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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Information Ventures, Inc.

File: B-294267

Date: October 8, 2004

Bruce H. Kleinstein for the protester.

James L. Weiner, Esq., Department of Interior, and John W. Klein, Esq., and Laura Mann Eyester, Esq., Small Business Administration., for the agencies.

Charles W. Morrow, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging agency determination not to set aside procurement for small business concerns is sustained where the decision was based on an unreasonably limited search of the potential small business market, and the contracting officer did not consider the responses of several small businesses to the presolicitation notice in making her determination.

DECISION

Information Ventures, Inc. protests the decision of the Department of the Interior, Minerals Management Service (MMS), to issue request for proposals (RFP) No. 35164, for assessing various health education methods, on an unrestricted basis. Information Ventures, a small business, contends that the requirement should be set aside for small business concerns.

We sustain the protest.

On May 28, 2004, MMS published a presolicitation notice on the Federal Business Opportunities website (www.fedbizopps.gov), in which it announced its intent to procure, on behalf of the Department of Health and Human Services, Office of Disease Prevention and Health Promotion (ODPHP), and on an unrestricted basis pursuant to Federal Acquisition Regulation (FAR) subpart 13.5, Test Program for Certain Commercial Items, a report that “draw[s] national attention to innovative health education methods and the commonalities of successful programs; and to

provide a resource for those who are developing health education materials for youth ages 9-13.” Presolicitation Notice.¹ (As subsequently clarified in the solicitation, issued on June 18, the purpose of the report was to evaluate the current state of health education methods and propose strategies for implementing more innovative health education methods, with a focus on physical activity and healthy eating programs that are integrative, interactive and engaging (e.g., interactive video and computer games, youth-developed messaging, and popular media programming). RFP § II at II-1.)

The presolicitation notice set forth a two-step process in which interested parties were first required to demonstrate their qualifications to perform the required work by submitting a capabilities statement, and then, following review of the capabilities statements, the agency would request those deemed capable and qualified to perform the work to submit a proposal. The presolicitation notice specified June 4 as the deadline for requesting a copy of the solicitation and June 17 as the deadline for submitting capabilities statements.

Twenty business concerns requested a copy of the solicitation by the June 4 deadline, including six small business concerns (two of which included capability statements with their requests). Notwithstanding the expressions of interest on the part of small business concerns, the RFP, issued on June 18 (but with a June 21 “Solicitation Issue Date”), was not set aside for small business concerns, but instead was issued on an unrestricted basis. The solicitation provided that in order to compete, offerors must first demonstrate their qualifications by submitting a capabilities statement by July 7. In addition to the two small business concerns that had already submitted a capabilities statement with their request for a copy of RFP, an additional four firms (three small business concerns and one large business) submitted capabilities statements by the July 7 deadline. The agency found three of the firms (including two small business concerns) to be capable and qualified and requested each to submit a proposal. One of the two small business concerns determined to be capable and qualified was one of the small businesses that had submitted its capability statement with its request for a copy of the solicitation prior to issuance of the solicitation.

On June 30, prior to the due date for receipt of the required capabilities statement, Information Ventures filed this protest with our Office. Information Ventures challenges several aspects of the solicitation, including the fact that the procurement was not set aside for small business concerns. According to the protester, the agency failed to conduct adequate market research before determining not to set aside the procurement.

¹ MMS is authorized to contract on behalf of other federal agencies, and is conducting this procurement pursuant to an interagency agreement between MMS and ODPHP.

In this regard, the contracting officer, in response to the protest, has explained that she determined prior to issuing the presolicitation notice not to set aside the acquisition for small business concerns based on several types of market research. Contracting Officer's Statement at 2. Specifically, the record indicates that in searching for potential contractors to perform the requirement here, the contracting personnel reviewed the GSA Advantage online database, which is a database of the products and services available from GSA and Department of Veterans Affairs federal supply schedules, GSA "in stock" programs, and GSA special order programs that may be purchased from supply schedule contractors. Five contractors in the GSA Advantage database, including three small business concerns and two large businesses, were contacted by telephone; according to the agency, all responded that they could not perform the agency's requirement. In addition, the contracting officer consulted the contracting officer's technical representative, who suggested contacting Action for Healthy Kids, a volunteer coalition of organizations working to implement programs in schools to eliminate obesity. The coalition, however, indicated that it could not perform the requirement and reportedly was unable to recommend another source.² As a result of this research, the contracting officer determined that there was not a reasonable expectation that two or more small businesses could perform this requirement. Id.

Information Ventures protests the adequacy of the market research conducted by the agency to determine not to set aside the acquisition, arguing that a proper market survey should have included researching the Central Contractor Registration (CCR) database, and not just the GSA database, and obtaining the input of the Small Business Administration (SBA), the Interior small business representative, and the ODPHP small business representative.

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, and we will not sustain a protest challenging the determination absent a showing that it was unreasonable. McSwain & Assocs. Inc. et al., B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses capable of performing the work. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. Our Office will review a protest of an agency determination not to set aside a

² Although the agency has stated that the contracting officer also participated in interactive, on-line communication among industry acquisition personnel and customers, Supplemental Agency Report at 4, the record indicates that these communications were e-mails related to the above inquiries.

procurement to determine whether a contracting officer has undertaken reasonable efforts to ascertain the availability of capable small businesses. Id. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination was based upon incomplete information. McSwain & Assocs. Inc. et al., supra. While we have recognized that 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 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. Rochester Optical Mfg. Co., supra, at 5.

In our view, the record does not show that the contracting officer reasonably considered whether the procurement could be set aside for exclusive small business participation. On the contrary, the record indicates that the contracting officer failed to take into account known information indicating the interest of capable small business concerns in this procurement.

As discussed above, the contracting officer reports that prior to determining that there was no reasonable expectation of receiving offers from at least two responsible small business concerns, contracting personnel contacted five contractors in the GSA Advantage database, including three small business concerns and two large businesses, and also a nonprofit organization; according to the agency, all responded that they could not perform the agency's requirement. However, the agency has pointed to nothing in the record that indicates that the reported inability of the selected entities to undertake the contemplated contract was related to their size (rather than to other considerations, such as, for example, other commitments).

As part of our development of the record, we requested and received comments from SBA, who contends that the agency's market research was inadequate. SBA notes that the contracting officer failed to investigate other recommended, readily available sources of information concerning the availability of responsible small business concerns. For example, FAR § 13.102, applicable to simplified acquisitions such as this one, provides that "[c]ontracting officers should use the Central Contractor Registration [CCR] database . . . as their primary sources of vendor information." In this regards, SBA notes that small business concerns are encouraged to register in the CCR. The contracting officer, however, did not consult the CCR. Had she done so, using the North American Industry Classification System (NAICS) code that she views as appropriate, NAICS code 54161, Management Consulting Services, she would have discovered a large pool of small business

concerns from which to select firms for further evaluation.³ SBA also points to the agency's failure to search SBA's PRO-NET, which is an online database of information on more than 195,000 small, disadvantaged, Section 8(a), Historically Underutilized Business Zone (HUBZone), and women-owned businesses. (SBA recently merged the CCR and PRO-NET databases into the "Dynamic Small Business Search" database.)

In addition, FAR § 19.202-2 generally requires contracting officers, before issuing solicitations, to make "every reasonable effort to find additional small business concerns," which "should include contacting the agency SBA procurement center representative, or if there is none, the SBA." Likewise, FAR § 19.202 requires contracting officers to consider recommendations of the agency Director of Small and Disadvantaged Business Utilization, or the Director's designee, as to whether a particular acquisition should be set aside for small businesses, while FAR § 19.501(e) states that the contracting officer shall review acquisitions to determine if they can be set aside for small business, "giving consideration to the recommendations of agency personnel having cognizance of the agency's small business programs." Again, however, the contracting officer failed to utilize these available sources of information concerning potential small business participation.

Furthermore, the record establishes that the contracting officer in fact was on notice, prior to issuance of the solicitation on June 18, of substantial small business interest in this procurement, including interest from small business concerns that the agency itself ultimately determined to be capable of performing the requirement. In this regard, in response to the presolicitation notice, six small business concerns requested a copy of the solicitation, and two included evidence of their capabilities. Further, the agency ultimately found two of the small business concerns (including one that had submitted prior to issuance of the solicitation a qualifications statement with its request for a copy of the solicitation) to be capable and qualified and requested each to submit a proposal. The contracting officer, however, apparently did not evaluate the capabilities of any of the small businesses which had expressed

³ Although the contracting officer reports that she found no small business concerns on CCR when reviewing, for purposes of responding to the protest, NAICS code 54161, Management Consulting Services, it appears that the contracting officer simply failed to review the specific categories comprising this overall code. For example, had she reviewed NAICS code 541611, Administrative Management and General Management Consulting Services, a subcategory of 54161, she would have discovered 344 active small business concerns under that category in the District of Columbia alone. (Information Ventures was also listed under NAICS code 541611, albeit at a Philadelphia location.) Likewise, had the contracting officer reviewed NAICS code 541613, Marketing Consulting Services, another subcategory of 54161, she would have discovered 175 active small business concerns under that category in the District of Columbia alone.

interest in the solicitation to determine, before issuing the solicitation, whether her previous determination that there was no reasonable expectation of receiving offers from at least two responsible small business concerns was still supportable. The agency, instead, simply issued the solicitation on an unrestricted basis. We agree with SBA that the contracting officer should have assessed the capability of the small business concerns that had responded to the presolicitation notice before issuing the solicitation on an unrestricted basis. See Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3 (contracting officer failed to survey firms that had responded to Commerce Business Daily announcements to assess their capability to perform the contract); see also ACCU-Lab Medical Testing, B-270259, Feb. 20, 1996, 96-1 CPD ¶ 106 at 3 (contracting officer failed to consider small business concerns that showed interest when requirement was still set-aside).

Since the contracting officer did not assess the capability of the small business concerns that had responded to the presolicitation notice, and otherwise did not make a reasonable effort to survey the market to ascertain whether there was a reasonable expectation that two or more responsible small business concerns would submit bids at fair market prices, before issuing the solicitation on an unrestricted basis, we find that the determination that there was no reasonable expectation of receiving offers from at least two responsible small business concerns was not based on sufficient facts to establish its reasonableness. Therefore, we sustain the protest.⁴

Because MMS has already determined that two small businesses are capable of meeting the requirement, we recommend that the contracting officer cancel the solicitation and re-issue it as a set-aside for small businesses, unless she can 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. We also recommend that Information Ventures be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys'

⁴ Information Ventures also contends that it was improper to solicit the requirement under FAR subpart 13.5 because the services are not a commercial item. Under FAR § 2.101, a commercial item with respect to services is defined as "services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions." In this regard, agencies are required to conduct market research to determine whether commercial items are available that could meet the agencies requirements. FAR § 12.101. Since it is unclear from the record whether there are "established catalog or market prices" for these services, the contracting officer should document her market research in this regard prior to reissuing the solicitation.

fees. 4 C.F.R. § 21.8(d)(1) (2004). The protester'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.

Anthony H. Gamboa
General Counsel