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**Comptroller General
of the United States**

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

Decision

Matter of: TRS Research

File: B-290644

Date: September 13, 2002

Robert G. Fryling, Esq., and Edward J. Hoffman, Esq., Blank Rome Comisky & McCauley, for the protester.

Capt. Gregory A. Moritz, Department of the Army, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Susan K. McAuliffe, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest of consolidated procurement is sustained where solicitation consolidated procurement requirements previously provided under separate smaller contracts, and was likely to be unsuitable for award to a small business, and thus constituted a bundled procurement, and record shows that agency failed to comply with requirements to demonstrate that bundling was justified.

2. Agency improperly failed to coordinate its anticipated consolidated procurement with the Small Business Administration, as required by statute and regulation, since small business contractors currently perform work included in the consolidated procurement and magnitude of the consolidated procurement renders small business participation unlikely.

DECISION

TRS Research, a small business, protests the terms of request for proposals (RFP) No. DAMT01-02-R-0028, issued by the Department of the Army, Military Traffic Management Command (MTMC), for the award of a fixed-price indefinite-quantity contract for container program management services to meet Department of Defense (DOD) needs for leased intermodal container equipment worldwide.¹

¹ The intermodal containers permit transshipping of cargo among sea, highway, rail and air modes of transportation.

TRS contends that the procurement is improperly bundled and that the agency has not shown that the consolidation of procurement requirements is justified.

We sustain the protest.

The RFP, issued on March 29, 2002, sought a single source to provide leased intermodal container equipment worldwide to the Army and other agencies, and to manage the agency's intermodal container leasing program, including the development and maintenance of a web-based information management system for ordering equipment and obtaining performance management information via the Internet. The solicitation calls for program management services and the provision of a wide range of intermodal container equipment, including refrigerated containers. The RFP's performance work statement was developed by an Integrated Process Team (IPT) consisting of government and industry representatives who set out to incorporate standard business practices into the agency's intermodal container leasing program.

The solicitation was issued on an unrestricted basis after the agency decided, with the concurrence of the agency's small business specialist, not to set the procurement aside for small business concerns because "[t]here is no expectation that 2 or more small businesses exist that can provide the robust system consistent with the requirements of the proposed acquisition in order to provide the best mix of cost, performance and schedule." Small Business Coordination Record, Mar. 19, 2002. The contracting officer, however, did not refer the proposed acquisition to the Small Business Administration (SBA) Procurement Center Representative (PCR) or to anyone else at the SBA for review prior to conducting the procurement.

The RFP contemplated the award of a contract for a base year and 4 option years (at a value of approximately \$82 million); the RFP provided an additional 5-year award term incentive (increasing the total potential value of the contract to approximately \$186 million). RFP § B.2.4. The guaranteed minimum value for the indefinite-quantity effort was set at \$500,000 per year, reflecting the agency's estimate that, at a minimum, the program management function would be ordered each year. RFP § B.2.3. Award was to be made to the offeror that submitted the proposal deemed to present the best value to the agency, management, technical, past performance, socio-economic commitment and price factors considered. RFP §§ M.2-M.4.1.5.

The agency's intermodal container leasing program previously had been managed by MTMC, which acted as program manager and contract administrator for requesting activities and vendors. The majority of containers were supplied by nine vendors--including the protester--that had been awarded indefinite-delivery/indefinite-quantity (ID/IQ) contracts under a Master Lease Agreement (MLA) in 1997. Three of the nine ID/IQ vendors (including the protester) are small businesses. The ID/IQ contracts vary in scope; although some vendors were awarded some of the same items, no two of the nine vendors were awarded contracts requiring exactly the same equipment.

The MLA, which is set to expire on September 30, had been valued at approximately \$45 million; the guaranteed minimum value of each vendor's contract under the MLA was set at \$10,000 for a 5-year period.

MTMC reports that refrigerated containers and related parts and generator sets were inadvertently omitted entirely from the list of items identified in the MLA. Consequently, the agency's refrigerated container requirements have been met by separate acquisitions outside of the MLA; at least three small businesses (again including the protester) have provided refrigerated containers to the agency under separate acquisitions. The agency reports that 320 refrigerated containers and related generator sets and spare part kits have been leased outside the MLA, by separate procurements, over the last 4 fiscal years (in contrast to the 27,211 pieces of various container equipment that have been leased under the MLA during that time). Contracting Officer's Statement, June 25, 2002, at 5.

The agency contends that awarding a single contract to one contractor for all of its intermodal container leasing program needs will cure performance problems experienced under the previous fragmented and inefficient approach, which required the administration of nine different ID/IQ contracts (as well as the separate smaller contracts for items not included in the MLA). Id.

TRS contends that the RFP improperly consolidates requirements to the detriment of TRS and other small business concerns, and that the agency failed to meet statutory and regulatory requirements for justification of its bundled procurement. In particular, TRS argues that the solicitation violates the restrictions against unnecessary and unjustified bundling in the Small Business Act and implementing regulations in that the agency has not justified its consolidation of procurement requirements previously provided under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern.² See 15 U.S.C. § 632(o)(2); 13 C.F.R. § 125.2(d)(i); Federal Acquisition Regulation (FAR) § 2.101. The agency contends that the procedural requirements for justification of bundling do not apply because the procurement is not bundled.

The Small Business Act, as amended, provides that, "to the maximum extent practicable," each agency shall "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements

² TRS initially also contended that the consolidated procurement unduly restricted competition in violation of the Competition in Contracting Act of 1984, 10 U.S.C. §2305(a)(1) (2000). The protester's subsequent submissions to our Office, however, pursued only the challenge of bundling under the Small Business Act. Accordingly, our discussion is limited to the requirements of the Small Business Act and that Act's application to the current procurement.

as prime contractors.” 15 U.S.C. § 631(j)(3) (2000). To implement this restriction, the Small Business Act defines bundling as:

consolidating 2 or more procurement requirements for goods or services previously provided or performed under separate smaller contracts [performed by or suitable for award to one or more small business concerns] into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to-- (A) the diversity, size, or specialized nature of the elements of the performance specified; (B) the aggregate dollar value of the anticipated award; (C) the geographical dispersion of the contract performance sites; or (D) any combination of the factors described in subparagraphs (A), (B), and (C).

15 U.S.C. §§ 632(o)(2), (3); see also FAR § 2.101.

Under the statute, an agency may determine that consolidation of requirements is “necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the Federal Government would derive from the consolidation measurably substantial benefits” 15 U.S.C. § 644(e)(2)(B). The statute provides that such benefits may include cost savings, quality improvements, reductions in acquisition cycle times, better terms and conditions, or other benefits. *Id.* The Act and implementing regulations provide specific requirements for an agency’s consideration and analysis of the benefits of the bundled procurement in light of its impact on small business concerns.³ 15 U.S.C. §§ 644(a), (e); 13 C.F.R. §§ 125.2(b)-(d) (2002).

The agency contends that the current procurement does not meet the definition of bundling. The agency primarily argues that the RFP’s intermodal container equipment requirements are not a consolidation of “2 or more procurement requirements,” as required in the statutory definition, but rather represent a single procurement requirement for container leasing services to meet all of the agency’s intermodal container equipment requirements worldwide, which previously had been met through the issuance of orders under the nine ID/IQ vendor contracts awarded under the MLA.

³ For example, combined benefits (in terms of cost savings, quality improvements, better terms, reductions in time, and other benefits), quantified at an amount equivalent to 5 percent of the contract value, or \$7.5 million, whichever is greater, where the contract value exceeds \$75 million, may justify a bundled requirement. 13 C.F.R. § 125.2(d)(5)(i)(B). Alternate procedures for the justification of bundled requirements are also provided in the regulations. See 13 C.F.R. § 125.2(d)(5)(ii).

The agency does not consider its separate acquisitions of refrigerated containers (and associated equipment) to constitute a separate procurement requirement, and it discounts the relevance of its occasional separate acquisition of refrigerated containers outside the MLA, contending that the refrigerated container equipment ordered was minimal compared to the amount of equipment ordered under the ID/IQ contracts. MTMC also contends that the acquisition of refrigerated containers should not be considered to be a separate procurement requirement, since the MLA should have provided for refrigerated containers as a type of intermodal container equipment but inadvertently did not.

The SBA disagrees with the agency's view that the procurement is not bundled and argues that the agency must comply with the Small Business Act provisions on bundling. The SBA concludes that the procedural requirements for justification of bundling were improperly disregarded by the contracting activity.

As stated above, the first element of the statutory definition of bundling involves the consolidation of "2 or more procurement requirements" previously satisfied by separate smaller contracts. The Act, however, does not define the term "procurement requirement." The agency contends that the term should be broadly defined here. Specifically, the agency contends that, since the MLA sought to include all of the agency's intermodal container equipment requirements, the MLA and the nine resulting ID/IQ contracts should be viewed as constituting one single broad procurement requirement for intermodal container equipment. The protester argues that the different coverage of each of those ID/IQ contracts indicates that more than one procurement requirement is being met by the contracts. The protester points out that its ID/IQ contract is for far fewer than the full list of items identified in the MLA, and argues that, since its award is not reflective of the MLA's full list, that list should not be considered the agency's procurement requirement that resulted in the award of its contract. In other words, the protester contends that the varied terms of each of the contracts indicate that, as awarded, the ID/IQ contracts meet multiple procurement requirements. The SBA agrees that each ID/IQ contract should be viewed as a separate procurement requirement, as the terms of each ID/IQ contract here define the agency's requirement to be met by that contract.

Our consideration of the entire record, including the submissions of the parties and the SBA, leads us to conclude that the RFP consolidated multiple requirements. While we recognize that there are instances where an agency awards identical ID/IQ contracts so that it might be reasonable to define what was solicited and awarded as one procurement requirement (a question we need not resolve here), that is not what occurred in this instance. In this case, although a single solicitation (the MLA) was issued, it listed a variety of equipment needed by the agency. The MLA thus was not a statement of a single procurement requirement, as the agency suggests, but instead functioned more as a list of a range of multiple procurement requirements. As the protester notes, the nine contracts awarded under the MLA were of varied scope and

covered varying lists of equipment. If the MLA referenced a single requirement, as the agency contends, that would mean that the contracting agency had awarded many (perhaps all) of the nine contracts even though (since they did not cover the entire MLA) they did not satisfy the agency's procurement requirement. The fact that all of the containers and all of the related equipment can be accurately described as intermodal container equipment does not establish that they are simply elements in a large unitary procurement requirement; otherwise, separate equipment contracts for different types of furniture, or for identical services in different regions of the country, would have to be viewed as contracts for a single procurement requirement. In our view, to define "procurement requirement" so broadly could shield from meaningful review the very sort of arbitrary consolidation of requirements that the Act's restrictions on bundling are intended to prevent.⁴

Our conclusion that the consolidated RFP at issue here covers "2 or more procurement requirements" is further supported by the agency's previous use of separate contract vehicles for refrigerated containers. The record is clear that, whether due to agency inadvertence or otherwise, neither the MLA nor any of the ID/IQ contracts contemplated or provided for the acquisition of refrigerated containers. The separate acquisition of refrigerated containers strongly suggests that they represent a distinct procurement requirement. Although the agency suggests that its refrigerated container acquisitions should be overlooked in determining whether bundling is involved here because there were far fewer refrigerated containers acquired than other types of equipment ordered under the ID/IQ contracts, the agency has not provided any legal support for this contention. The statutory provisions defining bundling simply do not differentiate between large or small procurement requirements regarding the required consolidation of two or more "procurement requirements"; in fact, the Act's definition specifically recognizes that procurement requirements may have been met under relatively small contracts. See 15 U.S.C. § 632(o)(2). Accordingly, our review of the record leads us to agree with the protester's and the SBA's view that the RFP here consolidates two or more procurement requirements previously provided under separate smaller contracts by small businesses.⁵

⁴ Our Office has recognized the benefits provided by the award of multiple ID/IQ contracts for related, but distinct, procurement requirements, because such ID/IQ contracts mitigate against a consolidated "winner-takes-all" situation that would preclude additional contractors from performing some of the government's requirements. See, e.g., Aalco Forwarding, Inc., et al., B-277241.12, B-277241.13, Dec. 29, 1997, 97-2 CPD ¶ 175 at 7 n.9.

⁵ Similarly, since the current RFP apparently includes additional requirements not specifically referenced in the matrix of the ID/IQ contract terms provided for the record, such as the leasing of 40-foot open top and flatrack containers, we note that, to the extent the agency has acquired such services by separate smaller contracts in
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The final element of the Act's definition of bundling concerns the likelihood that the consolidated requirement is unsuitable for award to a small business concern due to its size, value, specialized nature, or geographical dispersion. In its supplemental report submitted in response to the SBA's comments on the agency report, the agency contends that an award under the RFP should be considered suitable for a small business, since the agency in fact received one small business offer under the RFP.

Our review of the record shows that despite the agency's post-protest contention that an award under the RFP is suitable for small businesses, the record contains no evidence of any meaningful analysis or consideration by the agency that supports this position. Our review of the record instead indicates that the agency itself had some concerns in this regard—it expected that no small business may exist that could meet the sizeable performance requirements of the RFP. See Small Business Coordination Record, Mar. 19, 2002. Further, although the agency reports receipt of one, presumably self-described, small business offer, no information at all has been provided by the agency as to the technical acceptability or price reasonableness of the proposal. The receipt of only one small business offer, in any event, would suggest a substantial reduction in small business participation from that which was achieved under the prior MLA procurement (where three of the nine vendors awarded contracts in that procurement were small businesses). Consequently, given the lack of support for the agency's general conclusion as to the likelihood that a consolidated contract is suitable for small businesses, and in view of the specialized nature of the information technology portion of the solicitation, the significant increase in contract value of this intermodal container equipment procurement from the previous MLA procurement and the worldwide scope of the contract contemplated under the RFP, we believe the protester and the SBA have reasonably shown that award of the contract contemplated by the RFP is likely to be unsuitable for award to a small business. Accordingly, we believe the current RFP fits within the statutory definition of a bundled procurement. 15 U.S.C. § 632(o)(2).

It is clear from the record that because the agency did not consider the requirement bundled, it failed to follow any of the procedural requirements in the Small Business Act's implementing regulations to justify the bundling of requirements under the

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the past, they also would constitute separate procurement requirements consolidated in the current RFP.

RFP.⁶ We therefore sustain the protest.⁷

Our review of the record confirms an additional statutory violation by the agency regarding notification to the SBA of the anticipated consolidated procurement prior to public issuance of the solicitation. The Small Business Act and its implementing regulations (as well as specific DOD guidance for the consolidation of requirements) call for contracting agencies to submit documentation, including the solicitation, to the SBA for review of anticipated consolidated procurements where a bundled procurement is unjustified or it includes work currently being performed by a small business and the magnitude of the proposed procurement renders small business prime contract participation unlikely. See 15 U.S.C. § 644(a); 13 C.F.R. § 125.2(b); FAR §§19.201, 19.202-1(e); DOD Memorandum Regarding Consolidation of Contract Requirements, Oct. 23, 1996, at 1. The proposed procurement is to be reviewed by the SBA PCR at least 30 days prior to the solicitation's issuance. Id. Here, even if the contracting officer did not think the procurement was bundled, we believe it was unreasonable for her not to recognize that coordination with the SBA PCR was required, since small businesses were performing work included in the RFP and the magnitude of the proposed consolidated procurement could reasonably render small business prime contractor participation unlikely.⁸ The agency's failure to coordinate

⁶ The agency does not argue, nor does our review of the record show, that the IPT's market research or an early case study prepared by the agency's consultant quantified the value of benefits to be achieved under the actual consolidated requirements of the current RFP. Also, as the SBA notes, since the value of the contract here exceeds \$75 million, the agency is required to meet additional procedural requirements to justify "substantial" bundling. See 13 C.F.R. §§ 125.2(d)(1)(iii); 125.2(d)(7).

⁷ The agency points out that our Office will not sustain a protest where the protester has not suffered competitive prejudice from the agency's actions. See McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3. Here, however, we believe the record demonstrates sufficient prejudice. TRS, a small business that has supplied certain intermodal container equipment under its ID/IQ contract, and has also provided refrigerated containers outside of the MLA, has shown that it reasonably will be precluded from doing so here where the RFP's bundling of requirements, including the work it had performed in the past, renders unlikely that an award under the RFP would be suitable for a small business.

⁸ While MTMC argues that the contracting officer had an informal agreement with the SBA PCR to refer to the PCR only those anticipated procurements related to set-asides or matters about which the contracting officer had concerns, such an agreement cannot excuse MTMC from complying with the clear statutory requirements for review by the SBA here; there is no statutory or regulatory provision for the informal agreement the contracting officer offers to support her failure to follow the statutory and regulatory requirements.

its current consolidation of requirements with the SBA PCR was thus inconsistent with the requirements of the Act and implementing regulations.⁹ See Letter to the Air Force in the Matter of Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51 at 1-3.

In accordance with the above, we recommend that the agency forward a copy of the solicitation to the SBA PCR in order to give the PCR the opportunity, as required by statute and regulation, to propose alternative actions or to appeal the agency's consolidation of requirements. Id. We also recommend that the agency conduct the required statutory and regulatory reviews in order to properly document whether the current bundling of requirements is justified. See 15 U.S.C. § 644(a); 13 C.F.R. § 125.2(d). We recommend that the agency then revise the RFP, if appropriate, and solicit new proposals. We also recommend that the protester be reimbursed the cost of filing and pursuing its protests, including attorney's fees. The protester should submit its certified claim for such costs, detailing the time expended and the costs incurred, directly to the contracting agency within 60 days of receiving this decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel

⁹ The protester also argues that the RFP's \$500,000 guaranteed minimum annual value is an improper nominal amount; this argument is unpersuasive. Contrary to the protester's suggestion, there is no legal requirement for a guaranteed minimum to be large enough to reimburse a contractor for its start-up or performance costs. The agency has explained that the minimum amount provided in the RFP reflects the agency's expected minimum annual order of, at least, the program management function of the RFP. Since the minimum quantity on any one contract may not exceed the amount the government is fairly certain to order, FAR § 16.504(a)(2), we have no basis to question the RFP's stated guaranteed minimum; the protester simply has not shown that the amount would mislead contractors, subject the government to undue risk, or otherwise fail to provide adequate consideration to bind the parties to the contract. See Aalco Forwarding, Inc., et al., B-277241.15, Mar. 11, 1998, 98-1 CPD ¶ 87 at 6-8.