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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: International Filter Manufacturing, Inc.

File: B-299368

Date: April 10, 2007

William Blakely, Esq., and Lauren P. DeSantis-Then, Esq., Polsinelli Shalton Welte Suelthaus PC, for the protester.

Michael Walters, Esq., and Matthew Geary, Esq., Defense Logistics Agency, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

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DIGEST

Protest that agency should have issued a solicitation for part kits as a set-aside for historically underutilized business zone (HUBZone) small business concerns is denied, where the agency's market research did not reveal that the agency could reasonably anticipate receiving offers from two or more HUBZone small businesses.

DECISION

International Filter Manufacturing Corp. (IFM) protests the decision of the Defense Logistics Agency (DLA), Defense Supply Center Columbus (DSCC) to issue request for proposals (RFP) No. SPM7M3-07-R-0008 for part kits on an unrestricted basis rather than as a historically underutilized business zone (HUBZone) set-aside.

We deny the protest.

IFM is a small disadvantaged, woman-owned, minority-owned, HUBZone business concern that manufactures filters and assembles part kits. In the past, IFM has provided fluid pressure filter part kits to the agency that included its manufactured filters under a HUBZone set-aside contract. The contract was set aside for HUBZone contractors because the filter, which constituted a large portion of the kit, was manufactured by HUBZone small business concerns, including IFM.

The RFP, issued in December 2006, sought 5,950 fluid pressure filter part kits, National Stock Number (NSN) 4330-01-495-6900, with an option for an additional

5,950 kits. The kit is comprised of the same group of 20 NSNs as under the previous HUBZone set-aside contract, except that the filter was now going to be provided by the agency as “government furnished material.” This was the first solicitation for a kit without seeking filters from the offerors.

The RFP was issued on an unrestricted basis based on the market research of the contract specialist and contracting officer, who consulted with a DSCC technical representative, the DSCC Office of Small Business Programs, and the Small Business Administration (SBA) Procurement Center Representative (PCR) to determine whether the RFP should be set aside for HUBZone small business concerns. The contract specialist first reviewed the procurement history for the NSNs that comprised the kit and determined that of the 19 NSNs (excluding the filter), only 1 had been historically provided by a HUBZone concern, 3 others were provided by small businesses, and the remaining 15 NSNs were provided by large businesses. Agency Report, Tab 7, Defense Supply Center Philadelphia (DSCP) Analysis.

The contract specialist then asked a DSCC technical representative (a “product specialist”) to review a drawing of the kit to determine whether the listed NSNs were manufactured by HUBZone concerns. Agency Report, Tab 3, Contract Specialist’s Declaration, at 2. The DSCC technical representative determined that the 19 NSNs contained a total quantity of 107 individual parts, and 5 of the NSNs (which contained 76 of the total individual parts) were produced by two large businesses. Contracting Officer’s Statement at 2-3. Based on this, the contract specialist determined that there was not a reasonable expectation that two or more offers would be received from HUBZone small business concerns that could manufacture at least 50 percent of the work as required by applicable regulations.

The contracting officer reviewed the contract specialist’s market research and concurred with the results. Contracting Officer’s Statement at 3. The contracting officer consulted with both the DSCC Office of Small Business Programs and the SBA PCR. The SBA PCR met with the contracting officer, reviewed the technical drawing of the kit, and noted that many of the NSNs listed on the drawing were “nuts, bolts, and washers produced pursuant to military specifications which are the type of items normally mass produced by large businesses and not the type of items which HUBZone Small Business Concerns manufacture.” *Id.* The PCR researched several of the NSNs in “Haystack” and determined that they were not listed as items manufactured by HUBZone small businesses.¹ *Id.* The SBA PCR agreed that it was “appropriate” to issue the solicitation on an unrestricted basis, stating that

¹ “Haystack” is a comprehensive parts and logistics management database system that provides spare parts and tooling information on more than 100 million items that are located in the U.S. Federal Supply Catalog and in over 40 military databases. An individual may search Haystack by NSN, part number, “CAGE” code, company
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based on our review of all drawings [and] expected sources, we concluded that [HUBZone] products were not expected or sufficient [and] that even those of [small businesses] were unlikely.

Agency Report, Tab 6, Small Business Coordination Record, at 2.

The agency issued the solicitation on an unrestricted basis and IFM protested, contending that the RFP should have been set aside for HUBZone small business concerns. IFM asserts that the agency's market research was insufficient and "flawed," and does not support the determination to issue the RFP on an unrestricted basis.

Contracting officers are generally required to set aside procurements in excess of the simplified acquisition threshold for HUBZone small business concerns, if the agency determines that offers will be received from two or more HUBZone small businesses and that award will be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.1305(a), (b). With regard to a HUBZone supply contract, the concern seeking award must also be the manufacturer or supply the product of a HUBZone small business concern. FAR §§ 19.1303(d); 13 C.F.R. §§ 125.6(c)(4), 126.601(e) (2006). To satisfy this requirement, a qualified HUBZone small business concern may subcontract part of the HUBZone contract so long as:

the qualified HUBZone [small business concern] spends at least 50 [percent] of the manufacturing cost (excluding the cost of materials) on performing the contract in a HUBZone. One or more qualified HUBZone [small business concerns] may combine to meet this subcontracting percentage requirement.

13 C.F.R. § 125.6(c)(4).

The set-aside determination itself is a matter of business judgment within the contracting officer's discretion, which our Office will not disturb absent a showing that it was unreasonable. See Neal R. Gross & Co., Inc., B-290924.2, Jan. 17, 1991, 91-1 CPD ¶ 53 at 2. Although the use of any particular method of assessing the availability of firms for a HUBZone set-aside is not required, measures such as prior procurement history, market surveys, and advice from the agency's small business specialist may all constitute adequate grounds for a contracting officer's decision to set aside, or 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

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name, technical characteristics, product item description data, and other parameters. DLA E-Mail to Protester's Counsel (Feb. 24, 2007).

sufficient evidence so as to establish its reasonableness. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 5.

Here, we find that the agency's market research--which included a review of the procurement history by the contract specialist and contracting officer, a review of the drawings and NSNs by a DSCC technical representative, and consultation with the DSCC Office of Small Business Programs and SBA PCR--was sufficient to demonstrate that far less than 50 percent of the total cost the kit would be manufactured by HUBZone small businesses and thus the RFP need not be issued as a HUBZone set-aside. Although IFM asserts that more extensive market research efforts, such as searching the Central Contractor Registration or Federal Logistics Information Systems databases, would have revealed the existence of additional HUBZone contractors that could supply some of the NSNs, IFM has produced no credible evidence showing that 50 percent or more of the total cost of the kits could be supplied by HUBZone small businesses, such that the agency would have had a reasonable expectation of receiving offers from two or more HUBZone small business concerns. IFM has provided evidence showing only that, at most, two of the NSNs (excluding the filter) could be provided by HUBZone small business concerns, which totals only 0.7 percent of the estimated cost of the kits.² Protester's Corrected Additional Statement, attach. 3.

IFM asserts that the agency's market research is "flawed" in a number of ways. It contends that the DSCC analysis is not accurate, that the agency's focus on procurement history is not a true indicator of whether HUBZone or other small business concerns could provide the items, and that the agency's discussion of the "number" of NSNs (rather than "cost" or value of the kit) indicates that the agency did not reasonably evaluate whether a HUBZone set-aside was appropriate. These arguments do not provide a basis to sustain the protest.

We find significant that the SBA reviewed the agency's analysis, as well as the protester's multiple submissions and evidence on this issue, and concluded that "it does not appear that DSCC acted unreasonably" in determining not to set aside the procurement for HUBZone small business concerns.³ SBA Report (Feb. 16, 2007) at 5. Although the SBA found some "problems" with the agency's analysis (which led to the protester's complaints above), the SBA noted that a DSCC technical representative, the DSCC small business office, and the SBA PCR all "conducted

² Although IFM complains that the agency should have taken into account that at least two HUBZone small businesses can manufacture the filter, the agency need not have considered this in its set-aside analysis, given that the filter will be provided as government furnished material.

³ We accord substantial weight to the SBA's analysis. See USA Fabrics, Inc., B-295737, B-295737.2, Apr. 19, 2005, 2005 CPD ¶ 82 at 6.

tailored market research to determine whether HUBZone [small business concerns] would manufacture 50 percent or more of the cost of the Kit (excluding the Filter Element), and all of these individuals concluded that was not the case.”⁴ *Id.* at 4-5. Furthermore, the SBA’s own research of the various NSNs confirmed that fewer than 50 percent of the cost of the kits would be manufactured by HUBZone small businesses. *Id.*; SBA Report (Mar. 23, 2007), attach. A. Finally, the SBA reviewed the evidence provided by the protester and concluded that the protester “has not established that the DSCC contracting officer should have had a reasonable expectation of receiving competitive offers from at least two HUBZone [small business concerns] who can supply a Kit where at least 50 percent or more of the components are manufactured by HUBZone [small business concerns] or [small business concerns].” SBA Report (Mar. 23, 2007) at 2, attach. A. Based on this, the SBA found, and we agree, that the agency reasonably determined not to set aside the solicitation for HUBZone small business concerns.

In a “corrected additional statement” submitted after its comments on the DLA and SBA reports, IFM, for the first time, asserted that the agency should have set aside the procurement for HUBZone small businesses based on 13 C.F.R. § 121.406(c), which provides that “kit assemblers,” such as IFM, need only show that 50 percent of the total value of the components of the kit are manufactured by small businesses, without regard to whether any of those businesses are HUBZone concerns. IFM raised this argument only after the SBA, in its report, asserted that this regulation applies to HUBZone procurements. This argument is untimely raised under our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2), however, as the protester is on constructive notice of regulations published in the Code of Federal Regulations and should have protested this issue in its initial protest if it believed this regulation was controlling. *Environmental Tech. Assessment Compliance Serv.*, B-258093, Dec. 13, 1994, 94-2 CPD ¶ 239 at 3. In any event, we disagree that the referenced “kit assembler” regulation, which by its terms is applicable to small business and 8(a) set asides, is also applicable to, or must be considering in evaluating, HUBZone set-aside requirements. The HUBZone regulations, which are set forth in 13 C.F.R. Part 126,

⁴ IFM asserts that our decision in *MCS Portable Restroom Serv.*, B-299291, Mar. 28, 2007, 2007 CPD ¶ __, supports its position that the agency conducted inadequate market research. However, that case is distinguishable. In *MCS*, the agency had in fact received expressions of interest from a small disadvantaged veteran-owned small business that it disregarded, the agency failed to consult the SBA while performing market research, and the SBA did not support the protester’s position during the development of the protest. None of those circumstances exist here.

do not make any reference to kit assembly or to section 121.406(c), and neither the SBA nor the protester cite any authority to support their position.

The protest is denied.

Gary L. Kepplinger
General Counsel