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Decision

Matter of: Delex Systems, Inc.

File: B-400403

Date: October 8, 2008

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Duncan Butts, Esq., and Julie Griffiths, Esq., Department of the Navy, for the agency.
John W. Klein, Esq., and Laura M. Eyester, Esq., for the Small Business Administration.
Paula A. Williams, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. The set-aside provisions of Federal Acquisition Regulation (FAR) § 19.502-2(b) apply to competitions for task and delivery orders issued under multiple-award contracts.
2. Protest is sustained where agency failed to comply with the set-aside provisions of FAR § 19.502-2(b), when issuing, on an unrestricted basis, the solicitation for a delivery order under multiple-award contracts.
2. Protest alleging that agency erred in concluding that it had no reasonable expectation of receiving offers from two small businesses is sustained where the record shows that the agency's set-aside determination is not adequately supported by the record.

DECISION

Delex Systems, Inc. protests the terms of delivery order proposal request (DOPR) No. N61339-08-R-0035, issued by the Department of the Navy, Naval Air Systems Command (NAVAIR) for its general aviation training products (GATP) program.¹

¹ The GATP program is for the production and delivery of technical training products such as on-line training courses, web-based training, interactive courseware and

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Delex primarily contends that the agency should have issued the solicitation as a small business set-aside rather than on an unrestricted basis.

We sustain the protest.

BACKGROUND

On August 13, 2003, NAVAIR awarded the training systems contract (TSC) II, a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) contract to acquire the capability to analyze, model and simulate, design, and develop training and simulation products and systems with a base ordering period of 8 years and a total dollar ceiling of \$3 billion.² The TSC II solicitation designated North American Industry Classification System Code 33319 as the appropriate size standard for small business participation. RFP for TSC II Contract, at 35. TSC II contracts were awarded to a total of eight firms--four were small businesses, and four were other than small, *i.e.*, "large" businesses.³ All eight TSC II awardees had the right to compete for the award of delivery orders for trainers and training systems, and related technical products. However, the TSC II solicitation stated, at paragraph H.4 (a), that the agency reserved "the right to solicit individual delivery orders" on a small business set-aside basis "to meet the Command's small business set-aside goal." *Id.*

The DOPR, issued on May 22, 2008 and amended several times, contemplated issuance of a GATP delivery order for the Naval Center for Aviation Technical Training. The solicitation anticipated a 5-year performance period for the order, with an estimated value of \$75 million. The DOPR was also issued as a set-aside for the small business TSC II awardees.⁴ AR exh. 14, Acquisition Strategy Plan, at 3-5.

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electronic classrooms. Agency Report (AR) exh. 20, GATP Statement of Objectives, at 1.

² TSC II divided the range of services into two functional support areas--Lot I and Lot II; only Lot II is at issue here. Under Lot II, delivery orders would be issued for technology-based curricula, electronic classrooms, computer laboratories and related products. TSC II Statement of Work at 1.

³ The small business awardees were Delex, Carley Corporation, AERA Corporation, and D.P. Associates, Inc. Contracting Officer's (CO) Statement at 1. The large business awardees were Anteon, American Systems Corp., The Boeing Company, and Lockheed Martin Information Systems. *Id.*

⁴ In Fiscal Year 2003 (FY 03), the predecessor delivery order was competed on an unrestricted basis. Only two small business concerns, AERA and Carley, submitted
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Subsequent to the issuance of the solicitation by the Navy, the Small Business Administration (SBA) changed its regulations pertaining to small business size status under existing contracts, such as the TSC II ID/IQ contract. In response, on June 11, 2008, the Navy amended each TSC II contract to incorporate, among other things, Federal Acquisition Regulation (FAR) § 52.219.28, entitled “Post-Award Small Business Program Representation,” which implements the new SBA requirement. Under the FAR clause, the TSC II small business contract-holders were required to recertify their eligibility for set-asides prior to the start of the sixth year of the contract.⁵

By letter dated June 16, 2008, the contracting officer requested each of the TSC II small business awardees recertify their size status by June 23. AR exh. 11. The next day, on June 17, the agency posted a notice on its website stating that the GATP competition would be unrestricted, rather than reserved for the small business awardees. AR exh. 22, Agency’s Info-Share Website Notice (June 17, 2008).

In the meantime, recertification letters were received by the agency between June 17 and June 20 which indicated that only two firms, the protester and Carley, recertified as small business concerns. AR exh. 11. In a Memorandum for the Record, the CO states that she considered this information and determined that:

- The field of “potential” Small Business offerors will be narrowed down and there is no guarantee that proposals will be received from more than one Small Business concern.
- Previous competition of this requirement in FY03 where all contractors under TSC II, Lot II were given a fair opportunity to compete resulted in receipt of only two proposals from Small Businesses. Of those two Small Businesses, only one has shown interest in this RFP.
- The scope and complexity of the requirement, inclusive of options, is estimated at \$75 [million].

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proposals and the delivery order was subsequently issued to Carley. CO’s Statement at 7.

⁵ This rule is to address instances where a business concern was small at the time of initial contract award but over the course of the contract has become other than small. 71 Fed. Reg. 66434 (Nov. 15, 2006). Since the TSC II contracts were awarded on August 13, 2003, the agency reports that recertification had to be completed by August 13, 2008.

AR exh. 25, Memorandum for the Record (June 19, 2008).

Although the agency had already announced its decision to open this competition to large as well as small businesses, the CO's June 19 Memorandum expressly concluded that there was not a reasonable expectation of obtaining competitive offers "from at least two responsible small business concerns." Id. In addition, the CO noted that the agency's Small Business Advisor, as well as the local SBA specialist, had "no objections" to her decision to withdraw the set-aside. Id.

Despite this representation of SBA agreement, correspondence between the agency and the local SBA specialist, provided as part of the agency's report on this protest, shows that the SBA specialist disagreed with the rationale set forth in the CO's Memorandum, quoted above. The SBA specialist stated that if the CO decided to proceed without setting aside the delivery order for the small business ID/IQ contract-holders, then "a small business participation plan should be incorporated into each requirement in an effort to mitigate the impact of changing these requirements" to an unrestricted competition. AR exh. 39, Emails from SBA Specialist, at 14. The solicitation subsequently was amended to include, among other things, an evaluation factor to assess proposed small business participation plans. DOPR amend. 4, at 56, 60.

As relevant here, the record indicates that since the TSC II contracts were awarded in 2003, Delex has received a total of seven delivery orders and is currently performing a TSC II 5-year delivery order issued in May 2005 with an estimated value of \$15.3 million including options. AR exh. 32, Delex Delivery Orders (June 20, 2008). The record also shows that Delex is the prime contractor on an \$85 million ID/IQ contract for the Navy--on which it manages between 11 and 13 subcontractors, including corporations like SAIC and CACI. Protester's Comments, at 10 (Aug. 11, 2008).

After Delex complained to the agency about its decision to conduct this competition (and two others) among all of the ID/IQ contract-holders, large and small, and after the company received a negative response from the Navy's Ombudsman for the TSC II contract, see AR exh. 28, Letter to Delex (June 27, 2008), Delex protested to our Office.

DISCUSSION

Delex argues that the Navy should have limited this delivery order competition to the small business TSC II contract-holders. In this regard, Delex contends that the Navy erred in concluding that it had no reasonable expectation of receiving offers from two small business contract-holders.

In answer, the Navy contends that its conclusion was appropriate and within its discretion. Moreover, the Navy argues that even though it performed the analysis anticipated under FAR § 19.502-2(b)--the regulation which sets forth the so-called "Rule of Two," which requires agencies to set aside for small businesses any acquisition exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns--this rule does not apply to the issuance of task orders. In fact, the Navy argues that Congress refused to require that agencies apply FAR § 19.502-2(b) to the issuance of task orders. Navy Memorandum of Law, at 25 (July 24, 2008). Thus, in the Navy's view, Delex has no basis to argue that the rule must be followed here.

Because Delex's and the Navy's contentions raise legal questions related to the Small Business Act, and the FAR provisions implementing it, our Office solicited and obtained the views of the SBA on these questions.⁶ Contrary to the Navy's view, the SBA contends that FAR § 19.502-2(b) applies to the issuance of task and delivery orders and that the Navy was required to set aside the delivery order for the small business ID/IQ contract-holders. SBA Report 10 (Sept. 3, 2008). In addition, the SBA contends that the Navy unreasonably decided that it could not expect to receive offers from at least two responsible small business concerns at fair market prices.

Applicability of the Rule of Two

As set forth above, the Navy raises a threshold question, *i.e.*, whether FAR § 19.502-2(b) (the Rule of Two) applies to the placement of task and delivery orders under multiple-award contracts. In the Navy's view, set-aside requirements apply only to initial contract awards, and not to orders under multiple-award ID/IQ contracts.

The Navy's argument, in essence, is that an agency's obligation to follow the requirements of FAR Subpart 19.5 springs from, and is driven by, its obligation to follow the requirements for full and open competition set forth in FAR Part 6. Thus, the Navy notes that FAR § 6.203(c) requires contracting agencies to follow FAR Subpart 19.5, which governs small business set-asides. When an agency is placing task and delivery orders under a multiple-award contract, however, the Navy notes that FAR § 16.505(b)(1)(ii) advises that "the competition requirement in [FAR] Part 6 do[es] not apply to the ordering process." Thus, the Navy contends, since FAR Part 6 contains the requirement that agencies comply with FAR Subpart 19.5 (which contains the Rule of Two, § 19.502-2(b)), and since agencies are exempted from the requirements of FAR Part 6 when placing task and delivery orders, there is no

⁶ We accord substantial weight to the SBA's analysis. See USA Fabrics, Inc., B-295737; B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 6; SWR, Inc., B-294266, Oct. 6, 2004, 2004 CPD ¶ 219 at 5 n.4.

requirement for agencies placing such orders to comply with FAR Subpart 19.5. Navy Memorandum of Law, at 25-26 (July 24, 2008). We disagree.

As a preliminary matter, the requirements addressed in the Navy's argument, synopsized above, are not simply matters of regulation; most of them are matters of statute. For example, the regulations for using full and open competition set forth in FAR Part 6 are implementing the requirements for competition set forth in the Competition in Contracting Act of 1984 (CICA). 10 U.S.C. § 2304(a)(1)(A) (2000). Likewise, the regulations for using multiple-award ID/IQ contracts in FAR Subpart 16.5 are implementing the requirements of the Federal Acquisition Streamlining Act of 1994 (FASA). 10 U.S.C. § 2304a(d) (2000). And, of particular importance to this discussion, the regulations for awarding contracts to small businesses set forth in FAR Subpart 19.5, are implementing the requirements of the Small Business Act. 15 U.S.C. § 644(a) (2000).

As the SBA points out in its brief, the oldest of these statutory enactments, the Small Business Act, states that small businesses:

shall receive any award or contract or any part thereof, and be awarded any contract for the sale of Government property, as to which it is determined by the Administration and the contracting procurement or disposal agency (1) to be in the interest of maintaining or mobilizing the Nation's full productive capacity, (2) to be in the interest of war or national defense programs, (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government in each industry category are placed with small-business concerns, or (4) to be in the interest of assuring that a fair proportion of the total sales of Government property be made to small-business concerns;

15 U.S.C. § 644(a). As is evident from the text quoted above, the Small Business Act does not, on its face, enunciate the Rule of Two. Instead, as discussed below, the rule was established to implement the Act.

The origin of the Rule of Two predates the FAR; when the FAR was promulgated, the Office of Federal Procurement Policy (OFPP) prepared a Federal Register notice seeking comments on the rule's inclusion in the new government-wide procurement regulation. 49 Fed. Reg. 40135 (Oct. 3, 1984). This notice explains that the Rule of Two is intended to implement the Small Business Act language in 15 U.S.C. § 644(a), quoted above, requiring that small businesses receive a "fair proportion of the total

purchases and contracts for property and services for the Government.”⁷ Id. In addition, the notice advised that, in the view of OFPP, “the FAR language complies with current law and reflects the will of the Congress as expressed in the Small Business Act.” Id. Thus, while the Rule of Two is not specifically set out in the Small Business Act, it has been adopted as the FAR’s implementation of the Act’s requirements through notice and comment rulemaking.

We note next that when CICA was enacted in 1984, and when FASA was enacted in 1994, both statutes expressly recognized that their requirements were to be harmonized with existing statutes. See 10 U.S.C. § 2304 (a)(1) (CICA) and 10 U.S.C. § 2304a(a) (FASA).⁸ This explains, for example, why the “full and open” competition requirements of CICA can be harmonized with the FAR Rule of Two provision (which restricts competition, where the Rule of Two is met), since the latter implements the Small Business Act. Moreover, nothing in CICA or FASA would exempt task or delivery orders—and certainly nothing explicitly exempts them—from the requirements of FAR § 19.502-2(b).

With respect to the Navy’s contention that FAR § 16.505(b)(1)(ii) exempts task and delivery orders from the requirements of FAR Subpart 19.5, we think the Navy overreads the provision. When an agency is placing task and delivery orders under multiple-award contracts, it cannot, by definition, hold a full and open competition as described by FAR Part 6. This is because a contractor’s eligibility for future task and delivery orders is established by its receipt of one of the underlying awards; once the multiple-award contract is established, contractors who have not received an award have no vehicle (i.e., no contract) which they can use to compete for the placement of orders. Thus, in our view, the opening sentence of FAR § 16.505(b)(1)(ii)—i.e., “[t]he competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process”—means only what it says: that the competition requirements of Part 6 do not apply to ordering. In short, without an express waiver of the requirements of the Small Business Act (implemented here by the Rule of Two), we have no basis to conclude that this limited, and appropriate,

⁷ The Federal Register notice explains that the pre-FAR regulations known as the Defense Acquisition Regulation and the NASA Procurement Regulation implemented the “fair proportion” language of the Small Business Act with the Rule of Two standard, while the Federal Procurement Regulation implemented the same statutory language with a “sufficient number” standard. 49 Fed. Reg. 40135 (Oct. 24, 1984).

⁸ Specifically, the language in CICA limits its reach through the use of the words “except in the case of procurement procedures otherwise expressly authorized by statute, . . .” 10 U.S.C. § 2304(a)(1)(A). Similarly, the language in FASA states “[s]ubject to the requirements of this section, . . . and other applicable law,” 10 U.S.C. § 2304a(a).

exemption from the requirements of full and open competition in FAR Part 6 can exempt agencies from the requirements of FAR § 19.502-2(b) when placing orders.

The Navy also argues that Congress has never indicated that the small business set-aside requirements apply to the placement of task and delivery orders, despite numerous opportunities to do so in the years since the passage of FASA. Navy Memorandum of Law at 24-25 (July 24, 2008). In our view, this logic provides no basis for concluding that Congress intended that the small business set-aside requirements do not apply to FASA's authorization of the use of task and delivery order contracts. In fact, we think the Navy's argument is not supported by the facts.

The SBA points out that section 816 of the National Defense Authorization Act for FY 2006, Pub. L. No. 109-163, required the Secretary of Defense to issue guidance on the use of tiered evaluation schemes (sometimes referred to as "cascading set-aside clauses") for assessing offers for contracts and task and delivery orders. We note in particular that this enactment prescribes a prohibition on the use of such schemes unless a contracting officer has

conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations.

Pub. L. No., 109-163, § 816(b)(1). While this provision does not expressly state that the small business set-aside requirements of FAR § 19.502-2(b) are applicable to the placement of orders under ID/IQ contracts, it clearly indicates that Congress recognizes the possibility of limiting competition for task and delivery orders to small businesses when there is a sufficient number of small businesses to justify doing so. This provision also recognizes that there will be instances where the number of qualified small businesses will justify limiting competition pursuant to applicable law and regulations.

In our view, the legal question is whether the Rule of Two, which by its terms applies to "any acquisition over \$100,000," FAR § 19.502-2(b), applies to individually competed task or delivery orders under multiple-award contracts. We conclude that it does, because, at least for purposes of this analysis, those orders are properly viewed as "acquisitions." We have previously concluded that a delivery order placed under an ID/IQ contract is, itself, a "contract," at least for some purposes, see FAR § 2.101, and contracts are covered by the definition of "acquisition" in FAR § 2.101. Letters to the Air Force and Army concerning Valenzuela Engineering, Inc., 98-1 CPD ¶ 51 (Letter to the Air Force at n.1). Competitions for task and delivery orders are the stage when holders of multiple-award ID/IQ contracts offer prices and solutions to meet specific agency needs. This is therefore the most meaningful stage for a

Rule of Two analysis, in which the contracting officer needs to judge the likelihood of receiving at least two fair-market priced submissions from small businesses for the services or supplies being acquired under a specific solicitation. In sum, we conclude that individually-competed task and delivery orders are “acquisitions” for purposes of FAR § 19.502-2(b), so that the Rule of Two applies.⁹

As a final matter, we think the Navy has misinterpreted our decision in LBM, Inc., B-290682, Sept. 18, 2002, 2002 CPD ¶ 157, and a follow-on decision in that case, Department of the Army--Request for Modification of Recommendation, B-290682.2, Jan. 9, 2003, 2003 CPD ¶ 23, in its argument that our Office has concluded that there is no legal authority to use small business set-asides in placing task and delivery orders. In LBM, unlike here, the protester did not hold one of the ID/IQ multiple-award contracts. Instead, it complained that work it had been performing as a small business—i.e., motor pool services at Fort Polk, Louisiana—was improperly moved to the Logistical Joint Administrative Management Support Services (LOGJAMSS) contract without appropriate notice to the small business incumbent, and without following the set-aside requirements of FAR § 19.502-2(b). We agreed to hear LBM’s contention despite the (then in-place) limitation on our jurisdiction to hear protests involving the placement of task and delivery orders¹⁰ because LBM had a right to challenge the placement of this work on the LOGJAMSS contract without notice; we treated LBM’s complaint as a timely solicitation challenge to the LOGJAMSS contract. LBM at 5-6.

Of relevance to this discussion, after we sustained LBM’s protest, we denied the Army’s request to modify our recommendation that the Army consider whether, in

⁹ Where an agency is legally required to compete an individual order and to afford all multiple-award contract-holders an opportunity to submit an offer and have that offer fairly considered, it is FAR § 19.502-2(b) that would appear to provide the only legal basis for creating a small business set-aside. As the Acquisition Advisory Panel pointed out in its report, “voluntary” set asides, which the Navy appears to have originally undertaken in this acquisition, would seem to run afoul of the requirement (set out in the Defense FAR Supplement at § 216.505-70(b)) that all multiple-award contract-holders be given a fair opportunity to submit an offer and have it fairly considered. Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, Jan. 2007, at 306-07.

¹⁰ From FASA’s enactment until early this year, a bid protest challenge to the issuance of a task and delivery order under a multiple-award ID/IQ contract was expressly not authorized, except in limited conditions. 10 U.S.C. § 2304c(d). In section 843 of the National Defense Authorization Act for Fiscal Year 2008, Pub. L. 110-181, 122 Stat. 3, 237 (2008) (to be codified at 10 U.S.C. § 2304c(e)), Congress authorized protests challenging the issuance of such orders valued in excess of \$10 million.

accordance with FAR § 19.502-2(b), the motor pool services at Fort Polk should be set aside exclusively for small business participation. Specifically, we disagreed with the Army's view that it could appropriately limit the set-aside to small business LOGJAMSS contract-holders. Our disagreement was based on the posture of LBM as a non-LOGJAMSS contract holder, and on the fact that the protest arose, in our view, as a solicitation challenge to the formation of the LOGJAMSS contract. Thus, the remedy of limiting the set-aside decision to LOGJAMSS contract-holders would not have addressed LBM's underlying complaint that it was never provided notice that the work it was performing would be included on the original LOGJAMSS contract. Accordingly, our decisions in those cases have little application to the situation here.

For the reasons set forth above, we conclude that FAR § 19.502-2(b) applies to task and delivery order competitions among multiple-award contract-holders. Accordingly, the Navy is required to limit the competition for these delivery orders to small businesses if it concludes that it has a reasonable expectation of receiving offers from at least two responsible small business concerns, and concludes that award can be made at a fair market price.

Reasonable Expectation of Offers from Two or More Small Businesses

Next, as to the agency's decision that it does not expect to receive two or more offers from small businesses, Delex argues that the decision was unreasonable. Our Office generally regards a set-aside determination as a matter of business judgment within the CO'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. While the use of any particular method of assessing the availability of firms is not required, measures such as prior procurement history, market surveys, and advice from the appropriate small business specialists may all constitute adequate grounds for a CO's decision to set aside, or 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., B-292247; B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

The principal bases for the agency's set-aside determination was information obtained from a review of the TSC II procurement history. The CO explains that the agency's analysis of this information indicated that Delex did not submit a proposal for the predecessor GATP requirement; that in fiscal year 2007, while Delex had expressed interest in the last five delivery order acquisitions, it submitted proposals for only three of the five acquisitions. Moreover, the Navy explains that in a previous delivery-order competition under this ID/IQ contract, where only DPA and Delex submitted proposals, Delex's proposal was evaluated as unsatisfactory, leaving the agency with only the option of making award to DPA. CO Statement at 7-10. As a result, the CO explains that she does not think Delex will submit a viable proposal to successfully perform the GATP requirements, which, she explains, have a value five times the value of any delivery order Delex has previously performed. Id. at 8, 9.

Delex argues that the agency's analysis has a number of flaws. First, with respect to the predecessor GATP delivery order, Delex points out that the order was not reserved for small businesses. As a result, Delex explains that it made a business decision not to compete with the large business ID/IQ contract-holders for this work. Second, with respect to the last five delivery order acquisitions, for which Delex responded to only three, the protester (and the SBA) note that multiple solicitations were issued in a short period of time, so that the company reasonably chose to respond to some, but not all, of the solicitations. Finally, with respect to the delivery order competition 2 years earlier where Delex's proposal was evaluated as unsatisfactory, Delex contends the Navy's focus on that one proposal, while ignoring more current and more relevant information, is unfair.

We have examined each of the reasons identified by the Navy for withdrawing the initial set-aside determination, and we conclude that the Navy has not adequately documented the basis for its decision. For example, with respect to the predecessor delivery order for this requirement, we agree with Delex that a small business could reasonably decide not to compete with the large business contract-holders for this work, and that an agency should not rely on the results of an unrestricted competition to determine the likelihood that a small business will participate in a set-aside competition. With respect to the five previous acquisitions, we again agree with Delex. We know of no requirement that a small business participate in every acquisition for which it is eligible to compete, especially when several of these acquisitions are occurring over a short period of time.

Finally, we are concerned about the Navy's reliance on Delex's submission of an unsatisfactory proposal 2 years ago, as opposed to other more recent, and perhaps more relevant events. In addition, the Navy apparently offers this information to suggest that Delex may lack the ability to submit an acceptable proposal, and presumably to adequately perform.

The record here shows that Delex has received a total of seven TSC II delivery orders since 2003, and that the company is currently performing a 5-year delivery order issued in May 2005 with an estimated value of \$15.3 million including options. AR exh. 32, Delex Delivery Orders (June 20, 2008). We think information about Delex's actual performance of these ongoing orders should receive some weight in this deliberation. In addition, to the extent that the Navy is suggesting that Delex lacks capacity or ability, there is evidence in the record to the contrary. Not only is there information about Delex's performance of delivery orders under the TSC II ID/IQ contract, but Delex also advised, in its comments in answer to the agency report, that it is currently the prime contractor on an \$85 million ID/IQ contract for the Navy--on which it manages between 11 and 13 subcontractors, including corporations like SAIC and CACI. Protester's Comments at 10 (Aug. 11, 2008). In addition, Delex pointed out in its initial protest filing that it has performed

approximately \$265 million in Defense Department and Foreign Military Sales awards in the past 10 years. Protest at 6 (June 30, 2008).

When the Navy contends that this order will be larger by a magnitude of five than any order Delex has previously performed under this ID/IQ contract, we note first that this order is for \$75 million over 5 years. Thus, if the value of the work is evenly spread across the life of the contract, this work will be valued at approximately \$15 million per year. Given Delex's other Navy business, we think the Navy has not reasonably supported its conclusion that the company will not be able to submit a competitive proposal because the magnitude of the work is too great.

Finally, the SBA reviewed the agency's analysis as well as the protester's multiple submissions on this issue, and arrives at basically the same conclusion—that "the contracting officer has [not] based her decision on sufficient facts to establish its reasonableness." SBA Report at 13.

In this regard, the SBA noted that

the contracting officer could not rely solely on the fact that Delex had not submitted offers on previous requirements when making her determination. Further, the fact that the competition has decreased since there are now fewer [small business concerns] competing may increase Delex's desire to compete for this award.

In addition, it is not clear what information the contracting officer used to form her decision that Delex can not perform a five year, \$75 million requirement. . . . Further, the contracting officer's market research does not appear to be recent . . . and relies on assumptions based upon the quality of a previously submitted proposal rather than actual contractor performance.

SBA Report at 12-13. Based on this record, we think that the agency's determination to withdraw the initial set-aside and, to open the requirement to all TSC II awardees is not adequately supported.

RECOMMENDATION

We sustain the protest because we conclude that the agency has not adequately supported its determination that it could not expect to receive offers from the two TSC II small business concerns at fair market prices; in other words, the agency failed to adequately assess Delex's capability and interest before reversing its decision to set aside this order for the small business awardees. Accordingly, we recommend that the agency make a new determination of whether there is a reasonable expectation that it will receive offers from the two remaining TSC II small businesses, and whether award will be made at a fair market price. If the

agency's research indicates that these conditions are met, the agency should cancel the current solicitation and reissue it as a small business set-aside. We also recommend that Delex be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2008). The protester's certified claim for costs, detailing the time expended and the 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