



Comptroller General
of the United States

85299

Washington, D.C. 20548

Decision

Matter of: Specialized Contract Services, Inc.
File: B-257321
Date: September 2, 1994

Herbert C. Ross for the protester.
Capt. Gerald P. Kohns, and Roy L. Masengale, Esq.,
Department of the Army, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. Agency's determination not to set aside a procurement for small business concerns was reasonable where the agency concluded from a consideration of relevant factors that it could not reasonably expect to receive proposals from at least two responsible small business offerors at fair market prices.
2. Use of negotiation rather than sealed bidding procedures was proper where the agency reasonably determined, based on its experience, that it must evaluate technical factors in addition to price.

DECISION

Specialized Contract Services, Inc. (SCS) protests certain terms of request for proposals (RFP) No. DAKF57-94-R-0010, issued by the Department of the Army for meals and lodging for the Military Entrance Processing Station (MEPS) in Portland, Oregon. SCS argues that the Army improperly failed to set aside the procurement for small business concerns, and that the agency should have used sealed bidding rather than negotiated procedures.

We deny the protest.

Initially, the requirement for this procurement was synopsized in the Commerce Business Daily (CBD) on August 20, 1993, as an unrestricted sealed bid procurement. The contracting officer investigated whether the procurement should be restricted to small business in accordance with Federal Acquisition Regulation (FAR) § 19.502-2, and determined that a set-aside was not feasible. The Army subsequently published an amended CBD synopsis on January 7,

1994, indicating that the procurement would be conducted under negotiated procedures.

On April 12, the agency issued the solicitation on an unrestricted basis with a May 17 closing date for receipt of proposals. The RFP contemplated the award of a firm, fixed-price, indefinite quantity contract for a base year and 3 option years. The RFP specified that award would be made to the offeror whose proposal represented the best value to the government, based on two evaluation factors listed in descending order of importance: quality and price. The quality factor contained two subfactors: technical plan and management plan. Under technical plan, the solicitation set forth the following sub-subfactors, in descending order of importance: (1) location of hotel, (2) transportation plan, (3) location of restaurant, and (4) amenities.

SCS argues that the requirements of FAR § 19.502-2(a)--that there be a reasonable expectation that offers would be obtained from at least two responsible small business concerns at fair market prices--were met here, and that the contracting officer thus was required to set aside this procurement for small business. In this connection, SCS asserts that the contracting officer should have expected offers from at least two small business concerns, since other small business concerns competed for the identical requirement under a prior unrestricted solicitation (No. DAKF57-90-B-0041), and more than two small business concerns are on the bidders' mailing list (BML) for the current solicitation.

A decision whether to set aside a procurement for small business concerns is essentially a business judgment within the contracting officer's discretion, which we generally will not disturb absent a showing that this discretion was abused. Universal Hydraulics, Inc., B-232144, Oct. 31, 1988, 88-2 CPD ¶ 417. The record indicates that the agency had sufficient grounds to decide not to set aside this requirement.

The agency received six responses to the CBD synopsis. Of these responses, two firms requested to be removed from the BML, as they could not provide the required services, while another firm indicated that it was a large business. Of the

¹A procurement 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. Federal Acquisition Regulation (FAR) § 19.502-2(a).

remaining three firms, although one was a small disadvantaged business and two were small businesses, none owned offices or hotels located in the Portland area. As a result, the Army concluded that none of these three firms would be able to comply with the subcontracting limitation in FAR § 52.219-14, required to be included in all solicitations which are set aside for small business, mandating that at least 50 percent of personnel costs under a set-aside service contract be expended for employees of the concern. In addition to the information from the CBD responses, the Army requested the Small Business Administration (SBA) Procurement Center Representative to recommend any qualified small business hotels in the Portland area capable of meeting the specifications. After searching for qualified small businesses on its PASS system,² the SBA representative was unable to suggest any known small business firms in the Portland area as potential sources for these requirements.

We find that the agency proceeded reasonably to determine whether a small business set-aside was warranted and deciding, based on the information obtained, that it was not.³ The fact that small business concerns may have successfully competed under the Army's prior unrestricted solicitation for the identical requirement does not require a different result. Although the record shows that three of the four bids received under the prior solicitation were in fact from small businesses, one of these firms is no longer a small business, and the other two firms' prices were determined at the time to be unreasonably high. Thus, there was no indication from the prior unrestricted procurement that acceptable small business offers would be received at a fair market price.

Similarly, the fact that there were more than two small business concerns on the BML for the current solicitation, by itself, did not warrant setting the requirement aside. Where, as here, the contracting officer, after reasonable efforts, cannot ascertain that there are two or more responsible small businesses that would propose to successfully perform the services at a fair market price, the fact that two or more small business concerns were included on the BML does not support a set aside. See State Management Servs., Inc., B-252312, June 21, 1993, 93-1 CPD ¶ 474. This is because small businesses routinely request

²PASS refers to the SBA's nationwide small business bidders' list called the Procurement Automated Source System.

³We note that the protester did not rebut the agency's position in its comments on the agency's administrative report.

to be informed of procurements and a pre-solicitation mailing has not been shown to reflect any expectation that the firms will actually bid. See Kunz Constr. Co., Inc., B-234093, Mar. 30, 1989, 89-1 CPD ¶ 334. In fact, the record shows that of the offers received, only one is from a small business.

SCS also argues that the Army acted improperly in issuing the RFP because the use of sealed bidding for this procurement is required by FAR § 6.401(a), which provides that sealed bidding shall be used if: (1) time permits; (2) award will be based on price; (3) discussions are not necessary; and (4) more than one bid is expected. SCS objects to the agency's use of negotiated procedures, arguing that most contracts for the identical requirement have been solicited on a sealed bidding basis, and that the RFP's requirements here are so detailed and exhaustive as to dissuade both small and large businesses from submitting proposals.

The Competition in Contracting Act (CICA) directs contracting agencies to use the competitive procedure that is best suited to the circumstances of the procurement. 10 U.S.C. § 2304(a)(1)(B) (1988). CICA does, however, require agencies to use sealed bidding when the conditions enumerated above in FAR § 6.401(a) are present. If any one of the conditions is not present, sealed bidding may not be used; in such instances, negotiated procedures (competitive proposals) are to be utilized. 10 U.S.C. § 2304(a)(2)(B). Agency determinations that the conditions requiring the use of sealed bidding are not present must be reasonable. F&H Mfg. Corp., B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.

Here, the Army has determined that it cannot use sealed bidding for this procurement primarily because it must evaluate factors other than price in selecting an awardee. In making this determination, the contracting officer cited substantial problems that had occurred under the Army's previous contracts for these type services primarily resulting from the location of the hotels. Specifically, the Army's contract with a firm providing similar services in Spokane, Washington, was terminated for default due to prostitution and drug dealing activities that occurred on the hotel grounds and in the area adjacent to the hotel. Similar incidents occurred on the Army's contract with a firm providing similar services in Oakland, California, which was located adjacent to one of the highest crime areas in the nation. The Army reports that the key to avoiding these problems and to ensuring the safety of its personnel staying at the hotels is to evaluate the offers, in part, based on the location of a proposed hotel. The Army thus determined that technical factors and subfactors, as stated above, were to be considered in addition to price. Given

these considerations, we think the agency reasonably concluded that its minimum requirements necessitated the use of negotiated rather than sealed bidding procedures.⁴

The fact that identical Army requirements previously may have been solicited using sealed bidding procedures is not material, since an agency's past practice is not a basis for questioning its application of otherwise correct procurement procedures. See I.T.S. Corp., B-243223, July 15, 1991, 91-2 CPD ¶ 55. Further, the use of negotiated procedures is not rendered improper merely because these procedures necessitate more detail in the solicitation and may make it more burdensome for some interested firms to compete.

The protest is denied.

/s/ James A. Spangenberg
for Robert P. Murphy
Acting General Counsel

⁴Again, the protester did not respond in its comments to the Army's position.