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**Comptroller General
of the United States**

**United States General Accounting Office
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Decision

Matter of: Admiral Towing and Barge Company

File: B-291849; B-291849.2

Date: March 6, 2003

Michael A. Hopkins, Esq., and David M. Glynn, Esq., McKenna Long & Aldridge, for the protester.

George N. Brezna, Esq., and David Ranowsky, Esq., the Department of the Navy, the agency.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly amended solicitation to become a 100-percent set-aside for small businesses where the agency reasonably determined, based upon the proposals it received from small businesses, that it could reasonably expect after discussions to receive proposals from at least two small business concerns capable of performing the contract and that award would be at a fair market price.

DECISION

Admiral Towing and Barge Company protests the terms of request for proposals (RFP) No. N00033-03-R-1003, issued by the Department of the Navy, for tug boat services to assist vessels in Pearl Harbor, Hawaii and surrounding waters. Admiral challenges certain terms of the solicitation, as well as the Navy's determination to make this solicitation a small business set-aside.

We deny the protest.

The RFP, issued November 21, 2002, provides for the award of a fixed-price contract for the charter of four tug boats with crews to assist vessels in docking, undocking, and emergency situations. The RFP provides for a "time charter arrangement," whereby the contractor makes the tug boats available 24 hours per day, 365 days per year, and is paid a daily rate for each tug boat regardless of whether the tugs are used on any given day.

The RFP provides that the award will be made to the offeror with acceptable past performance submitting the lowest priced, technically acceptable proposal.

With regard to technical acceptability, the RFP sets forth certain vessel specifications and characteristics, and states that the agency will evaluate proposals to determine whether the proposed vessels meet the RFP's minimum requirements. The RFP also includes past performance worksheets to be completed by the offerors' references and returned by the references directly to the agency. Finally, the RFP provides a "rate table" to be completed by offerors, and explains that prices will be evaluated based upon the offerors' rates as set forth in their completed rate tables, and fuel costs to the government, based upon the fuel consumption figures provided by the offerors, the government's estimated work requirements, and cost of fuel as calculated by the agency.¹

The RFP was amended on December 3, 2002 to include a notice providing that "[i]f two or more offers from qualified small business concerns are received this solicitation shall be converted to a 100 percent set-aside for small business concerns." The RFP added here that "[n]otwithstanding the possibility of a small business set-aside, the procurement remains unrestricted and large businesses may offer." RFP amend. 1, at 2.

Admiral, one of the two incumbent contractors, protested to our Office that the above clause "unfairly discriminates against large, qualified bidders, including Admiral." Initial Protest at 3. The protester also challenged certain other terms of the solicitation.

On January 24, prior to the date for the agency's submission of its report in response to the protest, the agency amended the solicitation to inform offerors that it had "received two or more qualified small business offers," and that because of this, "the solicitation is converted to a 100% set-aside for small business concerns." RFP amend. 6, at 2.

In response, Admiral filed a second protest, challenging the agency's conversion of the solicitation to a 100-percent set-aside for small businesses.² Admiral contends that, based upon its review of the small business offerors' proposals, the agency's determination to amend the solicitation to make it a 100-percent set-aside for small businesses was unreasonable. In this regard, the protester argues that of the [DELETED] proposals submitted by small businesses, [DELETED] were either technically unacceptable or so high in price that the agency could not reasonably believe that at least [DELETED] small business offerors were capable of performing

¹ The RFP states that the government will provide fuel to the successful contractor.

² The amendment's deletion of the RFP notice that it may be converted to a set-aside for small business concerns renders Admiral's protest of the notice academic.

the contract at an acceptable price.³ In support of this assertion, Admiral points to the deficiencies in the [DELETED] proposals identified by the agency during its evaluation of initial proposals, and argues that because of these deficiencies, the agency's determination to set aside the procurement for small businesses lacked a rational basis. The protester adds here that neither of these [DELETED] offerors submitted certain required information in their initial proposals, and that, according to the record, the agency has not received any past performance information from the offerors' references. Admiral finally asserts that the total price of each of these proposals exceeds, by the protester's calculation, the agency's "price negotiation objective" by [DELETED] percent.

The record reflects that the contracting officer verified that each of the [DELETED] small business offerors self-certified itself as a small business. The contracting officer then determined through a check of the agency's "internal records and Dunn & Bradstreet reports" that there was no reason for the agency to question the self-certifications. Contracting Officer's Statement at 2. With regard to the results of the technical evaluation of initial proposals, as well as the lack of past performance information, the contracting officer found that "[n]othing in any of the offers indicated a problem that was not susceptible of resolution during discussions." Id. at 3. With regard to price, the agency found that the total price of one of the small business offerors was [DELETED] percent less than the independent government estimate (IGE), while the total prices of the other [DELETED] small business offerors were [DELETED] and [DELETED] percent higher. AR, Tab O, Business Clearance Memorandum, at 10. The contracting officer concluded that although the offered price that exceeded the IGE by [DELETED] percent "was higher than expected," the other [DELETED] offers received were "within . . . the normal range of offers under [the agency's] tug procurements." Contracting Officer's Statement at 3.

Federal Acquisition Regulation (FAR) § 19.502-2(b) generally requires that an acquisition over \$100,000 be set aside for exclusive small business participation where there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and that an award will be made at a fair market price. A determination that a particular procurement is to be set aside for small business participation is basically a business judgment within the broad discretion of the contracting officer. In making this determination, the contracting officer need not make determinations tantamount to affirmative determinations of responsibility, but rather need only make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. We will not question the set-aside

³ Admiral does not challenge the propriety of the agency's determination with regard to the [DELETED] small business offer received from the other incumbent contractor.

determination of the contracting officer in the absence of a clear showing of abuse of discretion. American Med. Response of Connecticut, Inc., B-278457, Jan. 30, 1998, 98-1 CPD ¶ 44 at 2-3.

This case involves the unusual situation where, consistent with the terms of the RFP, the agency's decision to make this solicitation a 100-percent set-aside for small businesses was made after receipt of proposals that included several from small businesses. Under such circumstances, we do not think that the agency, in determining to set aside this procurement, was required to determine whether the initial proposals as submitted were technically compliant or acceptably priced. See id.; cf. York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7 (although agency's determination to issue a solicitation as a small business set-aside lacked a reasonable basis, its receipt of offers from small businesses justified the set-aside). Rather, we think that the agency need only determine, based upon the initial proposals received, that there is a reasonable expectation that it will ultimately receive offers from at least two small business concerns that are capable of performing the contract and that award will be made at a fair market price. See FAR § 19.502-2; American Med. Response of Connecticut, Inc., *supra*.

As noted above, Admiral does not specifically contest the agency's consideration of one of the small business proposals in making its set-aside determination. Thus, in this case, the question becomes whether the contracting officer reasonably determined, with regard to at least [DELETED] of the [DELETED] other small business proposals received, that the technical deficiencies, lack of past performance information, and relatively high prices were "susceptible of resolution during discussions." See Contracting Officer's Statement at 3. Despite the protester's arguments to the contrary, we cannot find the contracting officer's determination in this respect to be unreasonable.

Specifically, the protester points out that the agency "found material omissions regarding bollard pull capacity, fendering, and the type of lines proposed" in one of the small business proposals, and argues that "[a]s a result of these and other omissions and overall lack of detail, the [agency] could not make an affirmative determination regarding technical acceptability." Protester's Comments at 6. Although the protester may be correct that a finding of technical acceptability at this juncture would be unreasonable, the protester has not shown that the contracting officer's determination that the technical deficiencies identified during its evaluation of initial proposals were susceptible to resolution through discussions constituted an abuse of discretion. Similarly, while pointing out that the agency has not received past performance information from the offeror's references, the protester has failed to explain why the agency's belief that this deficiency can be resolved through discussions is unreasonable. Nor has the protester explained why the agency's view that the price set forth in this small business offeror's proposal (which exceeds the IGE by [DELETED] percent (and the agency's price negotiation objective by [DELETED] percent)), was not so high that a reduction in the offeror's final revised

proposal to a point where the price could be considered reasonable, is objectionable. Thus, the agency could reasonably rely upon this small business offeror's proposal in making its small business set-aside determination.

Accordingly, the agency has two proposals from small businesses on which to base its small business set-aside determination.⁴ Under the circumstances, despite the protester's arguments to the contrary, we cannot conclude that the agency's determination that the procurement should be set aside for small businesses, based upon the proposals received, was an abuse of discretion.⁵

The protest is denied.

Anthony H. Gamboa
General Counsel

⁴ We need not consider the propriety of the agency's determinations with regard to the [DELETED] small business offeror, whose price exceeded the IGE by [DELETED] percent.

⁵ Because we find that the agency's decision to set aside the procurement for small businesses is unobjectionable, we will not consider Admiral's protest challenging certain other terms of the RFP, given that as a large business it is ineligible for award and is thus not an interested party that would be affected by the resolution of these issues. Four Winds Servs., Inc., B-280714, Aug. 28, 1998, 98-2 CPD ¶ 57 at 2. Also, to the extent that the protester is arguing that an award to any of the small business offerors is inappropriate, and that the set-aside should be withdrawn, its protest is premature. As indicated, the agency has not completed its evaluation of proposals, and accordingly, has made no determination as to whether any of the offerors should be awarded a contract. Should the agency award a contract to one of the small business offerors, Admiral may file its protest concerning such an award and its belief that the set-aside must be withdrawn at that time (presuming that it can establish its interested party status). See Ace-Federal Reporters, Inc., B-241309, Dec. 14, 1990, 91-2 CPD ¶ 438 at 3 n.2; Black Hills Refuse Serv., B-228470, Feb. 16, 1988, 88-1 CPD ¶ 151 at 3.