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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-299407

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.

Sharon L. Larkin, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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 acquisition was below the simplified acquisition threshold and thus was not required to be set aside for HUBZone small business concerns; in any case, the agency's market research did not reveal that the agency could reasonably anticipate receiving offers from two or more HUBZone small business concerns.

DECISION

International Filter Manufacturing Corp. (IFM) protests the decision of the Defense Logistics Agency, Defense Supply Center Columbus (DSCC) to issue request for quotations (RFQ) No. SPM7M0-07-Q-0194 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 sought 2,970 fluid pressure filter part kits, National Stock Number (NSN) 4330-01-495-6900. The kit was 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.”

The acquisition was issued on the basis of urgency, pursuant to the special emergency procurement authority (SEPA) granted in 41 U.S.C. § 428a (Supp. IV 2004). This statute provides emergency authority to procure property or services “in support of a contingency operation,” which is defined elsewhere as a “military operation . . . in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States.” 41 U.S.C. § 428a(a)(1); *see* 10 U.S.C. § 101(a)(13) (2000). The SEPA statute also increased the simplified acquisition threshold for any awarded contract to \$250,000. 41 U.S.C. § 428a(b)(2)(A). The agency invoked SEPA here because the kit is the “number one backordered item in the DSCC Maritime Supply Chain” and, of these pending backorders, 52 percent are needed to support urgent requirements in Southwest Asia (Iraq, Kuwait, and Afghanistan), and because the estimated value of this proposed acquisition was \$249,925.50. Contracting Officer’s Statement at 1.

Before issuing the RFQ on an unrestricted basis, the agency considered whether this acquisition should have been set aside for small business or HUBZone concerns. The agency requested that the small business programs office at the Defense Supply Center Philadelphia (DSCP) examine the procurement history of the NSNs listed on a drawing of the kit to determine whether any of the NSNs had been manufactured by small businesses or HUBZone small business concerns. Of the 19 NSNs listed (excluding the filter), DSCP determined that 3 had been previously provided by small businesses, 1 had been previously provided by HUBZone small businesses, and the remaining 15 had been provided by large businesses. *Id.* at 2; Agency Report, Tab 3, DSCP Analysis. The contracting officer’s supervisor analyzed DSCP’s results using the standard unit price list for the NSNs that make up the kit and determined that only 5 percent of the cost of the NSNs in the kit were procured from HUBZone small business concerns, and 15 percent of the costs were procured from small businesses. Contracting Officer’s Statement at 3. The contracting officer considered DSCP’s and his supervisor’s analyses, and determined that there was not a reasonable expectation of receiving offers from two or more small business or HUBZone small business concerns. Based on this determination, the contracting officer decided to issue the RFQ on an unrestricted basis.

The contracting officer coordinated with the DSCC office of small business programs and the Small Business Administration (SBA) Procurement Center Representative (PCR). Both concurred with the contracting officer’s decision.

The RFQ was issued on January 17, 2006, and IFM protested. IFM asserts that the agency should have set aside the RFQ for HUBZone small business concerns.

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). For procurements less than the simplified acquisition threshold but more than the micro-purchase threshold, the HUBZone set-aside requirements are not mandatory, but such acquisitions may be set aside for HUBZone small businesses “at the sole discretion of the contracting officer.” FAR § 19.1305(c). With regard to a HUBZone supply contract, such as the one here, 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 costs (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).

Here, the simplified acquisition threshold is above the estimated value of the contract, so the agency was not required to set aside the requirement for HUBZone small business concerns.¹ In any event, the contracting officer reasonably determined that it did not have a reasonable expectation of receiving offers from two or more HUBZone small businesses, given that only 5 percent of the cost of the NSNs in the kit had been provided by HUBZone small businesses in the past.² Although IFM challenges the sufficiency of the analysis, it has not shown the analysis to be unreasonable.

¹ IFM questions the agency’s calculation of estimated contract value arguing that this calculation is unsupported. However, not only has IFM provided no evidence that the estimated value exceeds \$250,000, but the amount of the actual order awarded under this RFQ is \$157,261.50.

² Although IFM questions the use of standard unit pricing and the determination that HUBZone manufacturers produced only 5 percent of the cost of the kit, the only evidence that it has produced indicates that HUBZone small businesses may be able to provide a small number of the NSNs that are contained in the kit. The record confirms that the overall total cost of the kits attributable to these NSNs is far less than the required 50 percent.

For example, IFM complains that the agency improperly focused on past procurement history and did not search various available databases that would have shown (according to IFM) that HUBZone small businesses could manufacture the NSNs.³ However, a contracting officer may rely on prior procurement history in the conduct of market research; the use of any particular method of assessing the availability of firms for a HUBZone set-aside is not required. See American Imaging Servs., Inc., B-246124.2, Feb. 13, 1992, 92-1 CPD ¶ 188 at 3. Here, the agency reviewed the procurement history for the NSNs, and also consulted the DSCC office of small business programs and the SBA PCR. As noted above, both of these offices concurred with the contracting officer's determination. Our Office also sought the views of the SBA during this protest, and the SBA found that the agency's determination not to set aside the procurement for HUBZone small business concerns does not violate any procurement law or regulation. Based on this record, we find reasonable the agency's determination not to set aside the RFQ for HUBZone small business concerns.⁴

The protest is denied.

Gary L. Kepplinger
General Counsel

³ IFM also complains that the agency's market research and set-aside determination failed to take into account that at least two HUBZone small businesses can manufacture the filter. We find that the agency was not required to consider whether HUBZone small businesses could provide the filter, given that the filter will be provided as government furnished material under this RFQ.

⁴ IFM contends for this first time in its comments on the agency report that the agency's analysis is flawed because it failed to recognize that, as a "kit assembler, [IFM] need only ensure that '50 percent of the total value of the components of the kit must be manufactured by business concerns in the United States which are small under the NAICS codes for the components being assembled.'" Protester's Comments at 3. For the reasons discussed in International Filter Mfg. Inc., B-299368, April ___, 2007, this protest basis, not raised in IFM's initial protest, is untimely and is in any case based upon a misinterpretation of the regulations. IFM also raises other untimely arguments for the first time in its comments—e.g., that the RFQ was "unduly restrictive." Because these protest grounds were also not raised in its initial protest, they too constitute piecemeal presentation of protest grounds that our Bid Protest Regulations do not permit. L-3 Sys. Co. Wescam Sonoma, Inc., B-297323, Dec. 3, 2005, 2005 CPD ¶ 219 at 5.