



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Crimson Enterprises, Inc.

File: B-241038.3

Date: July 5, 1991

D. Lee Roberts, Jr., Esq., Smith, Currie & Hancock, for the protester.
Lt. Col. William J. Holland, Department of the Air Force, for the agency.
Susan K. McAuliffe, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency's decision to set aside procurement for base housing maintenance for small disadvantaged business (SDB) concerns was proper where contracting officer determined that there was a reasonable expectation that offers would be obtained from two responsible SDB firms at a price within 10 percent of the fair market price and where the application of that 10 percent price differential did not generally deny nondisadvantaged small businesses a reasonable opportunity to compete for contracts in the industry category that encompasses base housing maintenance.

DECISION

Crimson Enterprises, Inc. protests the Department of the Air Force's decision to set aside for small disadvantaged business (SDB) concerns request for proposals (RFQ) No. F08637-90-R-0011, for military family housing maintenance services at Tyndall Air Force Base, Florida. Crimson principally contends that the SDB set-aside is improper because a disproportionate number of base housing maintenance contracts are being set aside for SDB firms, preventing nondisadvantaged small business concerns from competing on contracts in that industry. Crimson contends that the Secretary of Defense should adjust downward the 10 percent price differential preference (i.e., the statutory allowance for SDB awards within 10 percent of the fair market price) generally permitted for SDB contract awards. Crimson alleges that the application of that price differential denies nondisadvantaged small businesses a reasonable opportunity to compete for base housing maintenance contracts.

We deny the protest.

STATUTORY AND REGULATORY BACKGROUND

SDB set-asides serve a purpose similar to small business set-asides by ensuring equitable opportunities for SDB participation in government acquisitions. The Department of Defense (DOD) established its program of SDB set-asides to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. § 2301 note (1988), which also established a goal of awarding SDBs 5 percent of the dollar value of DOD contracts. This legislation, as amended by the National Defense Authorization Act of November 29, 1989, Pub. L. No. 101-189, 103 Stat. 1507 (codified at 10 U.S.C. § 2301 note (Supp. I 1989)), provides that, to achieve the stated 5 percent goal, the Secretary of Defense may enter into contracts using less than full and open competition but "shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to [SDB concerns]." Section 831. This legislation provides that the "Secretary shall adjust the [10 percent price differential] . . . for any industry category if available information clearly indicates that nondisadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage" Id.

The legislative history indicates that:

"In conducting an assessment under this provision, [DOD] . . . should consider data available from government agencies and the private sector [including information regarding] the relative aggregate share of contract awards [in the industry category] to disadvantaged small businesses and to nondisadvantaged small businesses, and the extent of any decrease in the aggregate share of contracts awarded to nondisadvantaged small businesses from previous fiscal years."

H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 3, reprinted in 1989 U.S. Code Cong. & Admin. News 1072.

A list of the referenced industry categories is set forth at Federal Acquisition Regulation (FAR) § 19.102(g), which provides the Standard Industrial Classifications (SIC) describing the principal nature of the product or service to be acquired. SIC 1799, entitled "Special Trade Contractors, Not Elsewhere Classified," is the construction industry classification that encompasses base housing maintenance.

The National Defense Authorization Act for Fiscal Year 1987, establishing the 5 percent SDB goal, left the promulgation of regulations and procedures necessary to achieve that objective to DOD's discretion. Sletager, Inc., B-241149, Jan. 25, 1991, 91-1 CPD ¶ 74. The DOD program is set forth at Department of Defense Federal Acquisition Regulation Supplement (DFARS) part 219. This program provides that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. DFARS § 219.502-72(a) (DAC 88-13); see also Grove Roofing, Inc., B-240743 et al., Dec. 10, 1990, 90-2 CPD ¶ 470.

In comparison, the Small Business Competitiveness Demonstration Program Act of 1988 (the SBCDP Act), 15 U.S.C. § 644 note (1988), establishes a demonstration program under which solicitations for the procurement of services in four designated industry groups--construction (including base housing maintenance), refuse systems, architectural and engineering services, and non-nuclear ship repair--with an anticipated dollar value greater than \$25,000, are to be issued on an unrestricted basis, provided the agency has attained its small business participation goal (i.e., 40 percent of the dollar value of the contract awards for each of the designated industries is to be awarded to small businesses). Sections 712 and 713. However, the SBCDP Act specifically provides, at section 713(a), that set-asides for SDBs under section 1207 of the 1987 Defense Authorization Act, which DFARS § 219.502-72 implements, are exempt from the demonstration program. See Kato Corp., 69 Comp. Gen. 374 (1990), 90-1 CPD ¶ 354. Thus, although this legislation and the implementing regulations at DFARS § 219.1070-1(a) (DAC 88-13) limit small business set-aside procurements in the four designated industry groups, they do not relieve DOD of its obligation to procure services and supplies in these industries by the means of an SDB set-aside where otherwise required. Sletager, Inc., B-241149, supra.

THE SOLICITATION

The RFP was originally issued on May 25, 1990, as a total small business set-aside under SIC 8744 (entitled "Base Maintenance"), which is not a designated industry category under the SBCDP Act. The Small Business Administration (SBA), in response to a SIC code appeal, subsequently determined that the services being procured were better designated under SIC 1799 and changed the RFP's SIC code to reflect that determination. Since SIC 1799 is included in the "Designated Industry Groups" prescribed by FAR § 19.1005(a)(1), and governed by the SBCDP Act, the agency determined that a small business

set-aside would be improper and the RFP was changed, by amendment dated August 15, to a total SDB set-aside. Proposals were received on November 28, and award was made to DGR Associates, Inc. on December 20. Performance on that contract has not been suspended.

PROTESTER'S CONTENTIONS

Crimson does not protest the SIC 1799 determination, but rather challenges the SDB set-aside determination on the basis that nondisadvantaged small businesses are generally denied a reasonable opportunity to compete for base housing maintenance contracts.^{1/} Crimson consequently contends that the Secretary of Defense is required to adjust downward the 10 percent price differential for this procurement.

ANALYSIS

The Secretary of Defense, in a report dated July 17, 1990, on the implementation of section 1207 of the National Defense Authorization Act, regarding contract goals for minorities, recognized that the nondisadvantaged small business community may be adversely affected by the SBCDP Act's authorization of SDB set-asides for construction contracts, where such contracts were previously set aside for small businesses. This report concludes, however, that nondisadvantaged small businesses have not been denied a reasonable opportunity to compete for construction contracts due to the application of the 10 percent differential the protester challenges here. In fact, DOD reports that construction awards to nondisadvantaged small businesses generally increased in FY 1990 from the previous year. The DOD report concludes that "an adjustment to the premium in the area of construction is not warranted at this time."

The Air Force reports that, of the \$238,016,000 of SIC 1799 contracts awarded in excess of \$25,000 by DOD in FY 1990, \$31,931,000 in contracts (including unrestricted and set-aside procurements) were awarded to SDB concerns; nondisadvantaged small businesses received \$120,889,000 in awards. During the

^{1/} Although Crimson argues that "base housing maintenance," an element of SIC 1799, should be considered a separate industry category for the comparison of SDB awards to nondisadvantaged small business contracts, the protester's position is not supported by the instruction provided by the SBA which directs the use of construction SIC codes for agency reporting purposes. See SBA Final Policy Directive, 54 Fed. Reg. 37742, 37746-37747 (1989).

first half of FY 1991, DOD awarded approximately \$55,608,000 in SIC 1799 contracts, of which nondisadvantaged small business concerns received \$39,588,000.^{2/}

These figures establish that the great majority of contracts within SIC 1799 were awarded to other than SDB concerns during FY 1990 and FY 1991. In light of these figures (which, DOD reports, show an increase from nondisadvantaged small business construction contracts awarded in FY 1989), we cannot find that nondisadvantaged small businesses generally have been denied a reasonable opportunity to compete for SIC 1799 contracts. Accordingly, we find reasonable the determination that no adjustment to the challenged 10 percent price differential was warranted.^{3/} Since an SDB set-aside was otherwise required here, based upon the agency's determination that it expected to receive offers from at least two responsible SDB concerns at a price within 10 percent of the fair market price, a determination which the protester does not challenge, we have no reason to object to the agency's decision to set aside this procurement for SDB concerns. DFARS §§ 219.502-72(a).

The protest is denied.


for James F. Hinchman
General Counsel

^{2/} The protester challenges the accuracy of the award figures provided by the Air Force on the basis that one such figure (\$1,077,000 awarded to SDB concerns in FY 1991 under SDB set-aside procurements) is allegedly inconsistent with the total dollar amounts listed on various contract documents obtained by the protester. The challenged figure only represents the number of dollars actually expended under delivery orders, in excess of \$25,000, issued before May 3, 1991 (the date the Air Force prepared this information for submission to our Office), whereas the higher total contract award prices represent estimates which cover a longer time period. Thus, we find no reason in the record to question the agency's figures.

^{3/} The Air Force reports that it spent only .1 percent in premiums (i.e., amount paid in excess of fair market prices) to SDB firms during FY 1990.