



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ACCU-Lab Medical Testing

File: B-270259

Date: February 20, 1996

Joseph Gallo, Esq., Gallo and Ross, for the protester.

H. Charles Coburn, Esq., Department of Justice, Federal Bureau of Prisons, for the agency.

Audrey H. Liebross, Esq., for the Small Business Administration.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency improperly withdrew small business set-aside for drug testing services, notwithstanding its receipt of 21 expressions of interest from small businesses, where the agency did not perform an adequate market survey to determine whether it could reasonably expect 2 or more responsible small businesses to submit bids at fair market prices, but simply relied on prior procurement history that did not itself justify the decision to withdraw the set-aside.

DECISION

ACCU-Lab Medical Testing protests the issuance of invitation for bids (IFB) No. 100-0575-5 by the Department of Justice, Federal Bureau of Prisons, for inmate drug testing services. ACCU-Lab asserts that the solicitation should have been set aside for exclusive small business participation.

We sustain the protest.

As originally issued by the Bureau in September 1994, the solicitation was set aside for exclusive small business participation. Twenty-one small businesses responded to the synopsis in the Commerce Business Daily (CBD) by requesting copies of the IFB. Before bids were submitted, the Bureau determined that the Department of Veterans Affairs (VA) Medical Center in Dallas, Texas, would be able to provide the drug testing services less expensively than the incumbent contractor. Instead of continuing with the procurement, the Bureau entered into an inter-agency agreement with the VA for the solicited drug testing services with performance commencing on July 13, 1995. Pharmchem, the incumbent contractor, then filed an action in the United States District Court to enjoin the Bureau from obtaining the drug testing services from the VA. Pharmchem alleged, among other things, that the Bureau had improperly determined that the VA could provide the services more

conveniently or cheaply than a commercial enterprise, a determination that is required by the Economy Act, 31 U.S.C. § 1535(a)(4) (1994), prior to entering into an inter-agency agreement. The Bureau decided to resolve the matter by agreeing to reissue the solicitation for the inmate drug testing services and, on that basis, the court dismissed Pharmchem's motion.

When it reissued the solicitation, the Bureau announced in an August 23, 1995, CBD notice that the acquisition would no longer be restricted to small businesses.¹ ACCU-Lab, a small business, filed an agency-level protest objecting to the Bureau's withdrawal of the set-aside restriction. After it received the Bureau's denial of its protest, ACCU-Lab filed a timely protest with our Office, renewing its assertion that the solicitation should have remained set aside for small businesses. ACCU-Lab contends that there are numerous capable small businesses which can offer the solicited drug testing services at fair market prices.

An acquisition of services must be set aside for exclusive small business participation if the contracting officer determines that there is a reasonable expectation that offers will be received from at least two responsible small business concerns and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.502-2(b). For the most part, we view this determination as a business judgment within the contracting officer's discretion. Bollinger Mach. Shop and Shipyard, Inc., B-258563; B-259265, Jan. 31, 1995, 95-1 CPD ¶ 56. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. CardioMetrix, B-261327, Aug. 30, 1995, 95-2 CPD ¶ 96. Where, as here, a set-aside is withdrawn, the contracting officer is required to give written notice to the agency's small business specialist and the Small Business Administration (SBA) procurement center representative, if one is assigned, stating the reasons for the withdrawal. FAR § 19.506(a).

The Bureau reports that the contracting officer decided to withdraw the set-aside because she concluded that it was unlikely that at least two bids from small businesses would be received here because (1) during the 1990 solicitation for the same services only one bid from a small business was received at a fair market price; (2) a 1993 set-aside for inmate laboratory testing services at a correctional facility in San Diego resulted in no qualified bids from small businesses; (3) an inquiry of the National Institute on Drug Abuse found that that agency does not contract with a small business for its drug testing requirements; and (4) a small

¹The CBD notice also stated that the submitted bids would serve as a cost comparison to enable the Bureau to determine whether performance of the work under a commercial contract or by the government would be more economical.

business probably would have insufficient expertise and resources given the contract requirements.

We initially note that, in withdrawing the set-aside, the agency failed to comply with FAR § 19.506(a), which requires the contracting officer to consult with the agency's small business specialist and the SBA procurement center representative, if one is assigned. See Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., 72 Comp. Gen. 23 (1992), 92-2 CPD ¶ 269; Bollinger Mach. Shop and Shipyard, Inc., *supra*. Although the SBA procurement center representative for the Department of Justice had been detailed to SBA at the time the Bureau withdrew the set-aside, the record does not show that the agency's small business specialist was consulted or that the Bureau notified the SBA.

In response to our request for its views on this matter, the SBA reviewed the record and concluded that the Bureau's decision not to set aside this requirement for small business was unsupported and unreasonable. From our review, we agree with SBA that the Bureau has not provided a reasonable basis for its determination that it does not have a reasonable expectation of receiving bids from two or more small businesses at fair market prices. In this regard, we generally give great weight to the views of SBA in these matters.² Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., *supra*.

The record shows that the contracting officer primarily relied on the prior procurement history instead of investigating the numerous small business responses to the CBD announcement, performing a current market survey, or consulting with the small business representative or SBA.

While prior procurement history is certainly one factor to be considered, see FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270, the history here does not itself justify the decision to withdraw the set-aside. For example, the Bureau's unsuccessful 1993 set-aside of the San Diego facility's laboratory testing requirements was limited in terms of scope and location, and the Bureau has not explained how that unsuccessful set-aside suggests that no adequate small business competition would be received 2 years later for the current procurement, given the increased magnitude and nationwide scope of the drug testing services being solicited here. Regarding the 1990 solicitation, the scope of which more closely resembles the scope of the services being solicited here, even assuming only one small business actually offered a fair market price on that procurement—which the protester disputes—that unrestricted procurement was issued 5 years earlier and, as SBA and the protester contend, significant changes in the market since that time may have

²Since the SBA's views are incorporated into our analysis, we will not repeat them here.

occurred increasing the likelihood that more small businesses may participate and submit acceptable offers at reasonable prices.

The contracting officer concededly did not perform a current market survey to ascertain whether there were two or more responsible small businesses that could submit fair market prices to perform these services. Although 21 small businesses showed interest in the solicitation while it was still set aside, the contracting officer did not investigate whether any of those small businesses were likely to submit bids or were capable of performing the contract requirements before she withdrew the set-aside. See TLC Servs. Inc., B-255758, Mar. 28, 1994, 94-1 CPD ¶ 217. The contracting officer also did not conduct a search of the Procurement Automated Source System (PASS)³ database to identify qualified small businesses with experience in drug testing services, nor does the record show that the contracting officer asked the one agency source she did contact--the National Institute on Drug Abuse--whether it had unsuccessfully attempted to solicit small businesses. Consequently, we find that the contracting officer 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. See Neal R. Gross and Co., Inc.; Capital Hill Reporting, Inc., *supra*; Bollinger Mach. Shop and Shipyard, Inc., *supra*.

The Bureau also has provided no evidence to support its assertion, disputed by the protester and the SBA, that small businesses might lack the necessary expertise and will have difficulty meeting the performance requirements because of the magnitude of the contract, or shown that drug testing provided by large firms is more accurate and efficient. See Neal R. Gross & Co., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53; Stay, Inc., 69 Comp. Gen. 730 (1990), 90-2 CPD ¶ 248. Indeed, despite the nationwide scope of the contract, only a single laboratory is required for the approximately 136,601 to 195,152 screenings of urine samples the Bureau estimates will be performed annually because the agency, not the contractor, will be collecting the urine samples from the inmates at approximately 180 facilities and sending the samples to the contractor's laboratory. Furthermore, since the agency has not actually investigated whether any small business would be able to meet the requirements of this IFB, we find the Bureau's reservations regarding the expertise and capability of small businesses to be unsupported by the record. See Stay, Inc., *supra*.

In this regard, both the protester and the SBA point to an earlier Department of Labor (DOL) solicitation for drug testing issued in February 1994, successfully set aside for small business, that has a similar statement of work and is of similar

³PASS is an SBA database with descriptions of firms permitting the user to conduct market searches for firms possessing desired characteristics.

scope to the solicitation at issue here. Under the DOL solicitation, urine samples are also collected by the agency, in this case from Job Corps participants at 111 sites nationwide, and then sent to the contractor's laboratory for drug testing. DOL estimated the number of screenings to be performed annually as ranging from 155,000 to 195,000. Award was made to 1 of the 10 small business bidders and there is no indication that award was made at other than a fair market price or that the small size of the awardee has had any adverse effect on its performance.

Based on our review of the record, we agree with the SBA that the contracting officer, prior to dissolving the set-aside, did not conduct a reasonable investigation and that there is in fact a reasonable expectation that there are two or more responsible small businesses which would submit bids at fair market prices in response to the IFB.

We recommend that the current IFB be canceled and reissued as a small business set-aside. In addition, we recommend that ACCU-Lab be reimbursed the costs of filing and pursuing the protest, including reasonable attorneys' fees. Bid Protest Regulation § 21.8(d)(1), 60 Fed. Reg. 40,737, 40,743 (Aug. 10, 1995) (to be codified at 4 C.F.R. § 21.8(d)(1)). ACCU-Lab's certified claim for such costs, detailing the time expended and costs incurred, should be submitted directly to the agency within 90 days after receipt of this decision. Bid Protest Regulations § 21.8(f)(1).

The protest is sustained.

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