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

4591611

Decision

Matter of: General Distributors, Inc.
File: B-257812
Date: November 14, 1994

Michael A. Gordon, Esq., Holmes, Schwartz & Gordon, for the protester.
Jonathan C. Cramer, Esq., Department of Justice, for the agency.
Wm. David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency decision not to set aside procurement for exclusive small business participation is improper where the contracting officer did not investigate all the information available to him, and agency records showed the existence of a large number of small business bidders dealing in the items being procured. Without further investigation, the contracting officer could not reasonably conclude that there was not a reasonable expectation that bids at fair market prices could be obtained from at least two responsible small businesses.

DECISION

General Distributors, Inc. protests the failure of the Federal Prison Industries (UNICOR), to issue invitation for bids (IFB) No. 1PI-B-1023-94, as a small business set-aside. General contends that the agency had no basis for issuing the IFB on an unrestricted basis since there are numerous small business firms that can supply the agency's needs at reasonable prices.

We sustain the protest.

The IFB, issued on May 20, 1994, requested prices for a base year and 1 option year on four line items, each consisting of the estimated needs of the Federal Correctional Institution (FCI-El Reno) at El Reno, Oklahoma, for angle steel of different dimensions; and established a June 23 bid opening date. The IFB was mailed to 30 prospective bidders. General objected to the agency that it should set the

procurement aside for exclusive small business participation, and when the agency declined to do so, General filed this protest with our Office and did not submit a bid because it did not believe it could be competitive under an unrestricted solicitation. Five bids--three from small businesses and two from large businesses--were received and opened. The low and second low bids were submitted by small businesses. On September 16, the agency determined that FCI-El Reno's needs for angle steel in order to complete a contract of its own by October 12 presented "urgent and compelling circumstances" which required award of the contract notwithstanding the protest. Award was made to the third low bidder--a large business. The low, small business bidders declined to extend their bid acceptance periods in response to extension requests by the agency which resulted from this protest filing.

The agency contends that it made reasonable efforts to determine whether the procurement should be unrestricted or set aside, and on the basis of these efforts determined that there was no expectation that bids would be obtained from at least two responsible small business concerns at reasonable prices. First, it considered the recent procurement history at FCI-El Reno. The agency reports that, in April 1994, it was necessary to terminate a contract with a small business due to significant delays in its angle steel deliveries caused by that firm's inability to obtain steel in a timely fashion. According to the agency, similar problems had also occurred at other federal correctional institutions. These adversely affected the production of the institutions themselves. The agency also notes that prior to this protest the small business coordinator had not received any requests from small businesses to set aside FCI-El Reno's purchases of angle steel. Second, the agency considered the fact that the current domestic steel market was characterized by volatility and a greatly restricted steel supply. According to the agency, this problem resulted from tariffs that had been imposed on imported steel to deter dumping and increases in steel prices that domestic producers were able to impose by restricting the supply of steel.¹

An acquisition is required to 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 fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a).

¹The agency notes that it was determined that this specific requirement will be set aside for small businesses in the future.

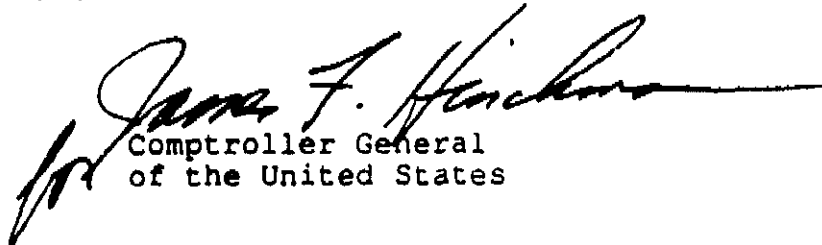
In this regard, a contracting officer must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses with the capabilities to perform the work, Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248. We have found unreasonable the determination to issue a solicitation on an unrestricted basis where the determination is based upon outdated or incomplete information. See The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. We have also found the determination to issue a solicitation on an unrestricted basis unreasonable where the agency failed to investigate the capabilities of small businesses that it knew to exist at the time the determination was made. Wind Gap Knitwear, Inc., B-251411; B-251413, Mar. 31, 1993, 93-1 CPD ¶ 281.

Here, the contracting officer's determination that there was no reasonable expectation that at least two responsible small businesses would submit bids at fair market prices was unreasonable under the existing circumstances. The fact that the small business coordinator had not had any requests that procurements of angle steel be set aside solely for small businesses, and that he may have agreed with the decision to issue this IFB on an unrestricted basis is not controlling where inadequate or incomplete information is the reason for the faulty decision not to set the procurement aside. Wind Gap Knitwear, Inc., B-251411; B-251413, Id. In this instance, the abstracts for the procurements of angle steel for a period of 3 years show the existence of a significant number of small business bidders. There is nothing to show that the small businesses listed on the bid abstracts received any consideration before the determination to advertise on an unrestricted basis was made. Further, the bidders' list for the immediate procurement--which the record shows was developed from agency computer files containing the pertinent information from bidders' Forms 129, submitted by firms interested in bidding for this item and show size status--contains the names of 30 small business concerns. This information was in the possession of the agency at the time the determination was made not to set aside the IFB. The record contains no explanation as to why the contracting officer did not consider that information.

The agency's justification for its method of determining small business availability is the statement from one of the agency's technical personnel that he finds the market research performed here "more effective than relying on contacting businesses regarding prices and ability to supply which has proven to be unreliable in my experience." This market research revealed the recent poor performance by one small business and the volatility of the market. We are not persuaded that one bad experience with a small business

should excuse the agency from investigating further where there is expressed small business interest in this market. Moreover, the agency has provided no explanation for why the volatility of the current market would affect small business bidders either more or differently than it would affect large business bidders. In any event, the agency made no effort to discuss this issue with the potential small business bidders. As a result, the agency had no concrete information on the effect of market volatility on small business suppliers. The determination to issue an unrestricted procurement, therefore, was based on incomplete and insufficient information concerning potential small business participation.

Accordingly, we find that this procurement was improperly solicited on an unrestricted basis. The agency overrode the stay of award of this indefinite quantity contract based on an urgent need. However, since this is a requirements contract and only one order has been placed during the first 3 months of this contract, UNICOR should resolicit the remaining base year requirements as a small business set-aside and then terminate the current contract.² If there are other circumstances, which are not reflected in the record before us, which cause the agency to conclude that termination is not feasible, we recommend that the option not be exercised and, if it is necessary to procure the option year needs, the procurement should be solicited as a small business set-aside. We also find that General should be awarded the expenses it incurred in pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d) (1994). General should file its claim, detailing and certifying the time expended and costs incurred, with the Department of Justice within 60 days after receipt of this decision. 4 C.F.R. § 21.6(f) (6).


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²While we ordinarily would require the agency to investigate the availability of the small business participation, the agency concedes that a small business set-aside for future procurements of angle steel is appropriate.