Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Stewart Title Company of Illinois

File: B-283291

Date: October 18, 1999

Serge E. Gaudry, Government Compliance Consultants, Inc., for the protester.
Peter Alexander, Esq., an intervenor.
Jud E. McNatt, Esq., Department of Housing & Urban Development, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency improperly set acquisition aside for exclusive small business participation is denied, where record shows that agency had a reasonable basis to anticipate that it would receive offers from at least two responsible small business concerns, and that award would be made at fair market prices.

DECISION

Stewart Title Company of Illinois protests the terms of request for proposals (RFP) No. R-ATL-00976, issued by the Department of Housing and Urban Development (HUD) for real estate closing services in and around the Chicago, Illinois area. Stewart maintains that the agency improperly issued the solicitation as a 100-percent small business set-aside.

We deny the protest.

The solicitation calls for real estate closing services in three regions, the Chicago area (region I), the surrounding counties (region II), and central Illinois (region III). RFP at 4. Stewart's protest focuses on regions I and II, where Stewart has been the incumbent contractor. HUD synopsized the acquisition, identifying it as a set-aside,

in the Commerce Business Daily (CBD) on May 5, 1999, issued the solicitation on June 21, and ultimately established a deadline for submitting offers of July 29.[1]

Stewart maintains that the agency previously acquired these services on an unrestricted basis and that it did not perform adequate market research before issuing the current RFP as a small business set-aside. According to Stewart, the record shows that, prior to Stewart's raising the matter with the agency before the deadline for submitting proposals, the agency had not properly researched the propriety of setting aside the requirement.

Federal Acquisition Regulation (FAR) § 19.502-2(b) provides that an agency shall set-aside an acquisition over $100,000 for exclusive small business participation where it has a reasonable expectation that offers will be obtained from at least two responsible small business concerns, and that award will be made at fair market prices. The agency may look to the procurement history of the same or similar items or services as one factor in deciding whether there exists such a reasonable expectation. Id. Since the decision to set aside a particular acquisition is essentially a business judgment largely committed to the discretion of the contracting officer, our Office will not object to an agency's set-aside decision unless the record shows that the decision was a clear abuse of the contracting officer's discretion. American Med. Response of Conn., Inc., B-278457, Jan. 30, 1998, 98-1 CPD ¶ 44 at 2-3.

The record shows that the contracting officer initially decided to set aside the procurement based on his extensive knowledge of procurements for the same services in the southeastern United States, which had been conducted as small business set-asides.[2] A review of those procurements showed that 76 percent (35 of 46) of the real estate closing services contracts had been awarded to small businesses under set-asides. Letter from Chief of Atlanta Contracting Operations to GAO 2 (Aug. 30, 1999). The contracting officer concluded that there was no reason why the Chicago area services would not also be suitable for a set-aside. Contracting Officer's Statement at 2. Subsequent to deciding that the acquisition could be set aside, the contracting officer received 10 requests for copies of the RFP in response to the CBD announcement which--because the announcement indicated that the procurement was being set aside--he presumed were from small businesses.

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[1]Much of Stewart's argument in its protest rests on its incorrect assertion that the CBD announcement did not identify the acquisition as a set-aside. Although, as the protester points out, the CBD announcement stated that "[a]ll responsible sources may submit a proposal," it specifically references Standard Note No. 1, which provides "[t]he proposed contract is 100 [percent] set aside for small business concerns." (The Standard Notes are printed every Monday in the CBD. See, e.g., CBD, Sept. 13, 1999, at 48.)

[2]The solicitation here was issued by HUD's Atlanta regional office, whereas the services previously had been procured through a Chicago office.

Contracting Officer Statement at 3. The contracting officer viewed these requests as confirming that there was sufficient small business interest that he could reasonably expect to obtain at least two offers from eligible concerns.

Thereafter, following a request by Stewart, the contracting officer sought more specific information from the Chicago office that previously had conducted the procurement for these services, specifically asking why the services previously had been acquired on an unrestricted basis. E-mail Memorandum from the Atlanta Regional Office to the Chicago Regional Office, July 12, 1999. In response, the Chicago office advised the contracting officer that there was no clear indication in their files regarding why the prior procurements had been conducted on an unrestricted basis. E-mail Memorandum from the Chicago Regional Office to the Atlanta Regional Office, July 13, 1999. They further advised, however, that (1) during the prior acquisition cycle for region I, 12 offers had been submitted, 7 of which were from small businesses (2 of which were technically acceptable); and (2) for region II, 10 offers had been submitted, 6 of which were from small businesses (2 of which were technically acceptable). Id. (In region III, not in issue here, four offers had been submitted, two from small business concerns.) Id. Again, the contracting officer viewed this information as further support for his set-aside decision. Contracting Officer's Statement at 4.

The set-aside determination was proper. Because the acquisition here was of the same size and type as the successful set-asides in the southeast, and there was no apparent reason to expect a different outcome merely due to geography, we think the contracting officer reasonably relied on his prior experience in initially deciding to set this procurement aside. Moreover, the contracting officer's further investigation--in response to the protester's inquiry--bore out his conclusion, showing that, within the Chicago and surrounding regions, there had been sufficient small business competition to justify the conclusion that at least two viable small business offers could be anticipated. Finally the record shows that, during the pendency of the protest, the agency received offers in response to the RFP and obtained at least two technically acceptable offers for regions I and II, and that the prices offered were within the range of what could reasonably be considered a fair market price.[3]

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[3]We do not discuss the details of the offers received because the information is source selection sensitive and our Office did not issue a protective order in this case because the protester is not represented by counsel. We do point out that at least one of the offers in each region is below the government estimate for the services.

While the contracting officer obviously did not rely on this information in initially deciding to set the acquisition aside, it nonetheless supports the agency's decision. York Int'l Corp., B-244748, Sept. 30, 1991, 91-2 CPD ¶ 282 at 7.

The protest is denied.

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