



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

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

Decision

Matter of: The Protective Group, Inc.

File: B-310018

Date: November 13, 2007

Richard L. Moorhouse, Esq., John G. Stafford, Esq., David T. Hickey, Esq., and Sean M. Connolly, Esq., Greenberg Traurig, LLP, for the protester.

Christine M. Choi, Esq., Department of the Army, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency determination not to set aside body armor procurement for small businesses was proper where record shows agency was familiar with body armor marketplace, and responses from firms participating in “industry day” conference with agency demonstrated that it was not likely to receive proposals from at least two responsible small businesses capable of meeting the unique requirements of the solicitation.

DECISION

The Protective Group, Inc. (TPG) protests the terms of request for proposals (RFP) No. H92222-07-R-0011, issued by the United States Special Operations Command (USSOCOM), for body armor plates for individuals in the special operations forces (SOF). TPG primarily contends that the requirements should be set aside for small business concerns.

We deny the protest.

The body armor being procured here is part of the SOF Personnel Equipment Advanced Requirements (SPEAR) body armor system, a family of integrated body armor and load carriage systems (BALCS) consisting of advanced clothing components and equipment that are tailored to different special operations uses. An important component of this system is the ballistic armor plates, which are specifically designed to stop certain munitions, and which consist of different sizes, shapes, and plate technologies.

USSOCOM first began procuring ballistic plates to meet the SPEAR requirements in 1998, when it awarded a contract to Ceradyne, Inc., which was a small business at the time. Agency Report (AR), Tab 13, at 3; Tab 19, at 2. In August 2006, the agency issued an unrestricted solicitation for these items, which included detailed ballistic plate specifications, designed to reduce the weight of the body armor while increasing ballistic protection. AR, Tab 2, Legal Memorandum, at 3; AR, Tab 13, at 5. The agency received four proposals--three from small businesses, and one from the incumbent, Ceradyne, which no longer qualified as a small business. One of the proposals was not evaluated because it was incomplete, and the three remaining proposals were found technically unacceptable for failing to meet certain "go/no go" criteria. USSOCOM canceled the solicitation on January 11, 2007. AR, Tab 1, Contracting Officer's Statement, at 1.

On February 9, the agency issued a pre-solicitation notice stating that a new solicitation for the requirement would be released shortly, and that USSOCOM would be holding an open "industry day" conference, during which

[i]ndividuals cleared at the Secret level will have the opportunity to provide information at that classification during one-on-one meetings about the status of ongoing ballistic technologies that are manufacturable for the upcoming solicitation. During this industry day, potential offerors will have the opportunity to comment on the requirements of the solicitation, and provide perspective on the technologies they have available to meet the requirement.

AR, Tab 7. The notice further provided offerors a detailed explanation of the technical specifications for the ballistic plates. Id.

Nine firms attended the industry day conference. On the morning of the first day of the conference, all firms received a briefing regarding the details of the competition, including configuration and technical specifications for the plates. Firms were then given an opportunity to ask questions in an open forum, and eight of the firms--including the protester and four other small businesses--then participated in individual one-on-one meetings. Thereafter, on May 9, USSOCOM issued the RFP. TPG filed this protest with our Office prior to the August 7 closing time.

TPG maintains that the agency improperly failed to set aside this procurement for small businesses. In this regard, agencies generally are required to set aside for small businesses 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. Federal Acquisition Regulation (FAR) § 19.502-2(b). TPG asserts that, in addition to itself, at least one of its small business competitors is capable of competing, and that a set-aside therefore was required.

An agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two responsible small businesses capable of performing the work in question. Rochester Optical Mfg. Co., B-292247, B-292247.2, Aug. 6, 2003, 2003 CPD ¶ 138 at 4. No particular method of assessing the availability of capable small businesses is required; rather, the assessment must be based on sufficient facts so as to establish its reasonableness. Id. at 5.

USSOCOM's decision not to set this procurement aside was unobjectionable because the record shows that it reasonably determined that it was not likely to receive offers from two capable small businesses. As an initial matter, the record shows that USSOCOM is highly familiar with the body armor industry. It has been procuring ballistic plates for the last 8 years, during which time it has worked with industry to modify the plate designs to increase their ballistic capabilities. AR, Tab 2, Legal Memorandum, at 2. Further, USSOCOM's small business advisor—who concurred with the agency's decision not to set the requirement aside—has been attending trade shows and small business innovation research events for the last 10 years. USSOCOM Letter to GAO, Oct. 9, 2007, Declaration of Karen L. Pera, at 1.

The principal basis for the agency's determination was the information obtained through the industry day meetings with prospective offerors prior to the release of the solicitation. As noted, the agency met with five small businesses—including all three of the small business offerors under the first solicitation—in one-on-one sessions and specifically discussed with them their ability to meet the current requirement. In this regard, the agency asserts, and the protester does not dispute, that the required ballistic plates are “completely distinct from any other standard product in the marketplace,” USSOCOM Letter to GAO, Oct. 9, 2007, Contracting Officer's Statement, at 1, and are significantly more difficult to produce than other body armor plates—including the “small arms protective inserts” and “enhanced small arms protective inserts” manufactured by the protester and the other small businesses that attended the industry day conference—which do not meet USSOCOM standards for weight, thickness, and ballistic requirements. USSOCOM Letter to GAO, Oct. 9, 2007, Declaration of Richard W. Elder, at 1-4.

The agency asserts—and TPG does not dispute—that none of the small businesses, including the protester and the firm the protester identified as a second likely competitor for the requirement, provided any information during the industry day conference showing that they could or intended to try to meet the government's requirements for this procurement. TPG now asserts that it has the desire and capability to supply the ballistic plates. However, notwithstanding its current stated intent, again, TPG does not dispute that it failed to furnish the agency any information during the industry day meetings that demonstrated its intent and capability to compete. Since there likewise is nothing in the record refuting the agency's determination that no other small businesses were viable prospective offerors for the requirement, we find the agency reasonably determined that it would not receive two offers from capable small businesses. See Belleville Shoe Mfg. Co.

et al., B-287237 et al., May 17, 2001, 2001 CPD ¶ 87 (set-aside not required where record supports finding that firm had never produced boots of the type and quantity required under the solicitation); MCS Mgmt., Inc., B-285813, B-285882, Oct. 11, 2000, 2000 CPD ¶ 187 (set-aside not required where there is no indication that small business concerns could perform food service contracts of the scope and complexity required under the solicitation).

The protester maintains that the fact that the agency received three offers from small businesses under the first solicitation was sufficient to establish a reasonable expectation that two small business offers would be received under the current solicitation.¹ TPG goes on to argue, essentially, that the agency's determination of small business firms' capability went beyond FAR § 19.502-2(b), which only requires that a small business be "responsible"—which the protester characterizes as having "sufficient technical and financial capabilities and resources to successfully perform the contract," see FAR § 9.104-1—in order to be considered a prospective offeror for purposes of a set-aside determination. TPG Letter to GAO, Oct. 10, 2007, at 4.

We do not agree that the agency's actions were improper. In making a set-aside decision, an agency need not make either an actual determination of responsibility or a decision tantamount to a determination of responsibility; however, an agency must make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from two small business concerns that are capable of performing the contract. ViroMed Labs., B-298931, Dec. 20, 2006, 2006 CPD ¶ 4 at 3-4; Information Ventures, Inc., B-279924, Aug. 7, 1998, 98-2 CPD ¶ 37 at 3 (in determining the availability of responsible small business concerns for set-aside purposes, the contracting agency's investigation goes not only to the existence of the businesses, but also to their capability to perform the contract). The considerations relevant to this judgment may be similar to responsibility standards. Railroad Constr. Co., Inc., B-249748.3, Dec. 29, 1992, 92-2 CPD ¶ 446 at 5. In the final analysis, the set-aside decision necessarily entails consideration of whether small businesses can be expected to perform satisfactorily; if the agency reasonably determines that they cannot, a set-aside is not warranted. The agency here determined that, while the protester and other small concerns were in the business of manufacturing body armor, none was capable of furnishing body armor meeting the agency's unique requirements here, and a set-aside therefore was not warranted. We find nothing in the agency's actions or determination that was unreasonable or otherwise improper.

¹ In comments provided in response a request by our Office, the Small Business Administration (SBA) likewise asserts that the small business offers in response to the original solicitation, together with the attendance of five small businesses at the industry day conference, reasonably indicated that offers from at least two responsible small businesses would be received. SBA Comments, Oct. 15, 2007, at 2-3. For the reasons discussed, we disagree with SBA's position.

The protester also maintains that there is an ambiguity in the solicitation that should be clarified by incorporating a question and answer generated during the procurement process.² We find no ambiguity. Prior to the submission of proposals, a questioner asked whether proposals were only required to include “high-level” approaches for first article testing (FAT) plans, the SPEAR unique quality assurance plan, and the production ballistic lot test (BLT) plan. The agency responded that proposals were to include a formal, complete quality assurance plan and a thorough discussion of the FAT and BLT plans. AR, Tab 15. The information in the agency’s response was essentially the same as the information in the solicitation. Specifically, the solicitation states in the “Requirements Matrix” that “the proposal shall thoroughly discuss the offeror’s plan for conducting first article testing”; that the contractor “establish, maintain and submit with their proposal a SPEAR Unique Quality Assurance Plan,” with the government evaluating “the extent to which the plan is thorough and detailed”; and that the government will “evaluate the extent to which the proposal thoroughly discusses the offeror’s Ballistic Lot Test Plan.” AR, Tab 12, RFP attach. 2, at 3, 4. Accordingly, this argument is without merit.³

The protest is denied.

Gary L. Kepplinger
General Counsel

² TPG asserts that it was told at the industry day conference that it would be required to have a separate production facility for the ballistic plates, and that the agency’s failure to incorporate this requirement into the solicitation creates an ambiguity. However, oral advice does not operate to amend a solicitation or otherwise legally bind the agency, Shaw Env’tl, Inc., B-297294, Dec. 2, 2005, 2005 CPD ¶ 218 at 5, and thus does not provide a basis for finding a solicitation ambiguity.

³ In its protest, TPG also asserted that certain testing requirements and the number of plates required to be submitted with a proposal for testing purposes were unduly restrictive. The agency responded to these assertions in its report, and TPG did not rebut the agency’s position in its comments on the report. In these circumstances, we consider these arguments to be abandoned. Planning Sys., Inc., B-292312, July 29, 2003, 2004 CPD ¶ 83 at 6.