



United States General Accounting Office
Washington, DC 20548

Decision

Matter of: N&N Travel & Tours, Inc.; BCM Travel & Tours; Manassas Travel, Inc.; Alamo Travel, Inc.; Ravenel Bros., Inc.; and Bay Area Travel, Inc.

File: B-285164.2; B-285164.3

Date: August 31, 2000

Josephine L. Ursini, Esq., for the protesters.
John E. Larriccia, Esq., and Mark S. Garrard, Esq., Department of the Air Force;
Thomas Y. Hawkins, Esq., General Services Administration; and Kenneth W. Dodds,
Esq., Small Business Administration, for the agencies.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. The statutory limitation on General Accounting Office bid protest jurisdiction over challenges to the award of a task order under an indefinite-delivery/indefinite-quantity (ID/IQ) contract does not apply where the protester's challenge, although triggered by the issuance of a task order, in essence, raises the question of whether the solicitation for the underlying ID/IQ contract properly could be used to procure services which, the protester argues, must be set aside for small businesses.
2. Despite the requirement that protests alleging improprieties in a solicitation must be filed before the time set for receipt of proposals in response to the solicitation, 4 C.F.R. § 21.2(a)(1) (2000), a protester's challenge to a solicitation is timely, even though filed after the closing time, where numerous representatives of the federal government--including representatives of the General Services Administration, the Department of Defense, and the Department of the Air Force--led potential small business offerors to conclude that the contract resulting from the solicitation would not be used to procure certain travel services which, the protester argues, must be set aside for small businesses.
3. Protester's contention that the use of a government-wide unrestricted ID/IQ contract to procure travel management services at Travis Air Force Base, California, violates the requirement in Federal Acquisition Regulation (FAR) § 19.502-2 to set aside procurements for small businesses where there is a reasonable expectation of

receiving fair market price offers from at least two responsible small business concerns is sustained where the record shows that there is a significant pool of small business offerors who have responded to a recent solicitation for precisely these services, and where there is no evidence in the record of any reason why the agency could not set aside the procurement.

DECISION

N&N Travel & Tours, Inc.; BCM Travel & Tours; Manassas Travel, Inc.; Alamo Travel, Inc.; Ravenel Bros., Inc.; and Bay Area Travel, Inc. jointly protest a decision by the Department of the Air Force to request quotes for travel management services for Travis Air Force Base (AFB), California, using a tailored task order request under contract line item no. (CLIN) 8 of Master Contract No. GS-09F-80607, awarded by the General Services Administration (GSA). All six protesters argue that the Travis AFB task order is beyond the scope of the GSA Master Contract, and that the Air Force violated FAR § 7.102 by failing to prepare an acquisition plan, and Office of Management and Budget Circular A-76 by converting travel management services from a contracted-out activity to an in-house activity. The four protesters who are currently considered small businesses--BCM, Manassas, Alamo, and Ravenel--argue that the Air Force was required to set aside this procurement for small business.

We sustain the protest of the small business offerors that this effort should be set aside for exclusive small business participation.

BACKGROUND

Since January 1994, N&N has provided travel management services to Travis AFB. At the time of initial award to N&N, the company was considered a small disadvantaged business, and its contract was awarded for a base year followed by three 1-year options. For reasons related to the facts below, but not relevant to resolution of this dispute, N&N's initial contract has been extended several times on a sole-source basis--even though N&N is no longer eligible for award of small business set-aside contracts. At a minimum, the record shows that the most recent of these extensions occurred after the time that N&N lost its status as a small business. Air Force Contracting Officer's (CO) Statement, May 5, 2000, at 2-3. N&N's contract to provide these services expired on June 30, 2000--during the pendency of this protest--and Travis AFB is currently providing travel services in-house.

During the more than 6 years that N&N provided these services for Travis AFB, three alternative contracting options were considered by the Air Force, and each of these options has a role in the resolution of this protest. Set forth below is a description of these options.

First, the contracting officer here explains that Travis AFB--and presumably all DOD entities--has been awaiting the development and award of a "mandatory regional Defense Travel System (DTS)" contract, which has been delayed repeatedly. *Id.* at 1. The delays in implementing a mandatory DOD-wide contract have been used as

justification for extending N&N's contract on a sole-source basis, and for the use of the GSA contract that is the subject of this protest. Id. at 1-3. According to the contracting officer, as of December 1999--when N&N's contract was last extended--there was no information available about an anticipated award date for the mandatory DTS contract. Id. at 1.

Given the ongoing unavailability of the DTS contract, and the need for continued extensions to N&N's contract, Travis issued a solicitation for its travel management needs in December 1998. This solicitation was set aside for small businesses, and nine offers were received. Prior to award of this contract, however, BCM (one of the small business protesters here) filed a protest with our Office on January 29, 1999. Subsequently, on February 17, the Air Force elected to cancel the solicitation and again extend N&N's contract on a sole-source basis. Id. at 2-3. Accordingly, our Office dismissed the protest as academic. BCM Travel & Tours, B-281950, Feb. 25, 1999.

After canceling its small business set-aside solicitation, Travis AFB began to explore a third option for meeting its travel management needs. Specifically, the CO explains that she became aware of the possibility of using GSA's ID/IQ travel services contract in late 1999. Id. at 1. Details regarding the GSA contract are set forth below.

GSA issued solicitation No. 9FBG-OLC-N-A-2092-99 on April 27, 1999; the solicitation anticipated multiple awards of non-mandatory, ID/IQ task order contracts for Travel Management Center (TMC) services for a 2-year base period, followed by three 1-year options. Contract at A-2.2, A-3. TMC services are available to all federal agencies, and include booking and ticketing travel, lodging, rental cars, and other services for official agency travel. GSA Agency Report, May 17, 2000, at 2. Each CLIN within the solicitation was designated for a specific geographic area; some were reserved for small businesses, others were not. At issue in this protest is CLIN 8, which covered the state of California and was not reserved for small businesses.

Pursuant to its solicitation, GSA made 393 contract awards to 46 contractors using 50 separate CLINs. GSA Request for Partial Dismissal, May 9, 2000, at 1. Under CLIN 8 covering California, GSA made eight awards on November 8, 1999. GSA Agency Report, supra. It appears that none of the awardees under CLIN 8 are small businesses. After becoming aware of the possibility of using the GSA travel contract until the mandatory DTS regional contract is available for use at Travis AFB, the contracting officer decided to place a task order against the GSA contract. This protest followed.

PROCEDURAL ISSUES

Jurisdiction

The Air Force and GSA (the procuring agencies here) request dismissal of all but one of the issues raised by these protesters because, in their view, the protesters are challenging the award of a task order under an ID/IQ contract. Under 10 U.S.C. § 2304c(d) (1994), “[a] protest is not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued.” Thus, as a preliminary matter, there is no dispute that the contention that this task order exceeds the scope of the GSA ID/IQ contract is properly before our Office.

With respect to the contention of the procuring agencies that we lack jurisdiction to hear an argument that the Air Force is violating FAR § 7.102, we agree. FAR § 7.102(a) requires that agencies perform acquisition planning and conduct market research for all acquisitions to maximize the use of commercial items and full and open competition. The protesters’ argument that the Air Force did not adequately conduct acquisition planning and market research before deciding to satisfy its needs using a task order, does not allege that the order increases the scope, period, or maximum value of the contract under which the order is placed. Accordingly, we conclude that the limitation on our jurisdiction in 10 U.S.C. § 2304c(d) bars our review of this allegation.

Also beyond our bid protest jurisdiction is the protesters’ challenge to the Air Force decision to let N&N’s oft-extended, sole-source contract lapse, and to instead perform the services in-house until the conclusion of this protest. An agency’s decision to perform services in-house rather than extend an incumbent’s contract is a matter of executive policy not within the reach of our bid protest function unless the agency has issued a competitive solicitation for cost comparison purposes. W. B. & A., Inc., B-229926.3, May 19, 1988, 88-1 CPD ¶ 475 at 2; see also Pemco Aeroplex, Inc.; Aero Corp., B-275587.9 et al., June 29, 1998, 98-2 CPD ¶ 17 at 6, 8 n.3. Since there has been no competitive solicitation for a cost comparison issued here, we have no basis to review this contention.

Finally, with respect to the contention that the travel management services here must be set aside for small business, the Air Force and GSA again argue that we are barred from reaching this issue, as it is not one of the issues anticipated by the statutory limitation on our authority to hear bid protests related to the award of task or delivery orders. On the other hand, the Small Business Administration has filed a report with our Office urging us to take jurisdiction over this issue, and to sustain the protest on the merits.

Our Office faced the issue of whether an agency violated FAR § 19.502-2 in failing to set aside for small businesses efforts included in a task order placed against an ID/IQ

contract in Letters to the Air Force and Army concerning Valenzuela Eng'g, Inc., B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51. Even though the protest of the same name (also set forth at 98-1 CPD ¶ 51) was dismissed as untimely for unrelated reasons, we directed a letter to the Secretary of the Air Force advising that the task order placed by the Air Force against the Army's ID/IQ contract violated the FAR's small business set-aside requirements. Id. at 4.

The acquisition at issue in Valenzuela was conducted pursuant to the Economy Act, 31 U.S.C. § 1535 (1994), as the Air Force transferred funds to the Department of the Army to pay for an order placed against the Army's ID/IQ contract. Letter to the Air Force, supra, at 2. Under the Economy Act, one agency may use its own contract to satisfy another agency's needs provided the requirements of the Act are met. 31 U.S.C. § 1535(a); Dictaphone Corp., B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380 at 3-4, recon. denied, B-244691.3, Jan. 5, 1993, 93-1 CPD ¶ 2. Acquisitions conducted pursuant to the Economy Act generally fall within our bid protest jurisdiction. See generally Dictaphone Corp., supra; Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413. Because the protest in Valenzuela was dismissed as untimely, we did not reach the issue of whether our jurisdiction over Economy Act procurements extends to our review of an alleged violation of the Small Business Act in the context of a task order.

During the course of this protest, and given the jurisdictional challenges raised by the Air Force and GSA, we asked the parties to address whether this procurement was conducted pursuant to the Economy Act, like the procurement in Valenzuela. We conclude it was not.

In this procurement, GSA, claiming authority derived from section 201 of the Federal Property and Administrative Services Act of 1949 ("the Property Act"), codified at 40 U.S.C. § 481 (1994), has placed a master contract for travel services, against which other executive agencies may place orders. The language of the Property Act provides that GSA may "procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities." 40 U.S.C. § 481(a)(3). In our view, this authority is sufficiently broad to include contracts for nonpersonal travel services needed by executive agencies to fulfill their respective missions. Given the existence of this separate statutory authority in the Property Act, this procurement falls outside the purview of the Economy Act.¹ See FAR § 17.500(b) (Economy Act applies only when more specific statutory authority does not exist); 55 Comp. Gen. 1497, 1499 (1976). Since we conclude that the Economy Act does not apply here, we again save--and do not decide--the question of whether our jurisdiction over Economy Act procurements

¹Thus, because the GSA has separate authority for the ID/IQ contract, there is no need for ordering agencies to execute the determination and finding document applicable to Economy Act orders pursuant to FAR § 17.503.

provides a basis for us to review alleged violations of the Small Business Act in the context of task orders.

Instead, we find that our jurisdiction to hear the small business issues in this protest rests upon a far simpler principle. Specifically, while we recognize that this challenge focuses on, and is triggered by, the decision to use a task order under GSA's ID/IQ contract to procure travel services at Travis AFB, this complaint, in essence, raises the question of whether the solicitation for the underlying ID/IQ contracts properly included Travis despite the claimed independent requirement to reserve the Travis effort for small businesses. Thus, as discussed in greater detail below, we conclude that the small business protesters are mounting a challenge to the terms of the underlying solicitation, and that the limitation on our bid protest jurisdiction in 10 U.S.C. § 2304c(d) therefore does not apply to this protest. Since we are charged by statute with reviewing protests alleging that a solicitation does not comply with applicable procurement statutes and regulations, 31 U.S.C. §§ 3552, 3554(b)(1), we conclude that this portion of the protest is properly within our bid protest jurisdiction. Ocuto Blacktop & Paving Co., Inc., B-284165, Mar. 1, 2000, 2000 CPD ¶ 32 at 4-5.

Timeliness

In anticipation of the possibility that our Office might view the small business issues here as a challenge to the underlying solicitation, the Air Force and GSA also argue that any such challenge is untimely at this juncture. In this regard, both agencies point out that the solicitation and resulting contract expressly indicate that GSA's ID/IQ contract will be available for use by any federal agency. Thus, in their view, the solicitation provided sufficient notice to potential small business offerors that Travis AFB would be allowed to place task orders against the contracts awarded pursuant to CLIN 8 of the contract. Contract § I-35.

Under our Bid Protest Regulations, a protest based upon alleged improprieties in a solicitation which are apparent prior to the time set for receipt of initial proposals must be filed before the time set for receipt of such proposals. 4 C.F.R. § 21.2(a)(1) (2000). Since proposals in response to the GSA solicitation for the ID/IQ contract were due no later than June 22, 1999, the Air Force argues that the four small business protesters here cannot now raise this issue. We disagree.

Despite the fact that the solicitation and resulting contract here expressly stated that all federal agencies were eligible to use GSA's contract, there is no dispute in the record that DOD entities were not anticipating using the GSA travel services contract for their travel service needs. Rather, DOD and Air Force officials have advised--and continue to advise--the travel industry that it is the DOD contract, and not the GSA contract, that will be used to procure these services. For example, the draft solicitation posted on the DOD website while this protest was pending, advises potential travel service offerors that travel services for Travis AFB will be procured

using the DOD contract, and will be set aside for small business. See <www.dtic.mil/travelink/rfp2/sbsaloc.html> and <www.dtic.mil/travelink/rfp2/otsbss1099.html>.

Likewise, GSA representatives were not anticipating use of this contract for Travis AFB, and were advising the public of this fact. GSA incorporated into the solicitation a transcript of a question and answer session with representatives of the travel industry in which agency representatives explained that there were “pockets” of DOD users around the country, but the contract was “primarily for the civilian agencies.” Contract § J-F.2, at 6. In addition, GSA concedes that Travis was not one of the DOD users identified during the solicitation process. GSA Request for Partial Dismissal, May 9, 2000, at 2.

Under these unusual circumstances, we think the actions of the DOD, the Air Force, and GSA led the small business protesters here to reasonably conclude that GSA’s contract would not be used to procure travel services for Travis AFB. We also think this reasonable conclusion negated the normal requirement to file a protest challenging the small business set-aside status of this portion of the solicitation prior to the time set for receipt of initial proposals in response to the solicitation. These circumstances--especially when viewed in light of our long-standing view that doubts over issues of timeliness should be resolved in favor of protesters, Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207 at 4 n.3--lead us to conclude that this challenge to the terms of the solicitation is timely, and should be heard.²

SMALL BUSINESS SET-ASIDE

With respect to the contention of the four small business protesters that the procurement of travel services at Travis AFB had to be reserved for small businesses, we agree.

The RFP here, as initially issued, implicitly included the work for Travis AFB as an undifferentiated part of the CLIN reserved for all federal travel needs for the state of

² In many ways, our resolution of the timeliness issues in favor of the four small business protesters relies upon some of the same considerations we might have used in reviewing the allegation that this task order exceeds the scope of the underlying ID/IQ contract. Put simply, the solicitation’s clear indication that the underlying contract would be available for use by all executive branch agencies was considerably obscured by the actions of GSA, DOD, and Air Force representatives. Nonetheless, since we ultimately sustain the small business set-aside challenge for the four small business protesters, we need not reach the issue of whether the task order here exceeds the scope of underlying contract. Similarly, the issue of scope is academic for the two large business protesters, as we hold that this work should be set aside for small business and they will not be eligible to participate in the new procurement.

California. Thus, the work that had previously been performed by a small business at Travis was bundled into the significantly larger master contract. The Small Business Act, 15 U.S.C.A. § 631(j) (West Supp. 1999), states that, “to the maximum extent practicable,” each agency shall “avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors.” There is no indication in the record here that bundling the work for Travis AFB into all federal travel work for the state of California was necessary to meet the agency’s needs, nor is there an indication that GSA ever contemplated use of its master contract by Travis AFB, much less concluded that the work should be bundled together with all other federal work for the state. In addition, as explained below, this effort should have been set aside for small businesses.

Contracting officers generally are required to set aside for small business all procurements exceeding \$100,000 if there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. FAR § 19.502-2(b); Safety Storage, Inc., B-280851, Oct. 29, 1998, 98-2 CPD ¶ 102 at 3. We regard such a determination as a matter of business judgment within the contracting officer’s discretion which we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. However, a contracting officer must make reasonable efforts to ascertain whether it is likely that offers will be received from at least two small businesses capable of performing the work. Mortara Instrument, Inc., B-272461, Oct. 18, 1996, 96-2 CPD ¶ 212 at 3. Our Office will review a protest to determine whether a contracting officer has made such efforts. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337 at 7.

While the use of any particular method of assessing the availability of small businesses is not required, and measures such as prior procurement history, market surveys and/or advice from the agency’s small business specialist and technical personnel 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, the assessment must be based on sufficient facts so as to establish its reasonableness. McSwain & Assocs., Inc.; Shel-Ken Properties, Inc.; and Elaine Dunn Realty, B-271071 et al., May 20, 1996, 96-1 CPD ¶ 255 at 2-3.

Here, the record shows that the competitive solicitation issued by Travis AFB for its travel services--and cancelled in early 1999 in response to a protest--yielded nine proposals from small businesses. Given this result, together with the lack of evidence that it was necessary to bundle travel services at Travis AFB with the entire federal workload for the state of California, a challenge to the underlying solicitation, filed prior to the closing date for receipt of proposals, would likely have resulted in a decision that this work should be procured separately and reserved for small businesses. In fact, we note that for the Travis work alone, the Air Force received more proposals from small businesses than GSA made unrestricted awards under CLIN 8 of its travel services contract for the entire state of California. In

addition, as indicated above, the current draft DTS solicitation, posted on the Internet, reserves travel services at Travis AFB for small business--providing evidence that DOD apparently anticipates receiving adequate competition from small business at fair market prices. Under these circumstances, we conclude that FAR § 19.502-2 required that the purchase of these services for Travis AFB be conducted as a small business set-aside.³

RECOMMENDATION

Generally, when we find that a solicitation is defective, we recommend that the agency amend the solicitation, and resolicit. Here, however, that recommendation is not practicable because the contracts resulting from the solicitation have been in place almost a year. Instead, we recommend that the pending task order be canceled, and that the Air Force procure travel management services at Travis AFB in compliance with the requirement in FAR § 19.502-2, as there is a reasonable expectation of receiving fair market price offers from at least two responsible small business concerns. We also recommend that the small business protesters here be reimbursed the reasonable costs of filing and pursuing their protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), the certified claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of this decision.

The protest is sustained.

Robert P. Murphy
General Counsel

³ Since the protesters prevail on their contention that this protest must be set aside for small business participation, we do not discuss the small business contentions that have no merit. For example, the contention that the agency has violated FAR § 19.202-1(e)(1)(i) by not providing a copy of the proposed acquisition package to the SBA procurement representative at least 30 days prior to release of the solicitation because the services are currently being performed by a small business, is ultimately not supported by the record. The incumbent here, N&N, has received at least one sole-source contract award extending its performance since the company lost its status as a small business. Thus, it is not clear that FAR § 19.202-1(e)(1) applies here. In addition, even as the SBA urges our Office to sustain portions of this protest, it concedes that its own representative apparently waived the application of this requirement for this procurement.