issued on an unrestricted basis. The

protester argues that the synopses of the procurements as unrestricted implied to SDBs that they could not compete, and made it less likely to generate responses from SDBs, particularly in light of the limited bonding capacity of some SDBs.

There is no requirement for using any particular method for assessing the availability of SDBs so long as the agency undertakes reasonable efforts to locate SDBs. See State Mgmt. Servs., Inc., B-252312, June 21, 1993, 93-1 CPD ¶ 474 (where agency synopsized requirements as unrestricted). Factors that may constitute adequate grounds for not setting aside a procurement include prior procurement history, nature of contract, type of contract, and/or market surveys. Here, because the procurement history showed virtually no interest or participation by SDBs and thus no reasonable probability that two or more responsible SDBs would submit acceptable proposals at reasonable prices for the construction services sought for Fort Sill and other installations in the Fort Sill area, a conclusion in which the SADBUS concurred, we find reasonable the contracting officer's decision to synopsize and issue the IFBs on an unrestricted basis. Id.

Morris offers to provide the contracting officer with the names and addresses of SDBs in the Oklahoma and Texas area "who would likely bid" on solicitations for construction services set aside for SDBs. Morris has not submitted this list of SDBs to either the agency or our Office. Receipt of such a list at this time would not require the amendment of the IFBs to set aside the procurements for SDB firms. Information that first becomes available after the issuance of a solicitation does not show that a contracting officer's determination not to set aside a procurement was unreasonable. McGhee Constr., Inc., supra. Nor does such information received after the issuance of a solicitation require a contracting officer to amend a solicitation and restrict the procurement. While the contracting officer retains the discretion to make new set-aside determinations after a solicitation has been issued, there is no requirement that a contracting officer restrict a procurement after the solicitation is issued on an unrestricted basis where the contracting officer's

determination not to set aside the solicitation was reasonable at the time the solicitation was issued. Id.; EKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270.

The protests are denied.



*for* James F. Hinchman  
General Counsel