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**Comptroller General
of the United States**

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

Decision

Matter of: Rochester Optical Manufacturing Company

File: B-292247; B-292247.2

Date: August 6, 2003

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome, for the protester. Dennis Foley, Esq., Department of Veterans Affairs, and Kenneth Dodds, Esq., U.S. Small Business Administration, for the agencies. Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency decision not to set aside procurement for small business concerns is sustained where decision was based on insufficient efforts to ascertain small business interest and capability to perform the requirement.

DECISION

Rochester Optical Manufacturing Company protests the decision of the Department of Veterans Affairs (VA) to issue on an unrestricted basis request for proposals (RFP) No. 626-09-03, for eyeglass fabrication and on-site eyeglass fittings in its Veterans Integrated Service Network (VISN) 9, which includes seven locations in the states of Kentucky, Tennessee, and West Virginia. Rochester, a small business concern, argues that the requirement should be set aside for small businesses, essentially contending that the agency failed to undertake sufficient efforts to ascertain small business interest and capability to perform the requirement.

We sustain the protest.¹

¹ In developing the protest record, our Office conducted a recorded telephone hearing in which the VA's contracting officer testified. Since there is not a written transcript of this hearing, references in this decision to the hearing are to the approximate point on the cassette recorder's numerical tape counter (TC at ____).

BACKGROUND

Prior Procurements

In 1999, the VA procured on an unrestricted basis a requirement for the fabrication of eyeglasses in VISN 9. (At the time, the standard industrial classification (SIC) code was 8099, with a corresponding \$5 million average annual gross revenue requirement.) Three small business concerns—Schaeffer Eye Center, Korrect Optical, and Classic Optical—submitted proposals; the VA awarded an indefinite-delivery/indefinite-quantity (ID/IQ) contract to each of these firms for the fabrication of eyeglasses in VISN 9.

In 2001, the VA procured on a small business set-aside basis, under North American Industry Classification System (NAICS) code² 621320 (offices of optometrists, with a corresponding \$5 million average annual gross revenue requirement) a requirement for the fabrication of eyeglasses and for the performance of eye exams in VISN 9. As relevant here, eyeglass fittings, which were to be priced under the line items for eyeglass fabrication, would take place off-site at a contractor's facility, as opposed to on-site at a VA facility. TC at 128-35. At the time of proposal submission, the following four firms self-certified that they were small business concerns under the above-referenced NAICS code: Korrect, Classic, Rochester, and Barnett and Ramel. After determining, in accordance with Federal Acquisition Regulation (FAR) § 19.502-2(b)(2), that these firms each proposed fair market prices, TC at 97-100, the VA awarded an ID/IQ contract to each of these firms to fabricate eyeglasses and to perform eye exams in VISN 9. After these awards were made, and as a result of size protests filed with the U.S. Small Business Administration (SBA), Korrect and Classic were determined by the SBA to be large businesses under NAICS code 621320; however, the VA determined that it would not be in the best interest of the government to terminate the Korrect and Classic contracts.

Current Procurement

On February 19, 2003, the VA issued the current RFP on an unrestricted basis, under NAICS code 446130 (optical goods store, with a corresponding \$6 million average annual gross revenue requirement) for the fabrication of eyeglasses and for on-site

² The NAICS code, which replaced the SIC system as of October 1, 2000, is used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts. Professional Landscape Mgmt. Servs., Inc.—Costs, B-287728.2, Nov. 2, 2001 CPD ¶ 180 at 2 n.3.

eyeglass fittings in VISN 9. The VA contemplates the award of multiple, fixed-price requirements contracts to the low-priced technically acceptable offerors.³

In determining not to set aside this procurement for small business concerns, the VA's contracting officer provided the following justification in a "record of procurement request review for the Small Business Program":

Due to market survey in 1999, procurement was set aside as a small business under SIC 8099, \$5.0 million.⁴ Korrect Optical, Classic Optical, Schaeffer were small businesses. 2001 procurement was set aside to small business. 21 offers were requested, 4 offers were received. Of the four offers received, Korrect was considered a large business; Classic was a large business; Rochester was small business; Barnett and Ramel was small business with large business subcontractors. . . . In addition Rochester was the highest priced. At the present time four contractors provide VISN 9 needs as indefinite delivery. This procurement will be a requirements contract meaning that one contractor will be awarded either one medical center's needs or all of them depending on their offer. There have been changes in the classification codes and due to businesses that were small becoming large the contracting officer is unaware of two small businesses capable of handling the quantity of requests needed to support the veterans. Offers were issued to local eyeglass companies and no response was received. Pro-Net,⁵ Sub-Net and minority business sites were checked and no available site was ascertained.

VA Agency Report, Tab 26, Contracting Officer's Record of Procurement Request Review for the Small Business Program, Feb. 4, 2003.

³ The VA explains that it could award either one requirements contract for all of VISN 9 or a requirements contract for each of the seven locations in VISN 9. TC at 235-40.

⁴ We note that while in this document the contracting officer characterizes the 1999 procurement as a small business set-aside, the 1999 RFP reflects that this procurement was conducted on an unrestricted basis.

⁵ Pro-Net is an Internet-based database for small, disadvantaged, 8(a), HUBZone, and women-owned businesses. The SBA's website describes Pro-Net as "an electronic gateway of procurement information—for and about small businesses. It is a search engine for contracting officers, a marketing tool for small firms and a 'link' to procurement opportunities and important information. It is designed to be a 'virtual' one-stop-procurement-shop." <http://pro-net.sba.gov>; Quality Hotel Westshore; Quality Inn Busch Gardens, B-290046, May 31, 2002, 2002 CPD ¶ 91 at 2 n.1.

The contracting officer attached the following Pro-Net results page to her justification not to set aside the current requirement:

PRO-Net Results Page
Table Listing
where annual gross revenue is no more than \$6.0
and business type includes at least one of: manufacturing, service
and the firm has NAICS code 446130
and the firm is in one of these state(s): TN [Tennessee]
and randomized by original start time of search: 01/27/2003 13:17:05
What Happened
No firms meet your search criteria, sorry.
What To Do About It
Hit your Web browser's "Back" button, make your criteria less restrictive and try again.

The VISN 9 small business specialist and the senior procurement analyst with the VA's Office of Small and Disadvantaged Business Utilization both concurred with the contracting officer's decision not to set aside this procurement for small business concerns.

ISSUE AND ANALYSIS

Rochester protests the contracting officer's determination not to set aside the agency's current VISN 9 requirement for small business concerns. Rochester maintains that the contracting officer should have reasonably expected, based on the prior small business set-aside procurement that resulted in awards of ID/IQ contracts to Rochester and Barnett and Ramel--both small business concerns--to have received fair market price offers here from at least two responsible small business concerns.

Contracting officers generally are required to set aside for small businesses all procurements exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. FAR § 19.502-2(b). 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 showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Mortara Instrument, Inc., B-272461, Oct. 18, 1996, 96-2 CPD ¶ 212 at 3. Our Office will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7.

While the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys, and/or 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, American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3, the assessment must be based on sufficient facts so as to establish its reasonableness. McSwain & Assocs., Inc.; Shel-Ken Props., Inc.; and Elaine Dunn Realty, B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 3-4. Here, the VA does not dispute that under the prior VISN 9 small business set-aside procurement, Rochester and Barnett and Ramel were small business concerns. Nevertheless, the VA asserts several grounds for why, in its view, it did not have a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns, thus obviating the need for it to set aside the current VISN 9 requirement for small businesses. As explained below, we find each of these grounds to be unreasonable and we conclude that the VA's determination not to set aside this requirement for small businesses was seriously flawed.

The VA first asserts that the prices proposed by Rochester and Barnett and Ramel under the prior small business set-aside procurement were not low. TC at 101-03. However, as stated above, FAR § 19.502-2(b) requires that in determining whether to procure requirements under a small business set-aside, an agency must have a reasonable expectation of receiving "fair market price" offers, not "low" prices, from at least two responsible small business concerns. Although the prices proposed by Rochester and Barnett and Ramel under the prior procurement were not low (among the four offers received),⁶ the fact that these two small business concerns received ID/IQ contracts under a small business set-aside reasonably demonstrates that the agency believed that their offers ultimately contained fair and reasonable prices. FAR § 15.402(a). Under these circumstances, the failure of these two small business concerns to submit the lowest prices under the prior procurement does not establish a reasonable basis for the VA to conclude that these two firms could not submit fair market price offers for the protested requirement.

The VA next argues that in determining not to procure its current VISN 9 requirement under a small business set-aside, it believed, based on the prior small business set-aside procurement, that it would not receive offers from at least two "responsible" small business concerns. In other words, the VA was not concerned with the quantum of known competition from the prior procurement—two small businesses, Rochester and Barnett and Ramel; rather, the VA believed that these two firms were not responsible contractors. In this regard, the VA states that under the

⁶ For purposes of context, we point out that "low" prices under the prior small business set-aside procurement were submitted by Korrect and Classic, both of which initially self-certified that they were small businesses, but ultimately were determined to be large businesses by the SBA. TC at 376.

prior procurement, Rochester received a cure notice for not submitting qualifications statements for proposed personnel and Barnett and Ramel subcontracted with a large business. (Under their respective ID/IQ contracts, Rochester received minimal orders, while Barnett and Ramel received no orders. TC at 347.) The record shows, however, that Rochester complied with the cure notice and its contract was not terminated by the VA. TC at 325. In addition, the record shows that Barnett and Ramel's subcontract relationship with a large business was acceptable so long as Barnett and Ramel, as the small business prime contractor, complied with the 50 percent limitation on subcontracting clause at FAR § 52.219-14, which was included in the solicitation. None of this establishes on its face that these two firms were not responsible contractors and we conclude that the VA's position, as stated above, does not provide a reasonable basis for it to decide not to procure its current VISN 9 requirement under a small business set-aside.

On a related matter, the VA states that its current needs are materially different from those as reflected in the prior VISN 9 small business set-aside procurement and, as a result, small business concerns will not be able to perform. The VA explained at the hearing conducted by our Office that under the prior procurement, where four ID/IQ contracts were awarded, if one of the small business contractors could not perform (*i.e.*, if the contractor could not handle the required quantities), TC at 251-55, 323-25, then the agency could select one of the other three contractors (a "back up" contractor) to perform, without having to terminate the first contractor's contract. In contrast, in the current procurement, where the VA contemplates the award of multiple requirements contracts, the VA explained that since there will not be a "back up" contractor available, it is "asking more responsibility" of the awardee, that is, the VA is "asking for one contractor to handle that VA quantity and if [the contractor] can't . . . you [*i.e.*, the VA] either terminate[s] for default or terminate[s] for convenience [the awardee's contract]." TC at 258-61. While we appreciate the impact associated with the change in the type of contract to be awarded (*i.e.*, a requirements, rather than an ID/IQ, contract), in our view, the VA has not explained why that impact supports a determination that its needs have materially changed such that small business concerns would not be able to perform the current VISN 9 requirement.⁷

⁷ We recognize the VA's position that it is more convenient for veterans to have their eyeglasses fitted on site at a VA facility ("one stop shopping" for the veteran), rather than off site at a contractor facility. TC at 190-200. However, the VA has failed to explain why a small business concern could not comply with the on-site fitting requirement. In fact, while the VA is concerned that only small business eyeglass labs, which fabricate the eyeglasses off site, will submit offers, TC at 204-06, 398-404, the VA concedes that a lab could nevertheless submit a proposal as a small business prime contractor and subcontract the on-site fittings portion of the requirement,

(continued...)

Finally, the record shows that the contracting officer's market research was inadequate and fails to support the determination not to set aside the current VISN 9 requirement for small business concerns. The first problem with the contracting officer's Pro-Net search is that she unreasonably limited her search to one state, Tennessee, as shown above, when VISN 9 also covers the states of Kentucky and West Virginia. When asked at the hearing conducted by our Office why she did not do the Pro-Net search for the three states covered in VISN 9 (or even nationwide), the contracting officer responded, "actually, when I did the Pro-Net search, I thought that block [on the Internet page] was 'where are you at' and I'm at Tennessee, so that's what I used and I came up with nothing." TC at 491. In other words, the contracting officer unreasonably limited her Pro-Net search to the state of Tennessee because that is where she was located, thus ignoring the possibility that there could be small business concerns in at least the other two states, Kentucky and West Virginia, that might be interested in competing for the current VISN 9 requirement. Another problem with the contracting officer's Pro-Net search is that in inserting an average annual gross revenue amount corresponding to NAICS code 446130, the contracting officer inserted "\$6.0," not "\$6,000,000.00." During the hearing, the contracting officer could not point to anything that would suggest that the monetary figure inserted by her translated to "millions of dollars," as opposed to just "dollars." TC at 497-535, 547. As a result, it should have come as no surprise that no small business concern was found to have had an average annual gross revenue amount not exceeding "\$6.00."⁸ At the hearing, our Office told the VA that we had performed a Pro-Net search on a nationwide basis using "\$6000000" and NAICS code 446130, without a "manufacturing, service" restriction; when pointed out to the VA that our search yielded 65 firms matching this criteria, the VA had no response. TC at 497. On this record, where the contracting officer's market research was geographically limited for no legitimate reason and where she used inaccurate information as the basis for her research, we conclude that the contracting officer's market research was materially deficient and could not reasonably be relied upon in determining not to conduct the current procurement as a small business set-aside.⁹

(...continued)

i.e., by placing someone on site at a VA facility to perform the necessary fittings. TC at 214-18, 405.

⁸ During the hearing, the SBA commented that the VA's Pro-Net search was "too narrow." TC at 530. The SBA also concluded that the VA's record did not support the decision to conduct the current procurement on an unrestricted, as opposed to small business set-aside, basis. SBA Report, June 9, 2003.

⁹ We also note that when asked at the hearing, the VA advised that it had received offers under the current RFP by the stated closing time, including a number from small business concerns. TC at 25-43. This information corroborates Rochester's position that there are small business concerns interested in competing for the VA's current VISN 9 requirement.

RECOMMENDATION

On this record, we sustain the protest because the VA unreasonably determined that there was no likelihood of receiving fair market price offers from at least two responsible small business concerns. We recommend that the contracting officer conduct a proper market survey to adequately investigate the potential small business interest and capability in the current VISN 9 requirement and determine whether there is a reasonable expectation that fair market price offers will be obtained from two responsible small business concerns. We point out, based on the record developed during this protest, that it appears that this procurement should have been set aside for small business concerns. Although the agency recently has received offers under the RFP, unless the contracting officer now can reasonably determine, after conducting a proper market survey, that there is not a reasonable expectation of receiving offers from at least two responsible small businesses at fair market prices, the contracting officer should cancel the RFP and re-issue it as a set-aside for small businesses. We also recommend that Rochester be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). Rochester's certified claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision.

The protest is sustained.¹⁰

Anthony H. Gamboa
General Counsel

¹⁰ To the extent Rochester argues that the unrestricted procurement constitutes improper bundling, this issue, first raised in Rochester's supplemental protest filed on June 10, 2003, is untimely since the amended closing date under amendment No. 1 to the RFP was May 8, 2003. 4 C.F.R. § 21.2(a)(1).