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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Diversified Management Group, A Joint Venture

File: B-288443.2

Date: October 12, 2001

H. F. Lauer, Lauer Contract Services, Inc., for the protester.
Clare A. Kersten, Esq., and Wilson J. Campbell, Esq., Naval Facilities Engineering Command, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Cancellation of invitation for bids (IFB) prior to bid opening was in the public interest where agency failed to investigate whether procurement should be set aside for acquisition from National Institute for the Severely Handicapped or small business prior to issuing the IFB on an unrestricted basis.

DECISION

Diversified Management Group, a joint venture, protests the decision by the Department of the Navy to cancel invitation for bids (IFB) No. N68711-01-B-0116 and procure the services from the National Institute for the Severely Handicapped (NISH).

We deny the protest.

The IFB, which was issued on June 26, 2001, sought bids to furnish base family housing maintenance services at three Navy installations in California (the Naval Base, Ventura County; the Naval Construction Battalion Center, Port Hueneme; and the Naval Air Station, Point Mugu). The IFB contemplated the award of a firm fixed-price/indefinite quantity contract for a base and four option years. The solicitation was issued on an unrestricted basis.

The IFB, as amended, set bid opening for July 30. On July 27, the incumbent contractor, Tri-J Industries, protested the failure of the agency to set the IFB aside for exclusive small business competition. Upon receipt of the protest, the agency

issued amendment No. 0004 to the solicitation, which postponed bid opening indefinitely.

The agency determined that it had erred in releasing the IFB on an unrestricted basis without evaluating potential set-aside preference categories and that corrective action was warranted. To determine the appropriate corrective action, the contracting officer consulted his agency's "Small Business Programs Set-Aside Precedence Matrix," a document that sets out by contract type and dollar threshold the order in which the various set-aside programs should be considered.¹ The matrix indicated that for facility support contracts of over \$25,000 in value, first priority should be given to procuring the services from NISH/NIB agencies pursuant to the Javits-Wagner-O'Day (JWOD) Act, 41 U.S.C. § 46-48c (1994),² and that second priority should be given to setting the acquisition aside for 8(a) firms.³

Based on this guidance, the contracting officer contacted the regional NISH representative to inquire whether NISH would be interested in performing the solicited services. By letter dated August 10, the NISH regional office notified the contracting officer that it would seek to have the services added to the procurement list. Upon receipt of the letter from NISH, the contracting officer issued amendment No. 0005 to the IFB, which cancelled the solicitation and stated that the services

¹ The matrix identified the following set-aside programs: NISH/NIB (National Institute for the Blind), 8(a), HUB (Historically Underutilized Business) Zone, Very Small Business, Emerging Small Business, and Small Business.

² The JWOD Act establishes a committee known as the Committee for Purchase From People Who Are Blind or Severely Disabled and authorizes it to establish and maintain a list of commodities and services provided by qualified nonprofit agencies for the blind or severely handicapped that it has determined are suitable for procurement by the government (the "procurement list"). 41 U.S.C. §§ 46(a), 47(a). Once a commodity or service has been added to the procurement list, contracting agencies are required to procure that commodity or service from a qualified agency for the blind or severely handicapped if it is available within the time period required. 41 U.S.C. § 48; Federal Acquisition Regulation (FAR) § 8.704; Aleman & Assocs., Inc., B-287275.2, B-287356.2, July 2, 2001, 2001 CPD ¶ 120 at 3. The Act directs the Committee to designate a central nonprofit agency or agencies to facilitate the distribution of orders for commodities and services on the procurement list among qualified agencies for the blind or severely handicapped, 41 U.S.C. § 47(c); in accordance with this instruction, the Committee has designated NIB to represent people who are blind and NISH to represent JWOD participating nonprofit agencies serving people with severe disabilities other than blindness. FAR § 8.701.

³ The matrix further indicated that for this type of acquisition, third priority should be given to a HUBZone set-aside and fourth priority to a small business set-aside.

would be procured in accordance with the JWOD Act. On August 17, Diversified protested the cancellation of the IFB to our Office.

The protester argues that the agency's decision to cancel the solicitation lacked a reasonable basis.

The FAR recognizes that the cancellation of an IFB before bid opening usually involves a loss of time, effort, and money spent by the government and bidders; consequently, it instructs that IFBs should not be cancelled prior to bid opening unless cancellation is clearly in the public interest. FAR § 14.209(a). The FAR also requires that procurements meeting certain requirements be set aside for agencies for the blind or severely handicapped,⁴ for particular categories of small businesses,⁵ or for small businesses generally.⁶ Where prior to issuing a solicitation on an unrestricted basis, an agency fails to investigate whether the conditions requisite to a set-aside under the JWOD Act or for a category of small business may be expected, cancellation is clearly in the public interest if the agency subsequently determines that the solicitation should have been set aside. Ryon, Inc., B-256752.2, Oct. 27, 1994, 94-2 CPD ¶ 163 at 4 (cancellation even after bid opening was proper where agency erroneously determined initially not to set procurement aside for small business).

Here, the agency admits that prior to issuing the IFB on an unrestricted basis, the contracting officer failed to consider whether it would be appropriate to set this procurement aside for a JWOD participating agency or for any of the categories of small businesses entitled to priority under the FAR. The contracting officer subsequently determined, in response to Tri-J Industries' protest, that the acquisition

⁴ As previously noted, a service that appears on the JWOD procurement list must be acquired from a qualified agency for the blind or severely handicapped if available within the time period required. FAR § 8.704.

⁵ For example, an acquisition exceeding the simplified acquisition threshold must be set aside for HUBZone small business concerns when the contracting officer reasonably expects that (1) offers will be received from two or more HUBZone small business concerns, and (2) award will be made at a fair market price. FAR § 19.1305(a) and (b).

⁶ Agencies are required to set aside for small business participation each acquisition of between \$2,500 and \$100,000 in value unless the contracting officer determines there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery. FAR § 19.502-2(a). Further, agencies are required to set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that (1) offers will be obtained from at least two responsible small business concerns offering the products of two different small business concerns, and (2) award will be made at fair market prices. FAR § 19.502-2(b).

should have been set aside for NISH, and in the event that NISH was unable to perform the services, for the 8(a) program. Under these circumstances, we think that the contracting officer's decision to cancel the IFB was justified as clearly in the public interest.

The protester further argues that it was contrary to the requirements of the Competition in Contracting Act of 1984 (CICA) for the agency to have set the procurement aside for acquisition from NISH pursuant to the JWOD Act.

While CICA generally requires contracting agencies to obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A) (1994 and Supp. IV 1998), non-competitive procedures are authorized where a statute expressly authorizes that the procurement be made through another agency or from a specified source. 10 U.S.C. § 2304(c)(5). The JWOD Act provides authority for the noncompetitive acquisition of supplies and services that appear on the procurement list maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled. See FAR § 6.302-5(b)(2); JAVIT Enters., Inc., B-266326, B-266327, Feb. 5, 1996, 96-1 CPD ¶ 39 at 2. Accordingly, it was not contrary to the requirements of CICA for the agency to have set the procurement aside for acquisition from NISH.

Finally, Diversified complains that the solicited services were not on the JWOD list at the time the IFB was cancelled. At the time the solicitation was cancelled, NISH had expressed interest in performing the services, but they had not been added to the procurement list. The services were added to the list on October 5. We see nothing objectionable in the fact that the services were not on the list at the time the IFB was cancelled given that the agency did not enter into a contract with NISH at that time. Compare JAVIT Enters., Inc., supra (agency violated CICA by issuing noncompetitive purchase order to Goodwill Industries pursuant to the JWOD Act where services acquired under the purchase orders were not listed on the JWOD procurement list at the time the orders were issued).

The protest is denied.

Anthony H. Gamboa
General Counsel