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

## Decision

**Matter of:** Heritage Reporting Corporation

**File:** B-252477

**Date:** June 30, 1993

Susan Booth Cassidy, Esq., Arnold and Porter, for the protester.

Ronald S. Perlman, Esq., and Ellen F. Randel, Esq., Porter, Wright, Morris and Arthur, for Neal R. Gross & Company, Inc., and Edward J. Tolchin, Esq., Fettmann & Tolchin, for Capital Hill Reporting, Inc., interested parties.

Terence W. Carlson, Esq., Department of Transportation, for the agency.

Audrey H. Liebross, Esq., and David R. Kohler, Esq. for the Small Business Administration.

John Van Schaik, Esq., and Susan K. McAuliffe, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that agency improperly decided to set aside for small business concerns procurement of court reporting services is denied where the contracting officer's decision to set the procurement aside was reasonable.

### DECISION

Heritage Reporting Corporation, a large business, protests the decision of the Department of Transportation (DOT) to set aside request for proposals (RFP) No. DOTS59-93-R00021 for exclusive small business competition. The solicitation is for nationwide verbatim reporting services for DOT's Office of Hearings.

We deny the protest.

### BACKGROUND

DOT's Office of Hearings uses court reporting firms to record and transcribe a verbatim account of its formal proceedings. In 1990, DOT issued an RFP for nationwide court reporting services on an unrestricted basis. A small business concern, Neal R. Gross & Company, Inc., protested that the solicitation should have been issued as a small business set-aside. We sustained that protest and recommended that DOT cancel the RFP and resolicit using a

small business set-aside, Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. Heritage requested reconsideration of that decision and argued for a recommendation that DOT conduct a market survey in lieu of the recommendation to proceed on the basis of a set-aside. We denied the reconsideration request, Heritage Reporting Corp.--Recon., B-240924.3, June 20, 1991, 91-1 CPD ¶ 584.

In February 1992, DOT issued another RFP for the same court reporting services. That solicitation was set aside for small businesses. DOT reports that, in response to a notice of this RFP in the Commerce Daily Business, 41 small businesses expressed interest in the solicitation. Although DOT received 10 small business proposals in response to that RFP, the solicitation was canceled on June 6, 1992 as a result of a solicitation defect unrelated to the decision to set aside the RFP.

DOT issued the current solicitation for court reporting services in January 1993, again as a small business set-aside. DOT reports that its decision to set the RFP aside was based on several factors, including the decisions of this Office concerning the earlier DOT solicitation, the contracting officer's general knowledge of the market for court reporting services and the numerous expressions of interest in the RFP by small businesses.

DOT states that in Neal R. Gross & Co., Inc., supra, we specifically recommended that DOT's solicitation for these services be set aside for small business concerns since the record in that protest demonstrated that at least two small businesses were interested in submitting offers. DOT also notes that in our decision on Heritage's reconsideration request, we stated that it was not necessary to conduct a market survey of small businesses to determine whether a set-aside was appropriate because the record showed the existence of two small businesses interested in submitting offers.

In addition to the two decisions addressing DOT's solicitation, DOT reports that its determination to set aside the solicitation for small business is supported by our decision in Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269. In that decision, we sustained a protest against the Department of Agriculture's decision to issue a solicitation for nationwide court reporting services on an unrestricted basis. As DOT notes, we stated:

"The fact that the services are to be performed on a nationwide basis, which may entail subcontracting by small businesses, also does not mean that fair and reasonable prices will not be obtained, since more than two small business court reporting companies currently provide nationwide services and have offices in several cities."

DOT states that small businesses are currently performing nationwide court reporting contracts for the Department of Agriculture and the Federal Energy Regulatory Commission and maintains that this also supports the set-aside decision.

DOT also maintains that its decision to set the RFP aside is supported by the fact that 10 small business proposals were received in response to the 1992 RFP for these services. Although the proposals were not evaluated, DOT argues that the response demonstrates that offers would be obtained from at least two responsible businesses for the 1993 court reporting solicitation. Finally, DOT notes that seven small businesses submitted proposals in response to the RFP. According to the agency, this response demonstrates that there is sufficient small business interest to justify the set-aside decision.

#### PROTEST ALLEGATIONS

Heritage argues that the solicitation should not have been set aside for small business concerns because it is impossible for any firm that qualifies as a small business for this solicitation to meet the requirements of the contract. Heritage points out that the standard industrial classification (SIC) code for this solicitation is 7338, which is limited to firms with no more than \$3.5 million in average annual gross receipts. Heritage also notes that the solicitation includes the clause at Federal Acquisition Regulation § 52.219-14, "Limitations on Subcontracting," which requires that "[a]t least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the [small business] concern."

According to Heritage, a firm limited to \$3.5 million in annual receipts cannot have a sufficient number of employees to successfully perform the DOT contract by itself.

(Heritage calculates that a small business under SIC code 7338 can have only 38 employees.) Heritage contends that a small business under SIC code 7338 will not have sufficient personnel to set up a national network of reporters, employ as "key personnel" a contract manager, assistant contract managers, and supervisors to manage and coordinate the work, administer the company, service its other clients, and perform the reporting and related requirements of the contract (including the provision of personnel to transcribe

testimony, convert data onto floppy diskettes, verify data, print transcripts, copy and bind transcripts and exhibits, deliver transcripts, store transcripts and check the quality, accuracy and legibility of transcripts). Heritage also notes that the RFP requires that the contractor assign reporters to deposition proceedings who are notaries public, while the earlier solicitation only required that depositions be transcribed by notaries, and that several states impose residency requirements for notaries. According to Heritage, as a result of the contract's varied requirements, the number of employees available to attend hearings would be far less than the total number of employees employed by the firm. The protester contends that if a small business awardee were to augment its reporter network after award through subcontracting, which Heritage argues such a firm would have to do in order to meet the contract requirements, "the contractor would perforce violate the [50-percent] limitation rule."

Heritage maintains that the agency failed to undertake reasonable efforts to determine whether it was likely that it would receive offers from two small business firms with the capability to perform the contract. In this respect, Heritage argues that expressions of interest by small business concerns should not have been dispositive of the question of small business capability since a statement by a small business that it is interested in a contract tells an agency nothing about that firm's capability to perform. According to Heritage, before setting the solicitation aside, the contracting officer was required to determine whether the small business firms that expressed interest in the solicitation are capable of performing the contract without violating the 50-percent rule.

In addition, Heritage argues that DOT unreasonably relied on the fact that other small business court reporting firms have provided nationwide reporting services in the past. In this regard, Heritage states that one of the nationwide contracts DOT references, a Department of Agriculture contract for deposition services for the entire nation, except Washington, D.C., Delaware, Maryland, Pennsylvania, Virginia and West Virginia, was awarded to a firm which, according to Dunn & Bradstreet, has only one employee and uses contract employees "depending on workload." Heritage maintains that the fact that DOT relies on this contract to support its set-aside decision belies the contracting officer's "general knowledge" of the court reporting industry.

In sum, Heritage argues that the contracting officer's decision to set aside the solicitation for small businesses was unreasonable since there is no reasonable expectation

that there are two small businesses capable of performing the contract.

#### ANALYSIS

An acquisition is to be set aside exclusively for 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 a fair market price. FAR § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a clear showing that it has been abused. E. L. Hamm & Assocs., Inc., B-249642, Dec. 8, 1992, 92-2 CPD ¶ 399. However, an agency must make reasonable efforts to ascertain whether it will receive offers from at least two small businesses with the capabilities to perform the work, and we will review a protest to determine whether the agency has done so. Id. Here, we conclude that the contracting officer's decision to set the procurement aside was reasonably based upon numerous small business firms' expressions of interest in competing under the RFP, historical procurement information regarding the agency's current court reporting services requirement and the fact that other agencies have successfully acquired court reporting services from small businesses under nationwide contracts.

First, despite Heritage's contentions that DOT's reliance on our earlier decisions recommending set-asides is misplaced since the current RFP states that a greater percentage of transcript pages are to be generated outside of Washington, D.C. compared to that required under the earlier DOT solicitation, the record shows that the noted changes in the requirements of the RFP are not so significant that a small business could not reasonably be expected to be capable of performing the contract. Although a greater percentage of the work under the current RFP is expected to be done outside of Washington, D.C., the total work requirements under the current RFP are far less than those under the earlier solicitation. While the 1990 RFP estimated 210 hearings generating 50,000 transcript pages per year, which we found could reasonably be performed by small businesses, the current RFP estimates only 113,200 pages over the 5-year contract, or approximately 22,000 pages per year. There is no evidence in the record to support the

protester's contention that a small business would be unable to meet the requirements outside of Washington, D.C.<sup>1</sup>

Second, as to Heritage's concern regarding the 50-percent rule, the record shows that the contracting officer considered information regarding other agencies' procurements of court reporting services under small business set-asides as support for his determination of small business capability. These procurements were reported to be successful ones; despite Heritage's contentions to the contrary with respect to the Agriculture contract, there is no indication that the contracting officer had any reason to believe there had been performance problems by the contractor or that the contractor had violated the 50-percent rule.

Further, as we pointed out in Heritage Reporting Corp., B-252425, June 29, 1993, 93-1 CPD ¶ \_\_\_\_, even if we accept Heritage's assertion that a small business under SIC code 7338 can have no more than 38 employees, violation of the 50-percent rule would not be readily indicated simply because of the nature of this type of contract since the rule does not prohibit compliance with contract requirements through subcontracting. That rule only requires that the awardee incur at least 50 percent of the personnel costs for contract performance using its own employees. Under the circumstances, a small business could subcontract for a significant amount of its personnel costs without violating the 50-percent rule and still stay within the \$3.5 million threshold for SIC code 7338. Other small business offerors under the RFP state, for instance, that a small business court reporting firm could subcontract the minimal cost recording services (e.g., recording of testimony at hearing sites nationwide) while performing the more costly, and the majority of the contract requirements (e.g., transcribing the recordings), with the firm's own personnel at a central location. In other words, while subcontracting might be necessary for many or even most of the hearings to be covered under the contract, that would not automatically indicate a likely violation of the 50-percent rule in light of the personnel costs that could be incurred by the use of the contractor's own employees to meet the myriad tasks associated with the contract.

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<sup>1</sup>Although the 1993 RFP includes a requirement for a notary public to attend each deposition that was not included in the 1990 RFP, the agency explains that such depositions are rare events at the Office of Hearings. We do not see how the occasional need for a notary would be beyond the capability of a small business firm by use of its own personnel or through subcontracts.

In summary, we find no basis to conclude that the agency unreasonably determined that it was likely to receive responsive bids from at least two responsible small business concerns. The protest is denied.

*Robert P. Murphy*  
/s/ James F. Hinchman  
General Counsel