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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Family Entertainment Services, Inc.

File: B-401693; B-401693.2

Date: October 20, 2009

Michael Bornstein, Esq., Bornstein Law Offices, Inc., for the protester.
Michael Twine, for G2 Engineering and Management, Inc., an intervenor.
Laura L. Hoffman, Esq., Department of Energy, for the agency.
Cherie J. Owen, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Protest that solicitation for facilities support services should have been set aside for historically underutilized business zone (HUBZone) businesses is denied, where agency reasonably determined from market research, past procurement history, consultation with a contracting officer at a similar site, and consultation with the Small Business Administration that there was not a reasonable likelihood that two or more responsible HUBZone business offerors would submit proposals at a fair and reasonable price.

DECISION

Family Entertainment Services, Inc. (FESI), of Jackson, Ohio, protests the terms of request for proposals (RFP) No. DE-SOL-0000530, issued by the Department of Energy (DOE) for facilities support services for the environmental clean-up activities at the Portsmouth Gaseous Diffusion Plant in Piketon, Ohio, a site with Category 2 nuclear facilities. FESI contends that the RFP should have been set aside for a competition limited to Historically Underutilized Business Zone (HUBZone) businesses.

We deny the protest.

BACKGROUND

On June 4, 2009, DOE issued a solicitation seeking facilities support services to support current and future decontamination and decommissioning (D&D) work at the Portsmouth Gaseous Diffusion Plant. The D&D work was to include maintaining

the grounds, including the roadway; snow removal; janitorial services; computer and telecommunication services; security; training services; records management; fleet management; non-nuclear preventive and corrective maintenance activities in non-nuclear and nuclear facilities; ongoing environmental, safety, health, and quality programs; waste management and pollution control; project management; and other support activities. Agency Report (AR), Tab 10C, Performance Work Statement, at C-1 to C-20.

Prior to issuing the solicitation, the agency performed market research from early 2007 through around July 2008 in support of its entire D&D project at the Portsmouth site. As part of this market research, DOE reviewed several databases, including the central contractor registration website (CCR) and an online search tool called the Dynamic Small Business Search. AR at 2. The agency also reviewed its procurement history for these services, and consulted with other contracting officers (CO) with similar contracts to determine whether there were HUBZone, Service-Disabled Veteran-Owned, or 8(a) businesses that might be capable of performing this work at a fair market price. Id. In connection with its general D&D project market research, the agency also conducted an industry day, which included a briefing on the project's acquisition strategy, a site tour, and one-on-one sessions with the CO and program officials. Id. The agency states that small businesses were encouraged to attend the industry day events and to engage in one-on-one sessions with the agency that were conducted in April 2008. Id. During these exchanges, DOE specifically noted work that it anticipated being set-aside for small businesses. Id.

With regard to the procurement at issue here, the agency expressly considered the possibility of setting aside the procurement for HUBZone small businesses. AR at 3. The agency's market research on this issue included database searches using the North American Industry Classification System (NAICS) code 561210 (Facilities Support Services). The agency also conducted database searches omitting the NAICS code, but using key words. In addition, the CO consulted with a CO at another DOE site who had procured similar services under NAICS code 561210. AR at 3.

The CO also met with the Small Business Administration's (SBA) Procurement Center Representative (PCR) to discuss her market research findings regarding this procurement. AR at 5. After discussing the CO's market research findings and attending the industry day briefing in March 2008, the SBA PCR concurred in the CO's determination that this procurement should be set aside for small businesses, but not for HUBZone small businesses. AR at 5; AR, Tab 8, Small Business Review Form, at 1. At the conclusion of this process, the CO decided that only one HUBZone business might submit an acceptable proposal at a fair market price.¹ AR

¹ While the CO initially identified two other potential HUBZone offerors, the first business did not express interest in competing for this procurement, and the CO
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at 3. Therefore, the CO concluded that the agency was not likely to receive two or more offers from HUBZone small businesses, and the procurement was set aside for small businesses, but not for HUBZone small businesses.

DISCUSSION

FESI challenges the agency's decision not to set the procurement aside for HUBZone small business concerns. Specifically, FESI asserts that the agency's FedBizOpps² notice for the industry day was insufficient because the notice stated that the agency was looking for a contractor "to lead the anticipated multi-billion dollar [D&D] project," which a HUBZone small business would likely not be qualified to handle. Supplemental Protest at 2. FESI also contends that the agency failed to conduct sufficient market research prior to issuing the RFP because, while the CO states that she contacted another CO who had procured similar services at a similar site, the CO failed to contact government facilities in adjacent states who may have also procured similar services. Protest at 3. Finally, the protester asserts that the SBA would not have concurred with the agency's decision to post the solicitation as a small business set aside, had the SBA PRC known of these alleged flaws in the agency's market research. In response, the agency argues that its market research was reasonable, and that the validity of its market research is supported by the fact that no HUBZone small business submitted a proposal in response to the solicitation.

Acquisitions must be set aside for HUBZone small business concerns if the agency determines that there is a reasonable expectation that offers will be received from two or more HUBZone small business concerns, and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.1305(a), (b). Generally, our Office regards such a determination as a matter of business judgment within the agency's discretion, which we will not disturb absent a clear showing that it has been abused. Global Solutions Network, Inc., B-292568, Oct. 3, 2003, 2003 CPD ¶ 174 at 3. An agency must make reasonable efforts to ascertain whether it will receive offers from at least two HUBZone small business concerns with the capability to perform the work, and we will review a protest to determine whether the agency has done so. Id. at 3. The use of any particular method of assessing the availability of HUBZone

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concluded that it was unclear whether this business had the capability to perform the work. In addition, this offeror left the HUBZone program before the deadline for submission of proposals. AR at 3. With regard to the second potential HUBZone offeror, the CO determined that the business was not, in fact, a HUBZone entity. This firm also did not express any interest in competing for the procurement at issue. AR at 4.

² The FedBizOpps website, www.fbo.gov, is the government-wide point of entry for the electronic publication of notices. Federal Acquisition Regulation (FAR) §§ 2.101, 5.003, 5.101, 5.201.

small businesses is not required, and 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 not to set aside a procurement. American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3.

As noted above, the CO performed database searches using both the applicable NAICS code and keywords. In addition, the CO consulted with another CO who had procured similar services at a similar DOE site. The CO also consulted with the SBA representative regarding the possibility of setting aside the procurement for HUBZone small businesses. The CO determined, based on all of these findings, plus her knowledge of the site's current contractors and the site's procurement history, that there was no reasonable expectation that the agency would receive two or more offers from HUBZone firms in response to the RFP.

While the protester focuses on the insufficiency of the FedBizOpps notice for the industry day, we think that the CO's research with regard to this particular procurement--database searches, consultation with another CO and with the SBA representative, and consideration of current contractors at the site and the site's procurement history--was reasonable. In view of the foregoing considerations, we have no basis to question the agency's judgment not to set aside this requirement for HUBZone concerns.

The protest is denied.

Lynn H. Gibson
Acting General Counsel