



Washington, D.C. 20548

Decision

Matter of: CardioMetrix

File: B-261327

Date: August 30, 1995 95-2 CPD ¶ 96.

Robert J. Loring for the protester.
Mike Colvin, Department of Health & Human Services, for the agency.
Behn Miller, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's determination not to set aside a procurement for small business concerns is reasonable where the agency concluded, based on the prior procurement history for the solicited services, that it could not reasonably expect to receive at least two offers from responsible small business concerns at fair market prices.

DECISION

CardioMetrix protests the terms of request for proposals (RFP) No. 764-05-08-95, issued by the Department of Health & Human Services for laboratory and pathology testing services at the Indian Health Center located at Fort Duchesne, Utah. CardioMetrix contends that the procurement should be conducted as a small business set-aside.

We deny the protest.

The RFP was issued on April 7 as an unrestricted procurement and contemplated the award of a base year plus 4 option-year requirements contract to the company submitting the most advantageous offer--based on a consideration of price and technical factors specified in the RFP. For their price proposals, offerors were to complete and submit the RFP's pricing schedule which required a fixed laboratory test fee rate for each contract year. With respect to technical proposals, the RFP required a detailed submission which would be evaluated under the following scheme: accreditation (20 points); quality improvement (20 points); staffing (20 points); reference material (20 points); and account satisfaction (20 points).

On May 5, CardioMetrix filed a protest with the agency which argued in part that the procurement should be conducted as a total small business set-aside; on May 8, after the agency refused to restrict the procurement to small business competition, CardioMetrix filed this protest at our Office.¹

An acquisition of services must 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 contract award will be made at fair market prices. Federal Acquisition Regulation (FAR) § 19.502-2(a). 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. Raven Servs. Corp., B-243911, Aug. 27, 1991, 91-2 CPD ¶ 203; MVW, Inc. et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270.

While the use of any particular method of assessing the availability of small business is not required in making a set-aside determination, an agency must undertake reasonable efforts to ascertain whether it is likely that two or more responsible small business concerns will actually submit proposals. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248. In this regard, we have recognized that such factors as the government's estimate and the prior procurement history for the solicited services may each constitute adequate grounds for a contracting officer's decision not to set aside a procurement. FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270; Raven Servs. Corp., supra.

¹In its agency-level protest, CardioMetrix also challenged several terms of the RFP. First, CardioMetrix challenged the requirement that all laboratory testing be performed on an in-house basis by the prime contractor as unduly restrictive; CardioMetrix also contended that the RFP was defective since it failed to specify a minimum quantity of laboratory testing services which the government would purchase. CardioMetrix also argued that the RFP's accreditation requirement was unclear. In response to these concerns, the agency removed the in-house performance restriction, and--during the course of this protest--issued an amendment which corrected the remaining solicitation defects by incorporating a minimum quantity of required laboratory testing services, and clarifying the accreditation requirement. CardioMetrix has not filed any response or rebuttal to the agency's corrective actions; consequently, we consider these issues to be resolved, and will not consider them further. Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

In this case, the contracting officer's determination not to set aside the procurement for small business concerns was made in reliance on the recent procurement history for these services. The last contract under which these services were successfully procured expired in January of 1993. Since that time, the agency has twice attempted to procure the follow-on services under a small business set-aside; however, both follow-on procurements were canceled because the agency did not receive a reasonably priced bid from a small business. Under the first follow-on solicitation, CardioMetrix was the only small business bidder--with a price which exceeded the government estimate by 101 percent. Under the second small business set-aside attempt (issued in December 1994), two bids were received from small business bidders--including one from CardioMetrix; however, the lowest-priced small business bid exceeded the government estimate by 71 percent.²

Since the recent procurement history reveals two failed attempts at obtaining a reasonably priced bid from a small business bidder, we find rational the contracting officer's conclusion that the agency was unlikely to receive a bid from a small business at a fair market price. As such, we find the agency's decision to conduct this requirement as an unrestricted procurement to be unobjectionable. See CardioMetrix, B-256407, May 27, 1994, 94-1 CPD ¶ 334.

The protest is denied.

/s/ Ronald Berger
for Robert P. Murphy
General Counsel

²The current solicitation informs offerors that the "estimated annual volume" of required laboratory testing services is \$73,000. Based on this estimate, CardioMetrix contends that its bid submitted under the prior small business set-aside procurement--for the amount of \$79,160--was reasonably priced, and should not have been rejected. In light of the agency's explanation, we find this contention without merit. Specifically, the agency reports that under the prior procurement the annual testing volume was estimated at \$47,000 because less testing services were required; this amount has necessarily increased to \$73,000 to reflect the increased number of required services--brought about chiefly as a result of the delays incurred by the two prior solicitation cancellations.