

Matter of: Building Services Unlimited, Inc.

File: B-254743

Date: January 14, 1994

Carol L. O'Riordan, Esq., Shapiro, Lifschitz and Schram, P.C., for the protester.
Colonel Riggs L. Wilks, Jr., and Major Bobby G. Henry, Jr., Department of the Army, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency's failure to set procurement aside for small disadvantaged businesses (SDB) is sustained where in determining whether or not bids from two or more SDBs could reasonably be expected, agency failed to investigate whether SDB bidders under previous solicitation for same services were interested in competing, and agency received expressions of interest from two SDBs prior to issuance of the solicitation.

DECISION

Building Services Unlimited, Inc. (BSUI) protests the decision by the Departments of the Army and Air Force, National Guard Bureau, not to set aside for small disadvantaged business (SDB) concerns invitation for bids (IFB) No. DAHA20-93-B-0006. The solicitation is for a job order contract for minor construction, repair, and renovation projects at the Combat Readiness Training Center, Phelps Collins Air National Guard Base, Alpena, Michigan. BSUI contends that the agency relied on incomplete information in determining not to set the procurement aside.

¹The protester argues, in the alternative, that if the acquisition is not set aside for SDBs, delivery orders not expected to exceed \$25,000 should be excluded from the scope of the solicitation and set aside for either small businesses or emerging small businesses. Since we sustain BSUI's protest on the first ground, we need not address this alternative argument.

We sustain the protest.

A pre-solicitation notice published in the Commerce Business Daily (CBD) on May 14, 1993, summarized the terms of the IFB and invited interested bidders to request copies of the solicitation. The notice referred readers to CBD numbered note 6, which informed them that the proposed contract either was, or was being considered for issuance as, a total SDB set-aside. The notice did not ask interested SDB bidders to furnish evidence of their capability to perform or their eligibility as SDBs, nor did it inform them that the IFB would be issued as unrestricted if an adequate number of SDBs did not express interest; it did, however, ask prospective bidders to identify the size of their businesses when requesting a copy of the solicitation.

Twenty-two firms, including one SDB, responded to the May 14 CBD notice. These firms were in turn issued copies of Standard Form (SF) 1417, which they were required to complete in order to receive a copy of the solicitation documents. Eleven firms, none of which was an SDB, returned their SF 1417s by the due date indicated on the form. Four additional firms, including one SDB, returned their forms late, but their expressions of interest were not considered in making the set-aside determination. The contract specialist concluded that there was no expectation that bids would be received from more than one responsible SDB and that the solicitation should be issued on an unrestricted basis.

A second synopsis of the solicitation, which identified the acquisition as unrestricted, was published in the CBD on July 12. By letter dated July 30, BSUI notified the contracting activity of its interest in the procurement and requested that the acquisition be set aside for SDBs. BSUI identified itself as a woman-owned SDB concern and included a capability statement with its letter. In a second letter, dated August 2, BSUI reiterated its request that the IFB be set aside for SDBs and noted that it also qualified as an emerging small business concern.² On August 5, the contracting activity issued the solicitation on an unrestricted basis.

The IFB, as amended, set bid opening for September 8. On September 2, BSUI filed its protest with our Office.

²The Federal Acquisition Regulation (FAR) defines an "emerging small business" as a small business concern whose size is no greater than 50 percent of the numerical size standard applicable to the standard industrial classification code assigned to a contracting opportunity. FAR § 19.1002.

Despite the pendency of the protest, the agency received and opened bids as scheduled. Three of the 11 bids opened were from SDBs. BSUI did not submit a bid.

The regulations implementing the Department of Defense SDB program, set forth in Defense FAR 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 technological talent consistent with the demands of the acquisition will be offered. DFARS § 219.502-2-70(a); Holmes & Narver Constr. Servs., Inc., B-251470.2, Aug. 24, 1993, 93-2 CPD ¶ 114. The regulations further provide that when a service has been successfully acquired by a contracting office under an SDB set-aside, all future requirements of that office for that service are to be acquired under an SDB set-aside unless the contracting officer determines that there is no reasonable expectation that the above criteria can be met. DFARS § 219.501(g) (S-70); Railroad Constr. Co., Inc., B-249748.3, Dec. 29, 1992, 92-2 CPD ¶ 446.

Although the previous year's solicitation for the same services had been set aside for SDBs, four SDBs had submitted bids, and award had been made to an SDB, there is no mention of the previous procurement in the set-aside determination, nor is there any indication that the bidders who responded to that IFB were contacted and asked whether they intended to bid under the instant solicitation. Moreover, it is clear that the agency did in fact regard three of the firms as potential competitors since it

³The agency argues that BSUI is not an interested party to maintain the protest before our Office since its "direct economic interest would not be affected by the award of the contract or failure to award the contract." According to the agency, BSUI does not have an economic interest in this procurement since it would have bid only if the IFB, which was issued unrestricted, had been issued as an SDB set-aside. We disagree. There is no dispute that BSUI would have bid if the IFB had been issued as an SDB set-aside; clearly then, it has a direct economic interest in the agency's failure to set the procurement aside for SDBs.

included them on its bidders mailing list and sent them copies of the solicitation.

The number of statements of interest from SDBs received in response to a CBD notice is one gauge of the level of SDB interest in a procurement; however, where the services have previously been acquired, the agency should examine the acquisition history for the services as well. Exclusive reliance on the number of responses to the CBD notice was a particularly inappropriate means of determining SDB interest here given that the notice did not ask prospective SDB bidders to express an interest in the acquisition by furnishing statements of capability and eligibility; it merely informed them where to write if they wanted to request a copy of the solicitation. Under these circumstances, we think that the bidders under the previous year's solicitation might well have assumed that they were already on the bidders mailing list and that they would receive a copy of the solicitation without specifically requesting it, and thus not submitted a request for a copy of the solicitation in response to the CBD notice.

Even if the contracting specialist had adequately investigated the SDB sources that had submitted bids under the previous solicitation and had reasonably concluded, based on the information obtained, that at least two could not be expected to submit bids under this solicitation, he would still have been required to reconsider his decision to issue the solicitation as unrestricted once he received BSUI's letter of July 30 stating that it was an SDB concern that was interested in competing, since this was at least the second expression of interest that the agency had received from an SDB.⁵ The agency explains that it did not revise its set-aside determination after receipt of BSUI's letter since during discussions with contracting officials, BSUI disclosed that it was "woman-owned, not [an] SDB."

In its letter of July 30, BSUI identified itself as a woman-owned SDB concern. Although the contracting officials appear to have assumed that BSUI incorrectly labeled itself an SDB based on the fact that it was woman-owned--or that a woman-owned firm could not also qualify as an SDB---a woman-owned firm can qualify as an SDB if the woman owner is a

⁴The agency states that it did not expect the fourth firm, which was the incumbent contractor, to bid since it had received an Internal Revenue Service tax levy which, according to the agency, made the firm ineligible to bid on this project.

⁵As previously noted, one SDB had responded to the CBD notice.

member of a socially and economically disadvantaged group,⁶ as is apparently the case with BSUI.

The record shows that the agency received expressions of interest from at least two SDBs prior to issuance of the IFB (i.e., prior to the point where any non-SDB firms might have incurred any expense in preparing a response to the solicitation). The agency also never determined, and has presented no evidence suggesting, that acceptable prices-- i.e., prices less than 10 percent above the fair market price--⁷would not be received if the procurement were set aside.⁷ Accordingly, we see no basis in this record to conclude that the conditions supporting a repetitive SDB set-aside do not continue to exist. See id.

⁶The FAR defines an SDB as a small business concern that is at least 51 percent unconditionally owned by one or more individuals who are both socially and economically disadvantaged. i.e., Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans and Subcontinent-Asian Americans. FAR § 19.001.

⁷The record supports the conclusion that acceptable prices would be received. It shows that a contract for the services being procured here previously was awarded to an SDB and that a number of other SDB concerns are currently performing similar job order contracts at other National Guard installations. Since award cannot be made to an SDB under a set-aside at a price exceeding the fair market price by more than 10 percent, DFARS § 219.506(a), the agency presumably determined before making each of these awards that the SDB prices were within 10 percent of the fair market price. See Holmes & Narver Constr. Servs., Inc., supra.

⁸The protester argues that the agency should have included the "Variation in Estimated Quantity" clause set forth at FAR § 52.212-11 in the solicitation. This clause provides for equitable adjustment of the contract price upon demand of either party where the quantity of a unit-priced item in the contract is an estimated quantity and the actual quantity of the unit-priced item varies more than 15 percent above or below the estimated quantity.

Unlike the solicitation in the case cited by the protester in support of this argument, Sletager, Inc., B-244710, Nov. 13, 1991, 91-2 CPD ¶ 452, the IFB here contains no quantity estimates; rather, it contemplates award of a job order contract under which services are accomplished by use of individual delivery orders. The delivery orders are based on application of fixed unit prices for specific

(continued...)

We recommend that the IFB be canceled and reissued as an SDB set-aside. In addition, we find that BSUI is entitled to recover the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(e) (1993). In accordance with 4 C.F.R. § 21.6(f), BSUI's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States

⁸(...continued)
construction tasks, multiplied by a coefficient submitted by the contractor. See Holmes & Narver Constr. Servs., Inc., supra. The IFB sets out minimum and maximum total dollar amounts for orders under the contract, but contains no estimates for individual tasks. Accordingly, we see no basis to conclude that the "Variation in Estimated Quantity" clause should be included in the IFB.