



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Supplemental Resources, Inc.; Favorite Nurses

File: B-254843.2; B-254843.3

Date: January 31, 1994

Theodore M. Bailey, Esq., Bailey, Shaw & Deadman, P.C., for Supplemental Resources, Inc., and Gerhard J. Kuti, for Favorite Nurses, the protesters.
Donald E. Barnhill, Esq., East & Barnhill, for Care Professional Nursing, Inc.; Roberta Buchman Cross, Esq., for Nurse Connection, Inc.; Wayne Pierce, for American Contract Health, Inc.; Linda F. Rohrer, for DPS, Inc.; Lois V. Cole, for Northeastern Professional Nurses Registry, Inc.; Ronald W. Ash, for Wesley Medical Resources, Inc.; and William G. Davis, for MedStaff, Inc., interested parties.
Captain Gerald P. Kohns and Robert D. Hamel, Esq., Department of the Army, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests that agency improperly set procurement aside for exclusive small business participation are denied where the contracting officer's decision to set the procurement aside was reasonable.

DECISION

Supplemental Resources, Inc. (SRI) and Favorite Nurses protest the decision of the Department of the Army to set aside request for proposals (RFP) No. DADA10-93-R-0061 for exclusive small business competition. The protesters contend that the agency's decision was unreasonable.

We deny the protests.

These protests concern a solicitation for intensive care unit (ICU) nursing services at Brooke Army Medical Center. One of the protesters, SRI, is currently performing these services under a contract awarded on the basis of a solicitation that limited competition to small business concerns. After award, the Small Business Administration

determined that SRI was not a small business, and the Army therefore decided to conduct a competition for a new contract rather than to exercise the options under SRI's contract.

In preparing the RFP at issue, the agency initially decided to allow unrestricted competition, based on the agency's determination that the scope of the RFP was considerably broader than that of the current contract. Specifically, the contracting officer found that the current RFP covered 11 ICU facilities, considerably more than were covered by the prior solicitation. The contracting officer also noted that a separate contract for some services within the scope of the new RFP had been awarded to a small business, and that the awardee had not performed acceptably. On the basis of these findings, the agency issued the RFP on July 15, 1993, as an unrestricted procurement.

On September 9, 1993, Care Professional Nursing, Inc., protested the agency's decision to issue the RFP on an unrestricted basis. The agency reviewed its file and the governing regulations, and determined that the RFP should have been restricted to small business concerns. The determination was based on: (1) the conclusion that the agency was required to set aside the procurement for small businesses because it is for a successor contract to one which had been a small business set-aside; and (2) the agency's finding that at least 12 potential offerors are small business concerns. Accordingly, by amendment No. 0004, issued on September 14, competition was limited to small businesses. After receiving notice both of the agency's corrective action and of the withdrawal of Care Professional Nursing's protest on September 27, our Office closed its file on the protest without further action. On October 5, the agency issued amendment No. 0006, dividing the services covered by the RFP into two schedules in order to allow for award of two contracts.

SRI and Favorite Nurses protest the agency's decision to restrict competition to small business concerns. They argue that the initial decision to issue the RFP on an unrestricted basis was reasonable, since, according to the protesters, no small business has provided, or can provide, nursing services of the magnitude called for in the RFP. In addition, the protesters contend that the predecessor contract's having been awarded under a small business set-aside is irrelevant because the awardee (SRI) is not, in fact, a small business, and because the contract awarded was for fewer ICUs than are covered under the current RFP.

An acquisition must be set aside for exclusive 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. Federal Acquisition Regulation (FAR) § 19.502-2(a). Generally, our Office regards 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 on expressions of interest by numerous small business concerns in competing under the RFP as well as on historical procurement information regarding the participation by small businesses in the competition for the predecessor contract. Because this is an area in which agencies have considerable discretion, the fact that the agency initially concluded that the RFP should be issued on an unrestricted basis does not render improper the agency's later determination that there was a reasonable expectation that offers would be obtained from at least two responsible small business concerns and that award would be made at a fair market price.

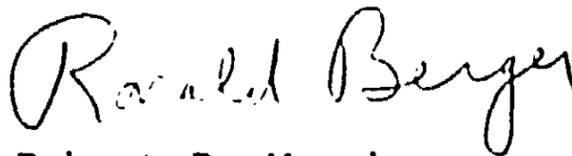
While the protesters allege that no small business is capable of providing all the services covered by the RFP, they have provided no support for this allegation. They do not dispute the agency's contention that, in the competition leading to the SRI contract, proposals were received from numerous small businesses which were capable of performing the work and which proposed fair and reasonable prices. The protesters' argument that small businesses are incapable of performing all the work covered by the RFP is further deflated by amendment No. 0006, which divided the services covered by the RFP into two schedules, so that any awardee would only need to furnish part of the total services required.¹

¹Favorite Nurses also contends that, while dividing the work may lead to units of work limited enough for small businesses to perform, such parceling up of the overall tasks causes inefficiency and other problems. To the extent that this contention is relevant to the protests, it constitutes a challenge to amendment No. 0006; piecemeal filing of protests, however, is not permitted, see Lenderking Metal Prods., B-252035; B-252036, May 18, 1993, 93-1 CPD ¶ 393, and we therefore will not consider this

(continued...)

The parties dispute the impact on this procurement of the regulatory requirement that, once a service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular service must generally be acquired on a set-aside basis. FAR § 19.501(g); Defense FAR Supplement § 219.501(g). The agency contends that this is essentially a procurement for the same services as those covered by the SRI contract, while the protesters respond that the greater scope of this procurement distinguishes it from the SRI contract. Even if we assume, arguendo, that the protesters are correct and that this procurement is qualitatively different from the current SRI contract, the decision to set this procurement aside for small businesses was proper, since the contracting officer had a reasonable basis to expect that offers would be obtained from at least two responsible small business concerns and that award would be made at a fair market price.²

The protests are denied.


 Robert P. Murphy
 Acting General Counsel

¹ (...continued)
 issue.

SRI further argues that the agency should consider the price that SRI proposed under the RFP in order to determine whether prices received from small businesses are fair and reasonable. This argument has no bearing on the protests, which concern the propriety of the RFP provisions, not the reasonableness of the prices which small businesses propose, once the procurement proceeds.

²Favorite Nurses further protests that SRI, because of alleged prior misrepresentation of its size status, should be precluded from competing in this procurement. Because SRI is not a small business and, as explained in our decision, the agency properly limited the competition to small businesses, this protest ground is academic.