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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: MCS Portable Restroom Service

File: B-299291

Date: March 28, 2007

Merrill Austin for the protester.

Christopher S. Cole, Esq., Department of the Air Force, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Nora K. Adkins, Esq., Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Procuring agency is required to make reasonable efforts to ascertain whether an acquisition is suitable for a set-aside for service-disabled veteran-owned small business concerns (SDVOSBC) before it can proceed with a small business set-aside.
2. Procuring agency has the discretion to make a sole-source award to an SDVOSBC if the contracting officer does not have a reasonable expectation that two or more SDVOSBCs would submit bids for the work.

DECISION

MCS Portable Restroom Service (MCS), a service-disabled veteran-owned small business concern (SDVOSBC), protests the Air Force's decision not to set aside a requirement for SDVOSBCs or, alternatively, to make a sole-source award to an SDVOSBC, for portable chemical toilet services at the United States Air Force Academy and Farish Memorial Park in Colorado, and to instead obtain these services as a small business set-aside under invitation for bids (IFB) No. FA7000-07-B-0002.

We sustain the protest.

The IFB, issued as a 100-percent small business set-aside, sought a contractor to provide all management, tools, supplies, equipment and labor necessary for the portable chemical toilet services. The IFB provided for an 8-month base period, with 4 option years.

As part of the market research for this acquisition, the contracting officer searched the Central Contractor Registration (CCR) database under North American Industry Classification System code 562991 (Septic Tank and Related Services), and located 28 SDVOSBCs, 29 section 8(a) concerns, 10 Historically Underutilized Business Zone (HUBZone) concerns, and 28 other small business concerns that potentially could perform the work. Agency Report (AR), Tab 6D, Market Research Summary, at 4. On February 14, 2006, the agency sent e-mails to all of these firms and received responses from two SDVOSBCs (MCS and a Florida company that expressed interest in developing a joint venture to perform this work), one HUBZone concern, and four small businesses. On April 18, the agency posted a “sources sought” notice on FedBizOpps and three companies responded: one small business, one women-owned small business, and MCS. Contracting Officer’s (CO) Statement at 1.

After considering this market research, the contracting officer determined that she did not have a reasonable expectation of receiving two or more bids from HUBZone or SDVOSBC concerns. AR, Tab 6D, Market Research Summary, at 6. Based on this determination and after receiving approval from the Air Force small business specialist to set aside the procurement for small businesses, AR, Tab 6C, Small Business Coordination Record, the agency, on August 8, posted a synopsis on FedBizOpps of the proposed solicitation for these services as a small business set-aside, that is, not one reserved for a subset of small businesses—either HUBZone or SDVOSBC concerns.

MCS then filed an agency-level protest of this determination. MCS contended that the IFB should have been set aside for SDVOSBCs or, in the alternative, a sole-source award should have been made to MCS because it is an SDVOSBC.

After receiving the protest, the contracting officer searched the CCR for all SDVOSBCs in Colorado and nationwide “to ensure that the market had not changed since the time the initial market research was conducted.” CO Statement at 2. This search revealed the existence of 2 SDVOSBCs in Colorado and 20 SDVOSBCs nationwide that could potentially perform the work. AR, Tab 6B, Letter from Air Force to MCS Denying Protest, Sept. 22, 2006, at 2. While it is not clear from the record whether the second CCR search identified firms that were previously identified in the initial CCR search, no efforts were made to contact any of these companies at that time. The agency determined that a sole-source SDVOSBC award was, for reasons explained later in this decision, prohibited by the Federal Acquisition Regulation (FAR). The agency then affirmed its decision to set aside the procurement for small businesses and denied MCS’s agency-level protest.

No actual solicitation for the services was issued until December 5, when the IFB was posted on FedBizOpps as a small business set-aside. MCS then timely protested to our Office, reasserting the grounds raised in its agency-level protest.

SDVOSBC SET-ASIDE REQUIREMENTS

MCS first asserts that the agency should have set aside the acquisition for SDVOSBC participation. It complains that the agency's market research was inadequate and does not support the determination to issue the IFB as a small business, rather than as an SDVOSBC, set-aside.

The Small Business Act was amended by section 36 of the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651, 2662 (2003), 15 U.S.C. § 657f (Supp. IV 2004), to establish the SDVOSBC procurement program. This amendment provided for procurements with competition restricted to SDVOSBCs as follows:

In accordance with this section, a contracting officer may award contracts on the basis of competition restricted to [SDVOSBCs] if the contracting officer has a reasonable expectation that not less than 2 [SDVOSBCs] will submit offers and that the award can be made at a fair market price.

15 U.S.C. § 657f(b).

This program is implemented in FAR Subpart 19.14, which in part provides:

- (a) The contracting officer may set aside acquisitions exceeding the micro-purchase threshold for competition restricted to [SDVOSBCs] when the requirements of paragraph (b) of this section can be satisfied. The contracting officer shall consider [SDVOSBC] set-asides before considering [SDVOSBC] sole source awards
- (b) To set-aside an acquisition for competition restricted to [SDVOSBCs], the contracting officer must have a reasonable expectation that--
 - (1) Offers will be received from two or more [SDVOSBCs]; and
 - (2) Award will be made at a fair market price.

FAR § 19.1405(a), (b).

SBA regulations also provide that:

the contracting officer should consider setting aside the requirement for 8(a), HUBZone, or [SDVOSBC] participation before considering setting aside the requirement as a small business set-aside.

13 C.F.R. § 125.19.

Generally, a procurement set-aside determination is a matter of business judgment within the contracting officer's discretion, which our Office will not disturb absent a showing that it was unreasonable. See Neal R. Gross & Co., Inc., B-2940924.2,

Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. Although the use of any particular method of assessing the availability of firms for a set-aside is not required, measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision to set aside, or not to set aside, a procurement. See American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3. The assessment must be based on sufficient evidence so as to establish its reasonableness. See Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

The agency here asserts that it properly determined not to set aside the requirement for SDVOSBCs because, based on its market research, it did not have a reasonable expectation that two or more SDVOSBCs were interested in the procurement. It notes that only one other firm besides MCS responded to the February 2006 e-mail survey, and that the agency reasonably concluded that this firm was no longer interested when the firm did not respond to the "sources sought" notice issued in April 2006.

We solicited and obtained the views of the Small Business Administration (SBA) regarding the propriety of the Air Force's decisions to not set aside this acquisition for SDVOSBCs or make a sole-source award to an SDVOSBC. The SBA disagrees with the contracting officer's actions here. We accord substantial weight to the fact that the contracting officer's determination has been reviewed by the SBA and found not to be reasonable. See USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 6; SWR, Inc., *supra*, at 5 n.4. In its response, the SBA recognizes that only MCS, an SDVOSBC and the incumbent contractor, and the Florida SDVOSBC, which expressed interest in forming a joint venture, responded to the February 2006 e-mail survey; however, the SBA further asserts that the agency's disregard of the Florida SDVOSBC's expression of interest (which was based upon the assumption that the firm was no longer interested because it did not also respond to the "sources sought" notice) was unreasonable. As the SBA points out, the firm's lack of response to the "sources sought" notice may not evidence a lack of interest—the firm may not have seen the notice or it may have believed a response was unnecessary given that it had already expressed interest. SBA Report (Jan. 26, 2007) at 4. Under these circumstances, the SBA argues, and we agree, that the agency should have followed up with the firm to clarify the firm's interest in the procurement to ascertain whether there was sufficient SDVOSBC interest to allow for a set-aside. See SWR, Inc., B-294266, Oct. 6, 2004, 2004 CPD ¶ 219 at 6 (agency's two unanswered telephone calls to a HUBZone small business that had previously expressed interest in the procurement was not adequate evidence to support an agency's determination that the firm was no longer interested in the procurement).¹

¹ The SBA also points out that the agency failed to seek the advice of an SBA representative on whether to set aside the procurement for SDVOSBCs, consulting only with the Air Force small business specialist. Furthermore, as evidence that this
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Under the circumstances, we conclude that the Air Force failed to make reasonable efforts to ascertain whether this acquisition was suitable for an SDVOSBC set-aside. We acknowledge that, unlike the HUBZone and small business set-aside programs, which generally require set-asides if two or more HUBZone concerns or small business concerns are interested in submitting offers and award is expected to be made at a fair market price, see FAR §§ 19.502-1, 19.1305, the decision to make an SDVOSBC set-aside is discretionary with the contracting officer. In this regard, the contracting officer “may,” but is not required, to set aside the acquisition for SDVOSBCs, even where it is found that two or more SDVOSBCs are interested in submitting bids and award is anticipated to be made at a fair market price. However, as indicated above, applicable SBA regulations provide that a contracting officer should consider the propriety of setting aside an acquisition for SDVOSBCs before proceeding with a small business set-aside and it is implicit in this regulation that such consideration be reasonable. Consequently, we conclude that the Air Force should perform further market research from which it can reasonably determine whether this acquisition is appropriate for an SDVOSBC set-aside.

SDVOSBC SOLE-SOURCE AWARD

MCS also complains that, even if the agency were correct that there was insufficient interest from two or more SDVOSBCs to set aside the procurement for SDVOSBCs, the agency should have made a sole-source award to MCS.

The agency asserts that FAR § 19.1406(a) precludes a sole-source award to an SDVOSBC where more than one SDVOSBC exists that can satisfy the requirement. FAR § 19.1406(a) states in pertinent part:

A contracting officer may award contracts to [SDVOSBCs] on a sole source basis . . . , provided—

(1) Only one [SDVOSBC] can satisfy the requirement . . .

In this regard, and as discussed above, after MCS protested that a sole-source SDVOSBC award should be made, the agency reviewed the CCR and found more than one SDVOSBC potentially capable of performing this work (even though they were not contacted and did not express interest in submitting bids). CO Statement at 4. The Air Force’s essential argument is that FAR § 19.1406(a) precludes making a

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procurement may have been appropriate for an SDVOSBC set-aside, the SBA notes that another Air Force base in Colorado has successfully issued a solicitation as an SDVOSBC set-aside for the same or similar services.

sole-source award to an SDVOSBC if, as its later CCR review established, more than one SDVOSBC exists that can potentially perform the work.

The protester and the SBA assert that the Air Force misinterprets FAR § 19.1406(a). The SBA argues that the FAR should be interpreted “logically and consistently” with the Small Business Act and the implementing SBA regulations, which provide that a contracting officer may consider making a sole-source award to an SDVOSBC unless more than one SDVOSBC is expected to submit a bid under the acquisition. SBA Report (Jan. 26, 2007) at 3.

Our analysis here begins with the Veterans Benefit Act of 2003, which provides for sole-source contract awards to SDVOSBCs and states in pertinent part:

- (a) **Sole source contracts** -- In accordance with this section, a contracting officer may award a sole-source contract to any [SDVOSBC] if --
 - (1) such concern is determined to be a responsible contractor with respect to performance of such contract opportunity and the contracting officer does not have a reasonable expectation that 2 or more [SDVOSBCs] will submit offers for the contracting opportunity; . . .

15 U.S.C. § 657f.²

The implementing SBA regulation similarly provides as follows:

A contracting officer may award a sole-source contract to [an SDVOSBC] only when the contracting officer determines that:

- (a) None of the provisions of . . . 13 C.F.R. § 125.19 apply.

13 C.F.R. § 125.20.

As relevant here, 13 C.F.R. § 125.19 provides that an acquisition may be set-aside for SDVOSBCs if there is “a reasonable expectation that at least two responsible SDVOSBCs will submit offers.” Thus, both the Act and the implementing SBA regulations provide contracting officers with the discretion to make sole-source awards to SDVOSBCs where the prerequisites that would allow for an SDVOSBC set-aside have not been met.

² The remaining statutory requirements for making a sole-source award to an SDVOSBC are not relevant here.

While the Air Force's position here would seem to be consistent with a literal reading of FAR § 19.1406(a), "a regulation must be interpreted so as to harmonize with and further and not conflict with the objective of the statute it implements." Trustees Of Indiana University v. United States, 618 F.2d 736, 739 (Ct. Cl. 1980). The "plain meaning" and intent of the Veterans Benefit Act of 2003 is that a sole-source award to an SDVOSBC is permitted if the contracting officer does not have a reasonable expectation that two or more SDVOSBCs would submit bids. We think the FAR should be read consistent with the SBA statutory and regulatory language. To adopt the more restrictive interpretation of the FAR advocated by the Air Force here--that no sole-source award can be made where another SDVOSBC exists that could conceivably perform the contract, even where the firm has expressed no interest in the work--would, in our view, frustrate the intent of the Act itself by limiting sole-source SDVOSBC awards beyond what the statute clearly authorizes and contemplates.

In fact, it is clear that the FAR was not intended to impose restrictions on awarding sole-source SDVOSBC contracts beyond the restrictions included in the Veterans Benefit Act of 2003. The Federal Register notice announcing the final FAR regulation responded to various comments on the draft regulation and discussed the relation between the SDVOSBC set-aside requirements of FAR § 19.1405 and those pertaining to sole-source SDVOSBC awards under FAR § 19.1406. The FAR Council stated that the regulation was intended to be "consistent with [15 U.S.C. § 657f]," and further stated as follows:

If market research indicates that there is only one SDVOSBC source capable of satisfying the requirement at a fair and reasonable price, the contracting officer may award on a sole-source basis. If market research indicates two or more SDVOSBCs are capable of fulfilling the requirement, the contracting officer may set aside the requirement. In the event where only one acceptable SDVOSBC offer is received in response to the set-aside, the contracting officer may make award to that offeror.

70 Fed. Reg. 14949 (Mar. 23, 2005).

This language supports FAR § 19.1406(a) being interpreted, consistent with the Veterans Benefit Act of 2003 and SBA's implementing regulations, as allowing a sole-source award to an SDVOSBC when the requirements for setting aside the procurement for SDVOSBCs have not been met. Moreover, in reviewing the FAR case file on this regulation, we find nothing in the comments or in the FAR Council's responses that would suggest that the Council intended an inconsistent or more

restrictive rule than was provided for in the Act and the corresponding SBA regulation.³

Thus, the Air Force did not reasonably exercise its discretion in determining whether this acquisition was appropriate for award on a sole-source basis to an SDVOSBC because it erroneously believed that the FAR precluded such an award.

RECOMMENDATION

We recommend that the contracting officer conduct additional market research to ascertain the interest and capability of SDVOSBCs for this effort and determine whether this acquisition should be set aside for SDVOSBCs. In the event the agency determines that there is not a reasonable expectation of receiving bids from two or more SDVOSBCs, then the agency should consider whether to issue a sole-source SDVOSBC award. We also recommend that MCS be reimbursed the reasonable costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2006). MCS's claim for costs, detailing the time expended and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Gary L. Kepplinger
General Counsel

³ However, we do recognize that the plain wording of FAR § 19.1406 is potentially at odds with that of the Act and the SBA regulations. By letter dated today, we are advising the FAR Council of the possible inconsistency in language with the applicable statute so that the Council may review the matter.