



Comptroller General
of the United States

35016

Washington, D.C. 20548

Decision

Matter of: CardioMetrix

File: B-256407

Date: May 27, 1994

Robert J. Loring for the protester.
Octavia R. Johnson, Esq., Department of Justice, Federal
Bureau of Prisons, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, 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 quotations from at least two responsible, small business concerns quoting a reasonable price.

DECISION

CardioMetrix protests the issuance of request for quotations (RFQ) No. RFQ-258-0051-4 by the Department of Justice, Federal Bureau of Prisons, for the provision of clinical laboratory testing services to the inmate population at the Federal Correction Institution in Manchester, Kentucky. CardioMetrix argues that the procurement should have been set aside for small business concerns because, it asserts, three responsible, responsive small businesses submitted reasonable prices under a recent, prior procurement of these services.¹

¹In its initial protest, CardioMetrix also argued that various provisions of the solicitation improperly restricted competition or failed to give prospective quoters adequate information to submit a quotation. Subsequent to the filing of the protest, the agency issued amendment No. 2, which addressed the protester's concerns. CardioMetrix, in its comments on the agency report, does not dispute the agency's contention that amendment No. 2 adequately addressed these concerns. As a result, we consider these issues to be abandoned. See Datum Timing, Div. of Datum Inc., B-254493, Dec. 17, 1993, 93-2 CPD ¶ 328.

We deny the protest.

An acquisition of services 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 § 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. However, an agency must undertake reasonable efforts to ascertain whether there is a reasonable expectation that two or more responsible small business concerns will actually submit proposals. Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248.

While the use of any particular method of assessing the availability of small business is not required in making such a determination, such factors as the government's estimate, the prior procurement history for the solicited services, the current market climate, and advice from the agency's small business specialist and technical personnel may all 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.

Here, 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. In early 1993, the agency issued an RFQ for these services as a small business set-aside. This solicitation was canceled and resolicited on an unrestricted basis, because no reasonable quotation was received from a responsible small business; only one of the three firms submitting quotations was a small business, and its price was nearly twice as high as that of the low bidder. Award was made to a large business in April 1993. When an invitation for bids (IFB) for these services was issued in August 1993, as an unrestricted procurement, three of the seven bids received were from small businesses. However, only one bidder, a large business, offered a price below the government estimate of \$35,000. The lowest-priced small business concern submitted a bid 8.86 percent higher than the government estimate, and the next-low small business concern submitted a bid 52.91 percent higher than that government estimate.

The IFB was canceled after bid opening, due to ambiguous specifications, and the services were resolicited in the instant solicitation, issued on January 31, 1994. In light of the recent procurement history, the contracting officer determined that there was no reasonable expectation of obtaining quotations from two or more responsible businesses that would be competitive in terms of price reasonableness.

CardioMetrix argues that the three small business concerns participating in the August 1993 procurement submitted competitive bids. CardioMetrix contends that the government estimate under that solicitation was "arbitrarily generated" and "obviously" not reflective of market prices, since market prices by definition are those submitted by the bidders.

CardioMetrix presents no evidence that the government estimate relied upon by the agency in its prior procurement effort was "arbitrarily generated." Moreover, that government estimate, \$35,000, is reflective of market prices when compared with the bid prices submitted. Of the seven bids received, one large business concern's price was \$32,010, a second large business concern's price was \$38,250, and one small business concern submitted a price of \$38,100. Even if the government estimate were considered to be unreliable, as CardioMetrix suggests, the price of a current competitor may be an appropriate measure of the current market price. See Sigma West Corp., B-247916, July 20, 1992, 92-2 CPD ¶ 31.

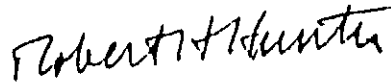
While CardioMetrix argues that the fact that both it and one other small business concern submitted quotations in response to the instant RFQ is evidence that the solicitation should have been set aside for small business, this evidence came well after the contracting officer's determination not to set aside this requirement. CardioMetrix's post-determination arguments do not require the agency to change the procurement to a set-aside for small business concerns. See FKW Inc., supra.²

Since the recent prior procurement history for these services reveals that only one small business concern has submitted a reasonable price, we have no basis to object to the contracting officer's determination that there was no reasonable possibility that two or more small businesses

²We note that the second small business that submitted a quotation in response to this RFQ later withdrew its quotation, which was some 50 percent below the government estimate.

would submit quotations, with an opportunity for award at a fair market price. As a result, the contracting officer's decision to issue this RFQ as an unrestricted procurement was reasonable.

The protest is denied.



for Robert P. Murphy
Acting General Counsel