



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: BFI Medical Waste Systems of Arizona, Inc.

File: B-270881

Date: May 10, 1996

Allen Samelson, Esq., Rogers, Joseph, O'Donnell & Quinn, for the protester.
Terrence J. Tychan, Department of Health and Human Services, for the agency.
Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of decision to set a procurement aside for small businesses is sustained where the record does not support the agency's determination that there was a reasonable expectation of bids from at least two responsible small businesses.

DECISION

BFI Medical Waste Systems of Arizona, Inc., protests the decision by the Phoenix Area Office of the Indian Health Service (IHS), Department of Health & Human Services (HHS), to set aside for small businesses invitation for bids (IFB) No. 5015 for the collection and disposal of medical waste.

We sustain the protest.

Federal Acquisition Regulation (FAR) § 19.502 requires that a solicitation be set aside for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns, and that award will be made at a fair market price. IHS set the procurement aside after the IHS small and disadvantaged business utilization specialist (SADBUS) and the contracting officer agreed that a set-aside was warranted under the FAR criteria. IHS mailed out 11 copies of the solicitation and received two bids in response, one from a small business, Arizona Medical Waste Management, Inc. (\$152,496 total for a base year and 4 option years), and one from an ineligible large business (\$230,828 total).

BFI, which timely protested before bids were opened, argues that IHS made virtually no initial effort to determine whether the criteria in the FAR for a set-aside were met, and did not investigate the matter even after BFI raised the issue with

the contracting officer.¹ BFI argues that a proper investigation in fact would have shown that a set-aside was not appropriate. BFI also maintains that Arizona Medical--the only small business to have responded to the IFB--cannot be found a responsible concern because some of the medical waste will have to be disposed of by incineration, which the firm is not equipped to do.

As a general rule, the decision whether to set aside a particular procurement is within the discretion of the contracting agency. York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282. However, an agency must undertake reasonable efforts to ascertain whether it is likely that the agency will receive offers from at least two small businesses capable of performing the work. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337. There is no particular method prescribed for assessing the availability of small businesses, although we have recognized it appropriate to refer to factors such as prior procurement history, nature of the contract, type of contract, market surveys, and/or advice from the agency's technical specialists. See FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270. Our Office will object to a set-aside decision that does not have a reasonable basis. York Int'l Corp., *supra*.

We agree with BFI that the record in this case does not support the set-aside. The record includes only three agency comments concerning the determination to restrict the procurement. In the protest report, HHS states:

"[T]he contracting officer conferred with the IHS small and disadvantaged business utilization specialist, who had personal knowledge of other medical waste disposal contracts in the state being performed by small businesses. They both agreed that there was a reasonable expectation of receiving bids from at least two responsible small businesses at reasonable prices."

In a memorandum prepared for the report, the contracting officer states that a set-aside "was recommended by the SADBUS Coordinator and concurred by the Contracting Officer." In another memorandum prepared for the report, the IHS Supervisory Contract Specialist repeats the contracting officer's statement, adding

¹BFI initially protested that IHS could not reasonably expect bids from two small businesses capable of incinerating all waste--IHS had advised BFI that incineration was the required disposal method. IHS subsequently reported that the advice to BFI had been incorrect, but maintained that BFI had not been prejudiced in the competition because the set-aside otherwise was proper, so that the protester was not eligible for award. In response, BFI argues that the set-aside is not supportable in any event.

that the determination "was based upon a previous and similar requirement initiated by this office for the Whiteriver Indian Hospital."

IHS has provided no information about the "other" Arizona medical waste disposal contracts of which SADBUS had knowledge, e.g., whether they were at all similar to the one in issue here, and why they supported an expectation of small business competition. There also is nothing in the record about the "similar requirement initiated" by IHS for the Whiteriver Indian Hospital, e.g., what is meant by "initiated," which on its face suggests an ultimately unsuccessful set-aside attempt, or whether the result was a successful set-aside procurement that would serve as a procurement history to support the current set-aside.² There is nothing else in the record to explain why the contracting officer agreed with the SADBUS's recommendation. Finally, the record does not indicate that any market survey was conducted, that any small businesses expressed interest in the contemplated procurement, or any other rationale that would establish the propriety of the set-aside.

In sum, the record is devoid of any substantive support for the contracting officer's decision that IHS reasonably could expect at least two offers from responsible small business concerns, the first of the two FAR criteria. We therefore have no basis to find the decision to set this procurement aside reasonable. See York Int'l Corp., supra ("the bare assertion that the determination was based on a reasonable expectation of small business participation, provides no basis on which to conclude that the decision, when made, was reasonable."). Additionally, we note that, unlike in York Int'l Corp., "subsequent events"--sufficient small business participation--did not justify the set-aside; only one small business responded to IHS's solicitation.

BFI's protest is sustained. We recommend that IHS cancel the IFB under protest and conduct an unrestricted procurement. We also recommend that BFI be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1996). The protester should submit its detailed and certified claim for costs directly to the agency within 90 days after receipt of this decision. Bid Protest Regulations, 4 C.F.R. § 21.8(f)(1).

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²In fact, in the previous, unrestricted procurement of the services involved here, the solicitation had been mailed to 30 potential bidders and the only two bids received were from BFI (the awardee) and another large business.