



## Decision

**Matter of:** JRS Staffing Services

**File:** B-414630; B-414630.2

**Date:** July 28, 2017

---

Jacqueline R. Sims for the protester.

William Robinson, Esq., and Nihar Vora, Esq., Department of Justice, for the agency.  
Alexander O. Levine, Esq., and Jennifer D. Westfall-McGrail, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

### DIGEST

Protest challenging agency's decision to negotiate a sole-source contract with a Historically Underutilized Business Zone (HUBZone) small business concern is denied where the agency's decision was reasonably based on the agency's market research and the agency's lack of progress in meeting its HUBZone goals.

---

### DECISION

JRS Staffing Services, a woman-owned small business (WOSB) located in Lawrenceville, Georgia, protests the decision of the Department of Justice, Bureau of Prisons (BOP) to negotiate a sole-source award with ProHill Services LLC, a WOSB and a Historically Underutilized Business Zone (HUBZone) small business concern, located in Virginia Beach, Virginia, for life connections program facilitator services at the Federal Medical Center Carswell, Ft. Worth, Texas.

We deny the protest.

### BACKGROUND

On July 18, 2016, BOP issued a solicitation seeking a life connection program facilitator at the Federal Medical Center Carswell. Contracting Officer's Statement (COS) at 1. The solicitation was issued without any restriction on competition. Id. Following a protest by JRS, the agency canceled the solicitation in order to conduct market research regarding whether it would be feasible to set aside the requirement for small businesses. Id. On December 12, the agency awarded a HUBZone sole-source contract for the requirement to ProHill in accordance with Federal Acquisition Regulation (FAR) § 19.1306. Id.

On January 19, 2017, JRS filed a protest with our Office of the award to ProHill. Among other arguments, JRS challenged the agency's failure to post a notice of its intent to award a sole-source contract on the FedBizOpps website. Id. On February 9, BOP terminated the challenged contract in order to begin the procurement process over. Id.

On March 1, BOP posted a statement of work and a sources sought notice for the requirement on the FedBizOpps website. The sources sought notice included a market research questionnaire that asked interested vendors various questions, including the vendors' size status under the applicable North American Industrial Classification System (NAICS) code and the vendors' status under any applicable "[s]ocio-economic program(s)." Agency Report (AR), Tab 4, Market Research Questionnaire, at 1. The FedBizOpps entry also contained a "general information" column that listed the requirement as "Total Small Business." AR, Tab 3, Sources Sought Notice, at 1.

The agency received two responses to the sources sought notice, one from JRS and one from ProHill. AR, Tab 10, Memo. on Market Research, at 1-2. In addition to reviewing these responses, the agency's contracting officer conducted a search of the Small Business Administration's (SBA) website to locate HUBZone small businesses listed under the applicable NAICS code. Id. at 2. The contracting officer determined that ProHill was the only HUBZone small business with a capability statement that matched the instant requirement. Id. at 2.

On April 11, BOP posted a synopsis on the FedBizOpps website providing notice of the agency's intent to negotiate a sole-source contract with ProHill. AR, Tab 11, FedBizOpps Synopsis. Attached to the synopsis was a request for quotations (RFQ) for the requirement,<sup>1</sup> which stated that the solicitation was 100 percent set aside for HUBZone small business concerns. AR, Tab 12, Solicitation, at 3.<sup>2</sup> The solicitation also included a cover letter providing a closing date for quotations of May 1, and instructing interested vendors on how their quotations should be submitted. Id. at 1. The RFQ stated that award would be made to "an offeror, pursuant to an affirmative determination of responsibility, whose offer, conforming to the solicitation, is determined to be the best value to the Government considering price, technical and past performance." Id. at 28.

On April 27, JRS filed a protest with our Office.

---

<sup>1</sup> The solicitation number was RFQP05051700004.

<sup>2</sup> The solicitation contained two different sets of page numbering. Unless otherwise noted, citations herein are to the bates numbers appearing at the bottom of the page.

## DISCUSSION

JRS challenges the agency's decision to negotiate a HUBZone sole-source award with ProHill. The protester argues that this decision was predicated on flawed market research and the incorrect conclusion that there was only one WOSB interested in, and capable of performing, the requirement. JRS further alleges that the agency violated FAR Part 19 requirements by making the decision without consulting with either the agency's Office of Small and Disadvantaged Business Utilization (OSDBU) or the SBA, and by failing to consider that the selected NAICS code was one in which WOSBs have been historically underrepresented. The protester additionally argues that the solicitation is ambiguous as to whether the agency intends to issue a HUBZone sole-source award or compete the requirement as a HUBZone set-aside.

As an initial matter, the FAR provides that "[t]here is no order of precedence among the 8(a) Program (subpart 19.8), HUBZone Program (subpart 19.13), Service-Disabled Veteran-Owned Small Business (SDVOSB) Procurement Program (subpart 19.14), or the Women-Owned Small Business (WOSB) Program (subpart 19.15)." FAR § 19.203(a). In determining which socioeconomic program to use, the contracting officer is required to consider, at a minimum, the (1) results of market research performed to determine if there are socioeconomic firms capable of satisfying the agency's requirement, and (2) the agency's progress in fulfilling its small business goals. FAR § 19.203(d).

The protester challenges the agency's determination to award the requirement through the HUBZone program.<sup>3</sup> In this regard, the protester asserts that the agency's market research was flawed because the sources sought notice misleadingly indicated that the requirement had already been 100 percent set-aside for small businesses. JRS contends that this misstatement made it appear that the agency had already decided to set aside the acquisition, which prejudicially impacted the number of responses the agency received. The protester argues that the agency's determination to make a HUBZone sole-source award based on such "flawed market research" was in error.

We do not agree. In our view, when read as a whole, the documents included with the sources sought notice indicated that the agency had not yet reached a final

---

<sup>3</sup> Section 19.1306 of the FAR permits an agency to award a contract to a HUBZone on a sole-source basis where: (1) the contracting officer does not have a reasonable expectation that offers would be received from two or more HUBZone small business concerns; (2) the anticipated price of the contract does not exceed \$4 million in the case of non-manufacturing services; (3) the requirement is not currently being performed by an 8(a) participant or has not been accepted by the SBA as an 8(a) requirement; (4) the acquisition is greater than the simplified acquisition threshold; (5) the HUBZone small business concern has been determined to be a responsible contractor; and (6) award can be made at a fair and reasonable price. JRS does not expressly argue that any of these requirements have not been met.

determination regarding how it would procure the requirement. In this regard, while the FedBizOpps website entry listed the set-aside status as “Total Small Business,” none of the substantive documents accompanying the entry (i.e., the market questionnaire and the statement of work) stated that the requirement had been set aside exclusively for small businesses or stated that the agency had reached a final determination on how it would acquire the services. In fact, the questionnaire sought information about each responding vendor’s socioeconomic program status.

Moreover, even if the requirement had been set aside for small businesses, interested WOSBs (and participants in SBA’s other small business programs) would have been eligible to compete for the requirement. Because WOSBs would have been eligible to compete under a small business set-aside, we see no reason that interested WOSBs would have been unlikely to respond to the sources sought notice at issue. Indeed, we note that JRS submitted a response to the sources sought notice despite its belief that the agency had chosen to procure the requirement as a small business set-aside. We therefore do not conclude that the agency’s market research was misleading or inadequate.<sup>4</sup>

JRS further argues that the agency overlooked or ignored the fact that ProHill, in addition to being a HUBZone small business, was a WOSB. The protester contends that had BOP properly considered this fact, the agency would have realized that it could compete the requirement as a WOSB set-aside since there was a reasonable expectation that at least two WOSBs (JRS and ProHill) could perform the requirement.<sup>5</sup> The protester argues that there is no indication in the record that BOP considered this fact prior to deciding to award the requirement as a HUBZone sole-source.

---

<sup>4</sup> We note that our Office has found that agencies need not use any particular methodology when conducting market research, and that measures such as prior procurement history, market surveys, and advice from the agency’s small business specialist may all constitute adequate grounds for a contracting officer’s decision. Guardian Moving & Storage Co., Inc., B-410171, Nov. 6, 2014, 2014 CPD ¶ 334 at 3. Here, the agency’s market research included both a market questionnaire and a search of the SBA’s website.

<sup>5</sup> The FAR provides that a contracting officer may restrict competition to WOSB concerns provided certain requirements are met, including that there be a reasonable expectation based on market research that “[t]wo or more WOSB concerns eligible under the WOSB Program. . . will submit offers.” FAR § 19.1505(c). Nothing in this section, however, requires an agency to procure a requirement under the WOSB program, rather than under another SBA program, simply because two or more WOSB concerns have expressed interest in the requirement.

We find that the record reasonably supports the agency determination to procure the requirement under the HUBZone program.<sup>6</sup> As noted previously, the FAR expressly states that there is no order of precedence between the WOSB and HUBZone programs, and, in deciding which program to select, agencies are to consider both the results of their market research and their progress in fulfilling their small business goals. FAR § 19.203(a), (d).

Here, the record establishes that, while BOP considered the results of its market research, the agency's decision to use the HUBZone program was based primarily on the agency's lack of progress in meeting its HUBZone goals. In this regard, as of May 16, BOP had spent only 0.75 percent of its acquisition dollars on HUBZone small business concerns, well short of its 3 percent goal.<sup>7</sup> AR, Tab 13, BOP Small Business Goal Info., at 2. At the same time, the agency had spent 7.15 percent of its acquisition dollars on WOSBs, which was in excess of its 5 percent goal. Id. In issuing a JOFOC, the agency expressly referenced the agency's lack of progress in meeting its HUBZone goals, stating that "[t]he agency's HUBZone small business goal has been difficult to achieve so an increased emphasis is being placed on this program." AR, Tab 9, JOFOC, at 2. We find this rationale to be reasonable and see no evidence that the ultimate decision to use the HUBZone program would have changed had the agency expressly acknowledged that there were two WOSBs interested in performing the requirement.

Next, relying on its contention that the agency originally set aside the acquisition for small businesses, JRS argues that the agency violated FAR § 19.506 by failing to consult with either BOP's small business specialist or the SBA prior to changing the requirement from a small business set-aside to a procurement conducted under the HUBZone program. JRS also argues that BOP violated FAR § 19.202 by failing to consult with the agency OSDBU prior to deciding to procure under the HUBZone program.

Regarding the first argument, the record fails to show that the agency had previously set aside the requirement for small businesses. We therefore find that the agency did not

---

<sup>6</sup> While the agency record does not contain an express consideration of the fact that there were two interested WOSBs, we note that ProHill's response stated in several places, including in bold font on the cover email, that the firm was a WOSB. AR, Tab 5b, ProHill Questionnaire Response, at 1-2. Additionally, ProHill's female owner was the person who corresponded with the agency and who was listed as the firm's point of contact. Id. at 1. As such, the record suggests that the agency was aware of ProHill's WOSB status.

<sup>7</sup> The protester objects to the agency's use of goal progress data from May 16 in support of its arguments, because the justification for other than full and open competition (JOFOC) was signed on April 5. We see nothing in the record, however, to suggest that the agency's goal progress was substantially different on the two dates.

withdraw or modify a small business set-aside as contemplated by FAR § 19.506. In this regard, while the March 1 FedBizOpps website entry contained a reference to the requirement being a total small business set-aside, the record evidences that the agency did not make a final decision regarding how it would procure the requirement until after BOP received responses to the sources sought notice. It was only at this time that the agency documented its analysis and issued a JOFOC. See AR, Tab 8, Set-Aside Decision Template (dated April 4), AR, Tab 9, JOFOC (dated April 5), AR, Tab 10, Memo. on Market Research (dated April 4). Once this analysis was completed, the agency issued the April 10 solicitation containing the HUBZone limitation.

Regarding the protester's second argument, FAR § 19.202 provides as follows:

In order to further the policy in [FAR] 19.201(a), contracting officers shall comply with the specific policies listed in this section and shall consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Director's designee, as to whether a particular acquisition should be awarded under [FAR] subpart 19.5, 19.8, 19.13, 19.14, or 19.15. Agencies shall establish procedures including dollar thresholds for review of acquisitions by the Director or the Director's designee for the purpose of making these recommendations. The contracting officer shall document the contract file whenever the Director's recommendations are not accepted.

While JRS interprets section 19.202 as requiring consideration of the OSDBU's recommendations for all set-aside determinations, we do not agree. Instead, reading the above regulation in a manner that gives effect to both the first and second sentences, we conclude that an agency is permitted to create policies and dollar thresholds governing when the agency will consult with the OSDBU. That is what BOP has done here. BOP Acquisition Policy 19.501 sets forth procedures governing the agency's consultations with the OSDBU, including a requirement that BOP provide notice to the OSDBU for unrestricted acquisitions exceeding \$2.5 million.<sup>8</sup> By setting this dollar threshold, the policy anticipates that consultation with the OSDBU will not be required where, as here, the value of the acquisition does not exceed \$2.5 million. In light of this policy, we conclude that BOP was not required to consult with the OSDBU before it decided to use the HUBZone program to acquire the services at issue.

JRS also argues that the agency was required by FAR §§ 19.201 and 19.1505 to consider the fact that WOSBs have historically been underrepresented in the NAICS code governing this procurement (813110). We disagree. As discussed above, FAR § 19.203(a) provides that there is no order of precedence between the WOSB and HUBZone programs. Nothing in the language of FAR §§ 19.201 or 19.1505 overrides this non-preference or requires an agency to make a specific finding with regard to the

---

<sup>8</sup> BOP Program Statement 4100.05, Mar. 3, 2016, at 96, available at [https://www.bop.gov/policy/progstat/4100\\_005.pdf](https://www.bop.gov/policy/progstat/4100_005.pdf) (last visited July 19, 2017).

representation of WOSBs under the applicable NAICS code before the agency can procure the requirement under the HUBZone program. Additionally, there is no requirement to consider this information as part of an agency's market research. Indeed, as noted above, agencies need not use any particular methodology when conducting market research; measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision. Guardian Moving & Storage Co., supra.

Finally, the protester argues that the solicitation issued by the agency was ambiguous regarding whether the requirement was being sole sourced to ProHill or being set aside for competition among HUBZone small business concerns. In support of this point, JRS notes that while the synopsis states that the agency intends to award a sole-source contract to ProHill, the attached solicitation stated that the solicitation was 100 percent set aside for HUBZone concerns; included instructions for the submission of quotations by interested vendors; and provided for award to the vendor whose quotation represented the best value. AR, Tab 12, Solicitation, at 1, 3, 26.

While we agree with the protester that the language in the solicitation was confusing as to whether the requirement was being sole-sourced to ProHill or competed amongst HUBZone concerns, we do not find that ProHill was prejudiced by any ambiguity that existed.<sup>9</sup> Competitive prejudice is an essential element of a viable protest; where the protester fails to demonstrate that, but for the agency's actions, it would have had a substantial chance of receiving the award, there is no basis for finding prejudice, and our Office will not sustain the protest, even if deficiencies in the procurement are found. HP Enter. Servs., LLC, B-411205, B-411205.2, June 16, 2015, 2015 CPD ¶ 202 at 6. Here, since JRS is not a HUBZone small business concern, it would not have been able to submit a proposal for the requirement even if the confusing language in the solicitation was resolved in favor of permitting HUBZone concerns to compete. We

---

<sup>9</sup> We also note that the agency provided some clarification on this point in its correspondence with JRS prior to the proposal submission deadline. In this regard, the contracting officer advised JRS on April 27 that "[a]ny other HUBZone company who is interested could contact me [prior to the proposal submission deadline] to indicate interest. I actually was expecting a response from you indicating you could work with a HUBZone partner as you had indicated this in the past?????" AR, Supp. Tab 2, Correspondence between JRS and BOP, at 1.

therefore conclude that JRS has not suffered prejudice from any error committed by the agency. See Bashen Corp., B-412032.2, Dec. 3, 2015, 2015 CPD ¶ 381 at 4 n.2 (protester cannot show prejudice where it was otherwise ineligible for award).<sup>10</sup>

The protest is denied.

Susan A. Poling  
General Counsel

---

<sup>10</sup> While JRS contends that it could have formed a joint venture with a HUBZone small business to compete for the requirement, this assertion is insufficient to establish prejudice. In this regard, JRS must assert direct prejudice on its own behalf, not indirectly on behalf of a hypothetical third party. Cf. InSpace 21 LLC, B-410852, B-410852.3, Dec. 8, 2014, 2014 CPD ¶ 363 at 3 (a joint venture participant is not an interested party to file a protest on behalf of the joint venture).