



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ruchman and Associates, Inc.

File: B-275956

Date: April 23, 1997

Anita M. Cream, Esq., and Scott M. Heimberg, Esq., Akin, Gump, Strauss, Hauer & Feld, L.L.P., and Neal H. Ruchman, for the protester.

Curtis Price, Jr., for C. Price & Associates, an intervenor.

Jesse E. Lasken, Esq., National Science Foundation, for the agency.

Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer's decision to procure complex publications clearinghouse requirement on an unrestricted basis, and not through a small business set-aside, is not an abuse of discretion where the market survey conducted by the agency did not support the expectation that small business concerns could provide the required services at a fair market price.

DECISION

Ruchman and Associates, Inc. (RAI) protests the decision of the National Science Foundation (NSF) to issue request for proposals (RFP) No. DAS 96041 for a publications clearinghouse on an unrestricted basis. RAI contends that the solicitation should have been issued as a small business set-aside.

We deny the protest.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b) (FAC 90-44), a procurement with an anticipated dollar value of more than \$100,000, such as the one at issue here, 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 that award will be made at a fair market price. Unless such a determination can be made, a total small business set-aside should not be issued. *FKW Inc.*, B-249189, Oct. 22, 1992, 92-2 CPD ¶ 270, at 2. 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; in this regard, factors that may constitute adequate grounds for not setting aside a procurement include prior procurement history, nature of the contract, market surveys, and/or advice from the agency's technical specialists. *Id.*

We regard a decision whether to set aside a procurement as a matter of business judgment within the contracting officer's discretion; consequently, our review generally is limited to ascertaining whether that official abused his or her discretion. CardioMetrix, B-271012, May 15, 1996, 96-1 CPD ¶ 227, at 2.

In this case, NSF reports that after conducting an extensive market survey, the agency's technical specialists advised the contracting officer not to restrict this procurement to small businesses. The contracting officer concurred in the technical specialists' recommendation for the following reasons. First, the publications clearinghouse requirement is a first-time effort for NSF, which issues approximately 1.7 million publications per year. Instead of simply warehousing paper publications at a government site, as is its current practice, NSF wants to consolidate its warehousing needs with a commercial bulk mail/electronic catalog system operation that will both disseminate publications to the public and convert the majority of the current paper publications to an electronic format. NSF also envisions that the inventory, bulk mailing, and dissemination process will be managed and accomplished via an electronic, computerized process. Although several small businesses--such as RAI--are capable of successful document storage, the NSF technical specialists questioned whether there were two small business concerns capable of actual publication "fulfillment"--an industry term used to refer to the sophisticated technology necessary to accomplish the electronic inventory, conversion, and dissemination services. The NSF technical specialists also questioned whether there was a small business capable of managing the volume of NSF's requirement.

Because of these concerns, the NSF technical specialists conducted the following market survey. First, the technical specialists contacted several agencies with similar clearinghouse operations involving comparable size and technology--the National Institutes of Health (NIH) and the Congressional Budget Office (CBO). Each agency provided the technical specialists with a list of industry sources, one of which was a small business. The NSF technical specialists contacted the identified small business but were told that because of the size of this requirement, the small business was not capable of maintaining the proposed clearinghouse operation. The small business further advised NSF that given this procurement's technical complexity and size, large business concerns were probably the only viable candidates for the procurement; the small business recommended another large business to NSF for this requirement.

The NSF technical specialists also reviewed the qualifications of several small businesses that had requested copies of this RFP in response to a September 1996 Commerce Business Daily synopsis; consistent with the market survey results, the NSF technical specialists concluded that each of the identified small business concerns lacked the technology and expertise necessary to accomplish the bulk mailing and electronic conversion/dissemination processes required for this

procurement. In this regard, although NSF was aware of RAI's interest, because of past performance difficulties encountered with the protester on a contract involving document warehousing services--including significant time delays and price increases--the NSF technical specialists concluded that even if RAI could perform the required clearinghouse operation, the agency did not expect to receive a proposal that was reasonably priced.

Finally, the NSF technical specialists visited each of the clearinghouse sources identified by NIH and CBO; these site visits, during which the NSF technical specialists observed the actual clearinghouse operations, confirmed the officials' initial concerns that the technology and resources required for this procurement likely rendered large businesses the only viable competitors for the size and type of clearinghouse operation required here.

We see no basis to conclude that the contracting officer abused his discretion here. The record clearly shows that NSF made a reasonable and good faith effort to investigate the small business market for this requirement. The extensive market survey by NSF's technical specialists--the basis for the contracting officer's decision to issue the solicitation on an unrestricted basis--failed to locate a qualified small business competitor for this requirement. In its comments on the agency report, RAI offered no substantive objection to either the agency's market survey or its conclusions regarding the protester's poor past performance. Under these circumstances, given that the record provides a reasonable basis for the agency's procurement approach, we find the agency's decision to conduct this requirement on an unrestricted basis to be unobjectionable. See Peterson Builders, Inc.; Swiftships, Inc., B-251695.2; B-251695.3, Apr. 22, 1993, 93-1 CPD ¶ 342 (unrestricted procurement approach upheld where market survey failed to locate qualified small business for design and construction of research and development prototype craft); FKW Inc., supra (unrestricted procurement approach for procurement of large-scale operations, maintenance and support services upheld where market survey revealed that small business concerns typically did not possess large staff and high level of managerial oversight required by the agency).

The protest is denied.

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