



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: CardioMetrix

File: B-271012

Date: May 15, 1996

Robert J. Loring, Ph.D., for the protester.

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

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that request for proposals for laboratory services should have been set aside for small businesses is denied where the record does not show that the contracting officer abused his discretion in determining that there was not a reasonable expectation of receiving proposals from at least two responsible small offerors.

DECISION

CardioMetrix protests the decision of the Federal Bureau of Prisons (BOP) not to set aside request for proposals (RFP) No. 276-1054 for exclusive small business participation. We deny the protest.

Issued on December 15, 1995, the RFP sought proposals for providing clinical laboratory services at approximately 15 correctional institutions located within BOP's South Central Region. Under the RFP, offerors would have to have the capability to perform a great number of laboratory tests. The RFP contemplated award of a requirements contract for a 1-year period and contained options for 4 additional years. The procurement was conducted on the basis of full and open competition.

The protester contends that the contracting officer should have known that at least two responsible small business concerns were likely to submit competitive bids. In this regard, the protester states that it identified six small businesses that were interested in competing to the local Small Business Administration (SBA) representative. In addition, CardioMetrix points out that 13 small businesses

requested copies of the RFP from the contracting officer.¹ Thus, the protester concludes that BOP was required under applicable regulations to conduct the procurement as a 100-percent small business set-aside.

A procurement must be set aside for exclusive small business participation when there is a reasonable expectation of receiving offers from at least two responsible small business concerns and award will be made at a reasonable price. Federal Acquisition Regulation (FAR) § 19.502-2(b) (FAC 90-32). A contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses with the capabilities to perform the work. See Espey Mfg. & Elecs. Corp., B-254738.3, Mar. 8, 1994, 94-1 CPD ¶ 180. An agency's determination concerning whether to set a particular procurement aside basically involves a business decision within the broad discretion of contracting officials, and our review generally is limited to ascertaining whether those officials have abused that discretion. Id.; see also FKW Inc., B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270.

The agency reports that this is the first time it has attempted to procure comprehensive medical laboratory services for all correctional institutions in the region; previously, each institution procured laboratory services for itself. Therefore, the present RFP requires offers to perform more than 100 different laboratory tests at 15 different prisons scattered throughout Texas, Oklahoma, and Louisiana, and the RFP estimated that more than 40,000 separate tests would be ordered during the base year alone. According to the agency, past procurements by the individual prisons required far fewer tests than are required here. The agency reports that the contracting officer conducted a market survey before concluding that it was unlikely that two or more small businesses would make offers at reasonable prices, and thus, properly decided to conduct a full and open competitive procurement.

The agency further reports that, after consulting with the Health Services Department of BOP's regional office and perusing the local telephone directory, the contracting officer identified two potential small business offerors. The contracting officer also obtained a list of potential small business offerors from the SBA regional office.² The contracting officer states that he attempted to contact some of the firms on the SBA's list. Some of the firms did not return the contracting officer's calls; others were contacted but reported that they were unable to handle

¹CardioMetrix requested and received a copy of the agency's list of potential offerors; 13 of the 19 firms on the list were designated as small in size.

²All firms on the SBA's list had apparently certified that they were within standard industrial classification code 8071, medical laboratories.

the large volume of work that BOP would order under the contract. However, the contracting officer was able to identify two additional potential small business offerors.

The contracting officer asked the four known small businesses several questions concerning the required work. Among other things, the firms were asked how much of the work they would accomplish by subcontracting with other firms and whether their possible subcontractors would be large or small businesses. Three of the small businesses indicated that they would probably subcontract 75 to 100 percent of the work to large businesses. Based upon these responses, the contracting officer identified only one small business that would be able to comply with the subcontracting limitation--mandating that at least 50 percent of the personnel costs under a set-aside services contract be expended for employees of the small business contractor--required to be included in all small business set-aside solicitations. See Specialized Contract Servs., Inc., B-257321, Sept. 2, 1994, 94-2 CPD ¶ 90; FAR § 52.219-14 (FAC 90-32). Accordingly, the contracting officer concluded that use of full and open procurement procedures was appropriate and would encourage more small businesses to compete since they would not be subject to the 50-percent subcontracting limitation.

We do not believe that the contracting officer abused his discretion here. The record clearly shows that the contracting officer, in consultation with both the SBA and BOP's own cognizant health services department, made a good faith attempt to locate qualified small business offerors. The record also shows that the contracting officer queried the known small businesses to ascertain whether they might make offers and whether they could meet the FAR's subcontracting limitation. Furthermore, the record shows that, after CardioMetrix filed its protest alleging that several potential small business offerors were overlooked, the contracting officer met with the local SBA procurement center representative and discussed his market survey and the propriety of his determination not to set the procurement aside. In a letter dated March 6, 1996, the SBA representative concurred in the contracting officer's determination, stating:

"After reviewing your Market Survey and Determination and Finding for full and open competition on the subject procurement, it is my opinion that you and your staff have complied with Federal Acquisition Regulation, Part 19 as pertains to small business set aside. You did not have a reasonable expectation that you would receive proposals from two responsible, responsive small businesses who could perform on this procurement."

The protester's argument that the RFP should be amended and the procurement set aside because several small businesses asked for the RFP or were on the bidders mailing list is without legal merit. The regulations do not require a contracting

officer to amend or cancel a solicitation after subsequently learning of interest by small businesses where, as here, the contracting officer conducted a reasonable investigation concerning the possibility of two or more qualified small businesses competing. See Espey Mfg. & Elecs. Corp., supra. Furthermore, because small businesses routinely request to be informed of procurements, a pre-solicitation mailing, such as a bidders mailing list, does not necessarily reflect any expectation that the firms will compete in a particular procurement. See Specialized Contract Servs., Inc., supra.

The protest is denied.

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