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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Millennium Data Systems, Inc.

File: B-292357.2

Date: March 12, 2004

Thomas O. Mason, Esq., and Francis E. Purcell, Jr., Esq., Williams Mullen, for the protester.

Kenneth R. Pakula, Esq., Environmental Protection Agency; Laura Mann Eyester, Esq., and John W. Klein, Esq., Small Business Administration, for the agencies.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's contention that the agency improperly issued a task order to a Federal Supply Schedule contract holder that did not meet the applicable size standard in the request for quotations (RFQ) is denied where the RFQ did not indicate that eligibility for the task order was limited to small businesses, and where the record shows that the agency did not intend to limit eligibility for the order to small businesses.

DECISION

Millennium Data Systems, Inc. (MDS) protests the issuance by the Environmental Protection Agency (EPA) of a task order for information services for EPA's Region 5 offices to RS Information Systems, Inc. (RS), pursuant to request for quotations (RFQ) No. R5-03-2003. The RFQ, as initially issued, sought "quotation packages"--in essence, technical proposals--from entities holding a contract under Federal Supply Schedule (FSS) GS-35F-5355H for information services, that were also certified as small disadvantaged business (SDB) concerns by the Small Business Administration (SBA). MDS argues that RS is ineligible for the order because it is not an SDB, and because SBA determined that RS was other than a small business for purposes of this procurement. MDS also argues that EPA failed to conduct a proper realism analysis of the price in RS's quotation.

We deny the protest.

BACKGROUND

The procurement here was reopened after an earlier selection decision, also of RS, led to a protest to our Office from MDS. EPA took corrective action in response to that protest, and reopened the competition, using the same RFQ. To properly analyze the issues in this protest, we need to set forth background information on events that occurred before, and after, the procurement was reopened.

The RFQ package was first issued March 14, 2003, and included the following: a 17-page letter from the contracting officer (CO), entitled a letter RFQ; a price schedule; a performance work statement; and a client authorization letter (to allow EPA to gather past performance information). The RFQ anticipated issuance of a fixed-price, performance-based task order for specified IT services, for a 1-year base period followed by three 1-year options, to the “offeror who best represents the best value to the government.” RFQ at 1. To evaluate responses, the RFQ identified four evaluation factors—technical approach, past performance, price, and special features. *Id.* at 3-4. The IT services solicited included providing support for printers, equipment attached to Ethernet LAN segments, voice mail, and telecommunications equipment that link EPA’s region 5 offices with other EPA offices and states.

The first page of the RFQ, under the heading “Business Size Information,” stated:

“The offeror **must** be certified as a SDB (small disadvantaged business) concern, or have completed a SDB application pending at the [SBA], or a Private Certifier (see Federal Acquisition Regulation 19.001). The government will only consider prospective offerors who are currently certified SDB concerns.

Id. at 1 (emphasis in original). In addition, the original RFQ included the following standard Federal Acquisition Regulation (FAR) clauses: Small Business Program Representations (FAR § 52.219-1), and Small Disadvantaged Business Status (FAR § 52.219-22). *Id.* at 10-13. Within the Small Business Program Representations clause the agency identified North American Industry Classification System (NAICS) code 541513 as applicable to this procurement; the clause also advised that the applicable small business size standard was \$21 million. *Id.* at 10.

Between the time this RFQ was issued, and responses were received, there were several communications between EPA and the parties regarding the small business issues in dispute here. On March 21, an RS representative sent an e-mail seeking inclusion of a second NAICS code and size standard in the RFQ. Agency Report (AR), Tab 2. On March 25, the CO distributed a revised RFQ, with changes marked in bold. AR, Tab 5. Of relevance here, the revised RFQ included the second NAICS code requested by RS, code 517710, and added a second size standard of 1,500

employees; as with the original NAICS code and size standard, these additions were reflected within the text of FAR clause 52.219-1.¹ AR, Tab 5 at 12.

In an e-mail to the CO, dated March 26, an MDS representative wrote, "I would like to know if this is an 8(a) set-aside or SDB set-aside opportunity." AR, Tab 16. Later that day, the CO responded, "The procurement is not a 8(a) or a SDB set-aside opportunity." AR, Tab 17. One day later, the CO again revised the RFQ--this time by e-mail message to the prospective offerors. Since the meaning of this revision is in dispute, the message is set forth in full below:

Propsective Offerors,

I am getting a lot of feedback regarding the use of FAR 52.219-1. And the feedback is ranging from "[r]estrict the procurement, by eliminating or changing NAICS codes," to "[o]pen up the procurement, by adding an additional NAICS code."

I am redacting the following from the RFQ:

1. Business Size Information. Contractors are no longer required to provide evidence of their being a SDB (Small Disadvantaged Business) concern.

The ordering official will use the size status in the prospective offeror's FSS contract. A contractor's size status is valid for the term of the contractor's FSS contract.

This means if an offeror is considered a SDB or 8(a) under their existing FSS contract, the ordering official will consider the contractor either an SDB or an 8(a) concern.

See FAR 19.804-6. *Multiple award and Federal Supply Schedule contracts.*

The present procurement does not meet the aforementioned programs.

2. Small Business Program Representation (52.219-1)(APR 2002).

3. Small Disadvantaged Business Status (52.219-22)(OCT 1999).

This e-mail hereby closes the issue regarding size standards.

¹ During the course of this procurement SBA determined that there is no existing NAICS code 517710, however, the question of what code should have been used ultimately has no relevance to the issues raised here. As discussed below, SBA determined that RS was other than small under any revenue-based size code. AR, Tab 87, at 6-7.

AR, Tab 23 (emphasis in original). By e-mail dated April 7, EPA revised the RFQ once more by distributing a new performance work statement, and reiterated its previous response to inquiries about the applicable size standard. Specifically, the message stated that “[t]he EPA resolved the issue, by redacting from the RFQ Business Size Information and FAR provisions 52.219-1 and 52.219-22.” AR, Tab 33.

By the April 15 due date, both MDS and RS submitted their responses to the RFQ; and on May 13, EPA notified MDS of the selection of RS. Upon learning of the selection, MDS filed a size protest with the CO, and a bid protest with our Office.² By letter dated June 26, EPA decided to take corrective action, and on June 30, MDS withdrew its protest. During the exchanges that led to MDS’s withdrawal, EPA advised that the existing RFQ would be amended, not replaced. AR, Tab 81.

By letter dated July 10, EPA advised both offerors of additional details regarding the reopened RFQ. Of relevance here, the July 10 letter advised that the agency was reinstating FAR clause 52.219-1 to the solicitation, and was reinstating the original NAICS code and size standard of 541513 and \$21 million, respectively. On July 17, EPA issued its revised RFQ, which it captioned as “Amendment Number 0001” to the RFQ, despite the numerous previous revisions to the solicitation since its original issuance. AR, Tab 92. Although the revised RFQ retained the four evaluation factors identified in the initial RFQ--technical approach, past performance, price, and special features--it added a scoring plan for assessing technical approach and past performance. Id. at 1-2.

During the time EPA was taking corrective action and revising its RFQ, MDS’s challenge to RS’s size was forwarded to SBA, and was resolved by SBA’s Area 2, Office of Government Contracting, on July 10. AR, Tab 87. In its decision, SBA concluded that: (1) the procurement was limited to small businesses; (2) the applicable NAICS code should be 541513; and (3) RS was other than small for purposes of this NAICS code, or any other revenue-based size code.³ Id. at 6-7.

After the reopening of this procurement, RS noted the reinstatement of FAR clause 52.219-1 and asked the CO if the procurement was “full and open and not limited to SDB(s) or SB(s)?” AR, Tab 98. In response, EPA answered that the procurement was not limited to small, or small disadvantaged businesses. AR, Tab 99. By

² MDS’s protest of the initial selection of RS did not raise any small business issues; rather, MDS argued that the evaluation was unreasonable in several respects not now relevant.

³ We refer here, and in several other places in this decision, to the SBA’s determination that this procurement was limited to small businesses, rather than to a determination that the procurement was limited to SDBs, because that is the language used by the SBA in its size determination, and in other documents.

August 25, both RS and MDS had responded to EPA's requests for both initial and final proposal revisions, and the agency began its reevaluation.

Between the time the offerors provided their final submissions and the issuance of the order, there were several developments of relevance here. For example, by letter dated September 26, EPA sought clarification from SBA regarding its July 10 size determination. EPA explained that it had expressly advised MDS (by e-mail dated March 26) that this procurement was not reserved for SDB concerns. Thus, EPA asked if SBA's determination that the procurement was reserved for small business concerns was advisory or binding, and if binding, under what authority. AR, Tab 141. EPA also asked SBA to clarify the effect of its size determination on RS's ability to continue to accept orders under its FSS contract, given regulatory guidance (at FAR § 19.806-4) which permits 8(a) businesses to "continue to accept new orders under a multiple award or FSS contract even after a concern's program term expires, the concern otherwise exits the 8(a) Program, or the concern becomes other than small for the NAICS code assigned under the contract." *Id.* (quoting FAR § 19.806-4).

SBA answered that the procurement was limited to small businesses on the face of the RFQ, and that given that limitation, EPA could not properly issue a task order to a company that did not meet the applicable size standard. With respect to the second question regarding the application of FAR § 19.806-4, SBA answered that a different office would have to address the matter, since the size determination was made by SBA's Office of Government Contracting, and not an office with authority over the 8(a) program. AR, Tab 143. In addition to its exchange with the SBA, EPA received and responded to several inquiries from members of Congress regarding the pending procurement.

At the conclusion of these exchanges, and at the conclusion of the evaluation, EPA determined that the two proposals were technically equal, and that both offerors were qualified to perform. EPA based its conclusion of technical equality on the closeness of the combined technical and past performance scores received by the two companies--RS received a combined score of 82.8, MDS received a score of 80.6. AR, Tab 156 at 9. After determining that the submissions were technically equal, EPA decided that the lower total evaluated price submitted by RS (\$8.8 million versus MDS's total evaluated price of \$10.7 million) represented the best value to the government. *Id.* at 9-10.

On November 14, EPA issued the task order to RS, and notified MDS of the selection decision. On December 5, MDS filed the instant protest.

DISCUSSION

MDS argues that issuance of the order to RS was improper because the procurement was limited to small businesses, and because RS does not meet the size standard applicable to this procurement. In the alternative, MDS argues that if this

procurement was not limited to small businesses, EPA failed to satisfy the requirements of FAR § 19.506 regarding the withdrawal of set-aside requirements. In this regard, MDS alleges EPA had twice before purchased information technology services from holders of FSS contracts on a set-aside basis, and, as a result, was required to continue doing so. Finally, MDS also argues that the agency failed to conduct a proper price realism analysis before accepting RS's lower price.

In arguing that RS is not eligible for this order because RS is not a small business, MDS contends that "EPA retained the small business nature of the RFQ through inclusion of FAR § 52.219-1 and NAICS Code 541513 with a \$21 million size standard." Comments, Jan. 15, 2004, at 3. MDS's contentions are based on the terms of the RFQ during the reopened competition—for which EPA reinstated the small business size standard clause (FAR § 52.219-1) it had deleted during the initial competition. To the extent that MDS bases its complaint solely on the inclusion of the clause at FAR § 52.219-1—as it does in its pleadings here—MDS's argument is without merit.

FAR clause 52.219-1, set forth in this RFQ, does not contain language indicating whether a procurement is, or is not, set aside for small business participation. Rather, the clause contains space for agency officials to identify the applicable NAICS codes and size standards. In addition, it contains a section for companies responding to a solicitation to indicate whether they are, or are not, small businesses under the size standards the agency identified. In fact, the clause, on its face, indicates that the source of any set-aside restriction is found elsewhere in the solicitation. Specifically, paragraph (d)(1) of the clause advises companies that if the solicitation is for supplies, and if the procurement has been set aside for small business concerns, "then the clause in this solicitation providing notice of the set-aside contains restrictions on the source of the end items to be furnished." FAR § 52.219-1(d)(1). If, as the protester urges, clause 52.219-1 provided notice of a set-aside, the clause's referral in paragraph (d)(1) to some other clause for such notice would make no sense.⁴

For these reasons, and others, our Office has long held that the inclusion of the clause at FAR § 52.219-1, a small business size standard, or other clauses calling for small business information in a solicitation, is not indicative of a set-aside. La Quinta Roofing, Inc., B-239795.2, Oct. 12, 1990, 90-2 CPD ¶ 282 at 2; Nello Constr. Co., B-216731, Nov. 19, 1984, 84-2 CPD ¶ 543 at 2. Instead, a solicitation must include

⁴ In addition, we note that this clause is required for use in a far broader universe than just procurements restricted to small businesses. FAR § 19.307(a)(1) requires inclusion of the clause at 52.219-1 "in solicitations exceeding the micro-purchase threshold when the contract will be performed in the United States or its outlying areas." MDS has not suggested that all such solicitations must be reserved for small businesses.

language restricting the procurement to small businesses. See La Quinta Roofing, Inc., supra. Thus, the inclusion of FAR § 52.219-1 in this reopened procurement, did not, in and of itself, limit eligibility for this task order to small businesses.

During the course of this protest, our Office solicited the views of SBA on this procurement. SBA argues that this RFQ, when viewed in the context of both the initial and reopened procurement, limited eligibility for the order to small business concerns. Although we agree that the agency's actions are no model of clarity, our review of this procurement as a whole leads us to disagree with SBA about whether EPA restricted this RFQ to small businesses.

As an initial matter, there is no disagreement that this RFQ, as issued, limited eligibility for the order to SDB concerns. Less than 2 weeks after the RFQ was issued however, on March 27, EPA's CO amended the RFQ's terms by e-mail message to both offerors. Specifically, the e-mail message "redacted" from the RFQ three enumerated items, which corresponded to headings in the RFQ. These were: (1) Business Size Information; (2) Small Business Program Representation (52.219-1); and (3) Small Disadvantaged Business Status (52.219-22). When these three segments of the RFQ were deleted--or "redacted," in the words of the CO--this RFQ no longer contained any indication that this procurement was limited to either SDBs or small business concerns.

At this juncture we must observe that neither SBA nor MDS has argued that the March 27 e-mail message deleted only the heading ("Business Size Information") from the RFQ, and not the corresponding text beneath the heading. This corresponding text in the RFQ contains the only express indication that the task order here was limited to SDBs. In this regard, we note also that there has been no suggestion from SBA or the protester that the text of FAR clauses 52.219-1 and 52.219-22 remained in the RFQ after this message was distributed--until 52.219-1 was restored to the RFQ in the reopened procurement. Thus, in light of the deletions to the RFQ, we see no reasonable basis for any assertion that this solicitation contained express language limiting this procurement to small, or SDB concerns, after March 27.

We turn next to the disposition and meaning of the text in the March 27 e-mail message (as opposed to the headings). With respect to disposition, the message does not clearly indicate whether the text following the first heading, "Business Size Information," replaces the text under the same heading in the RFQ, or stands apart as general guidance about the meaning of the RFQ once the heading and the accompanying text in the RFQ have been deleted. In this regard, we think the issue of whether the e-mail's text beneath the first heading is inserted into the RFQ, or is not, makes no difference in this dispute. We reach this conclusion because this language is ultimately relevant only for determining whether it supports or detracts from SBA's and MDS's contention that this procurement was reserved for small business. For that analysis, we are prepared to review this language regardless of

whether it is actually incorporated into the RFQ, or operates as stand-alone guidance about whether the procurement is restricted.

Turning next to the meaning of the text under the “Business Size Information” heading in the March 27 message, we have, for ease of reference, repeated the relevant portion of the message below:

1. **Business Size Information.** Contractors are no longer required to provide evidence of their being a SDB (Small Disadvantaged Business) concern.

The ordering official will use the size status in the prospective offeror’s FSS contract. A contractor’s size status is valid for the term of the contractor’s FSS contract.

This means if an offeror is considered a SDB or 8(a) under their existing FSS contract, the ordering official will consider the contractor either an SDB or an 8(a) concern.

See FAR 19.804-6. *Multiple award and Federal Supply Schedule contracts.*

The present procurement does not meet the aforementioned programs.

SBA contends that this language can only be understood within the context of a restricted procurement—*i.e.*, the language provides guidance about how the agency will determine whether an entity is, or is not, an SDB or 8(a) business, and if so, its size. While we agree with SBA about the meaning of this language for determining size, we disagree about whether this language limits the procurement to small businesses. Simply put, this language does not contain the express indication of restriction we have held is required to limit a procurement to small businesses. See Baker Support Servs., Inc.; Mgmt. Tech. Servs., Inc., B-256192.3, B-256192.4, Sept. 2, 1994, 95-1 CPD ¶ 75 at 4 (“Absent specific language restricting the procurement to small business, the procurement is not set aside and cannot be restricted to firms meeting the small business standard included in the solicitation.”).

In addition, this language does not stand alone. There are other exchanges in this record that are relevant here. As indicated above, one day prior to the March 27 message, MDS received an unambiguous response from the CO to the company’s inquiry about whether this procurement was, or was not, an 8(a) or SDB set-aside opportunity. The CO answered MDS as follows: “The procurement is not a 8(a) or a SDB set-aside opportunity.” AR, Tab. 17.⁵ Unlike the March 27 message, or other

⁵ A few weeks later, EPA’s CO again reminded both offerors in an e-mail message that he had resolved disputes about the applicable size standard “by redacting from
(continued...)

exchanges in this case, there is little ambiguity in this response, and little basis for any offeror receiving it to continue to believe that this procurement was limited, reserved, set-aside—or any other term used to indicate such restrictions—for SDBs or small businesses.

Between the time of these exchanges and the final selection decision here, the only other change to the relevant provisions of the RFQ was the reinstatement of FAR clause 52.219-1 (with the applicable NAICS code and size standard) in the reopened procurement, which, as indicated above, is also not indicative of a set-aside. La Quinta Roofing, Inc., supra. Accordingly, do not agree with SBA's conclusion that this procurement, viewed as a whole, was reserved for small businesses.

As an alternative to its assertion that eligibility for this task order was limited to SDBs, MDS argues that EPA failed to satisfy the requirements of FAR § 19.506 regarding the withdrawal of set-aside requirements. According to MDS, EPA was required to reserve this procurement for small businesses because the agency had twice before purchased information technology services from holders of FSS contracts on a set-aside basis. For the reasons set forth below, we again disagree.

As a preliminary matter, EPA explains that the two prior orders MDS claims were purchased on a set-aside basis, were not. CO's Statement, Jan. 2, 2004, at 10-11. Rather, the CO explains that the orders were placed directly with RS under the company's FSS contract, in accordance with FAR § 8.404. In its comments, MDS repeats its initial assertion, but provides no argument or basis for our Office to reach a different conclusion about the status of the two earlier orders. MDS Comments, Jan. 15, 2004, at 11-13.

More importantly, MDS is wrong about the operation of FAR § 19.506. In its protest, MDS relies upon a provision in the General Services Administration's (GSA) Acquisition Manual that requires continuation of set-aside requirements when previous purchases of the supplies or services were acquired using a small business set-aside. In such cases, the GSA manual imposes on GSA acquisition personnel the requirements of FAR § 19.506.

The government-wide regulations in the FAR exempt the issuance of task orders under FSS contracts from the application of FAR parts 13 and 19, where the requirements of FAR § 19.506 are found. FAR § 8.404(a)(1); Information Ventures, Inc., B-291952, May 14, 2003, 2003 CPD ¶ 101 at 2. Although FAR § 8.404(a)(1) identifies two exceptions to this exemption—FAR §§ 13.303-2(c)(3) and 19.202-1(e)(1)(iii)—neither are applicable here. MDS cannot rely upon non-regulatory

(...continued)

the RFQ Business Size Information and FAR provisions 52.219-1 and 52.219-22." AR, Tab 33.

provisions in an internal GSA document to override the FAR's express exemption of task orders from the requirements of FAR part 19. Accordingly, despite MDS's assertion to the contrary, EPA was not required to comply with FAR § 19.506.⁶

MDS's final complaint is that the agency failed to conduct a proper price realism analysis. In this regard, MDS contends that RS's low price indicates that it may have failed to account for all costs of performance.

Where, as here, an RFQ contemplates the issuance of a fixed-price task order under an FSS contract, an agency is not required to conduct a realism analysis. FAR § 8.404(a)(1)(i). While an agency may provide for a price realism analysis when conducting a competition for fixed-price orders, the requirement to complete the analysis as promised springs from the solicitation, not from the regulations governing the issuance of task orders. See, e.g., OMNIPLEX World Servs. Corp., B-291105, Nov. 6, 2002, 2002 CPD ¶ 199 at 3-4 (where our Office sustained a protester's challenge to the application of a solicitation's stated plan for assessing price realism in a competition for the issuance a blanket purchase agreement limited to FSS contract holders).

Here, the solicitation did not provide that the agency would conduct a price realism analysis, or otherwise assess technical understanding with reference to the offered prices. Nonetheless, EPA explains that it reviewed both the number and mix of labor hours proposed, and reviewed the fixed-price labor rates offered. Since, at the conclusion of its review, the agency concluded that RS is responsible and can perform at its offered price, RS's low price does not provide any further basis for questioning this procurement. AllWorld Language Consultants, Inc., B-291409, B-291409.2, Dec. 16, 2002, 2003 CPD ¶ 13 at 2.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁶ As a final matter, while we have not dismissed this basis of protest as untimely, we think the March 26 e-mail message to MDS wherein the contracting officer advised that "[t]he procurement is not a 8(a) or a SDB set-aside opportunity," AR, Tab. 17, should have caused MDS to explore this basis of protest prior to the submission of its offer, not after.