



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

Decision

Matter of: Heritage Reporting Corporation
File: B-252425
Date: June 29, 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.
Richard Zorn, Esq., and David M. Smith, Esq., Federal Labor Relations Authority, 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 Federal Labor Relations Authority (FLRA) to set aside invitation for bids (IFB) No. 92-S-0101 for exclusive small business competition. The solicitation is for verbatim or court reporting and related services for: (1) all FLRA unfair labor practice and representation case hearings held in the 48 contiguous states, Washington, D.C., Puerto Rico and the Virgin Islands; (2) all oral arguments held before the FLRA in Washington, D.C.; and (3) all hearings before the Federal Services Impasses Panel.

We deny the protest.

BACKGROUND

The FLRA's previous contract for these services was awarded to Heritage in 1987 under a small business set-aside. That contract, including options, ended in July 1992. In May 1992, the contracting officer synopsisized the current

solicitation in the Commerce Business Daily (CBD) and announced that bids would be considered from all responsible sources. In response to that notice, the agency received inquiries and requests for copies of the solicitation from seven small businesses.

In July 1992, the contracting officer sent requests to five firms, including four small businesses, for quotations on a blanket purchase agreement (BPA) to provide court reporting services during the interim period until the new contract could be awarded. Four firms, including three small businesses, submitted quotations and a contract was awarded to a small business, Capital Hill Reporting Services.

As a result of the three small business quotations received for the interim requirement and the small business response to the CBD notice, the contracting officer decided that the court reporting requirement described in the IFB should again be set aside for small businesses. The agency published a notice in the CBD that the solicitation would be set aside for small businesses; after publication of that notice, five additional small businesses requested the solicitation. This protest followed.

In addition to the interest expressed by small businesses in competing for the award of a contract under the IFB, as well as the number of small business quotations received by the FLRA for its interim requirement, the FLRA reports that its decision to set aside the solicitation was influenced by the fact that two small businesses had submitted bids on the 1987 solicitation for these services. The agency also states that information obtained from the National Labor Relations Board (NLRB), which has successfully set aside similar contracts for small businesses, supports the set-aside determination. The FLRA explains that while the NLRB contracts for these services on a regional basis, as opposed to the national basis planned by the FLRA, the volume of hearings expected to be held by FLRA is much lower, such that small businesses could be expected to be able to meet FLRA's requirements. Finally, the agency argues that subsequent events support the set-aside decision since five bids were received from small businesses in response to the IFB and at least two of those bids are responsive.

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 (FAR) § 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 simply cannot have a sufficient number of employees to successfully perform the FLRA contract by itself. (Heritage calculates that a small business under SIC code 7338 can have only 38 employees.)¹ Heritage contends that a small business under SIC code 7338 will not have sufficient personnel to set up a national network of reporters, perform numerous other required duties in addition to the reporting function (including such tasks as providing back-up tapes, performing data verification, printing and binding transcripts, preparation of exhibits, copying, record keeping of transcript sales to third parties, and delivery of transcripts), service the firm's other clients and administer the company and its personnel. The protester essentially 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

¹Heritage bases this contention on its analysis of the Department of Commerce's "Census of Service Industries," which is compiled from financial information collected from various service industries and is reported based on SIC code designations. The most recent data available from the Commerce Department are for 1987 and Heritage argues that this information provides a baseline for determining the amount of revenue that a small business firm in the court reporting industry currently must generate to support the cost of each employee. Heritage explains that it calculated a 3-to-1 ratio of revenues earned to employee pay for firms in SIC code 7338, and that based on that ratio, and based on its determination of the current average salary of employees of firms in the court reporting industry, Heritage calculated that 38 is the maximum number of employees which a firm can have and remain within the \$3.5 million revenue limit for SIC code 7338.

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 firms that expressed interest in the solicitation are capable of performing the contract without violating the 50-percent subcontracting limitation.

Finally, Heritage disputes the contracting officer's reliance on the NLRB's contracts and quotations received on the BPA to support the set-aside determination. Heritage argues that the NLRB's regional contracts, rather than supporting the agency's conclusion, support the protester's argument that a small business under SIC code 7338 is not capable of performing the FLRA's national contract. Also, Heritage argues that relying on the number of small business quotations received on the BPA for the agency's interim requirement was faulty since the BPA was not subject to the 50-percent rule. 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).² 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

²FAR § 19.501(g) provides that once a service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements for the service "shall, if required by agency regulations, be acquired on the basis of a repetitive set-aside" Although the previous contract for these services was set aside for small business, the FLRA's regulations do not require a repetitive set-aside so we will review the set-aside decision under FAR § 19.502-2(a).

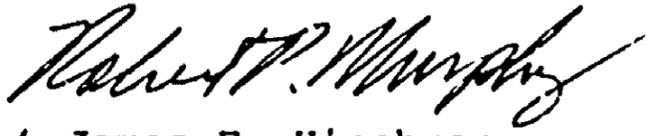
done so, Id. Here, we conclude that the contracting officer's decision to set the procurement aside was reasonable.

First, we find no merit to Heritage's argument that the NLRB's contracts which were regional in scope, rather than national, do not provide support for the FLRA's determination that small businesses are capable of performing its contract. In this respect, the record shows that each of two small businesses holds NLRB contracts for court reporting services in 7 of the NLRB's 34 regions. One of those firms has contracts in such diverse geographical regions as Boston, Philadelphia, New Orleans, Fort Worth, Seattle, Newark and Denver. In a recent year, approximately 600 hearings, considerably more than the number FLRA expects to be held during the contract year, were held in those 7 regions. There is no evidence in the record indicating that the small business firms did not or are not meeting contract requirements, including the 50-percent rule. Thus, we think that the contracting officer could reasonably conclude, based on the geographical diversity of the NLRB's contracts and the volume of hearings held under those contracts, that a small business could meet the FLRA's requirements.

Second, although Heritage argues that small businesses cannot perform the FLRA's national contract without violating the 50-percent rule, the contracting officer had no evidence that this was the case. In this respect, even accepting Heritage's assertion that a small business under SIC code 7338 can have no more than 38 employees, this record does not establish that a small business could not perform the FLRA contract without violating the 50-percent rule. The 50-percent rule does not prohibit subcontracting. That rule only requires that the awardee incur at least 50 percent of the personnel costs for contract performance using its own employees. Thus, a small business could subcontract for a significant amount of work without violating the 50-percent rule. Several of the small business bidders under the IFB 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.

Moreover, it is not clear that the 38-employee figure is accurate. SIC code 7338 is not limited to reporting firms but also includes secretarial, typing, resume writing and word processing companies. Also, the Commerce Department data on which Heritage relies is 6 years old. Accordingly, that data may not reflect the number of employees of small business court reporting firms.

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.


for James F. Hinchman
General Counsel