



Comptroller General  
of the United States

Washington, D.C. 20548

33336

## Decision

**Matter of:** DCT Incorporated

**File:** B-252479

**Date:** July 1, 1993

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David Tolman for the protester,  
Daniel H. Tarkington for Four Seasons Environmental, Inc.,  
and James J. Griffin for Griffin Services Inc., interested  
parties,  
Terrence J. Tychan, Department of Health and Human Services,  
for the agency,  
Jacqueline Maeder, Esq., and Ralph O. White, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

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### DIGEST

Protest is sustained where agency decision not to set aside  
operation and maintenance services procurement for small  
business concerns was based on insufficient efforts to  
ascertain small business capability to perform the contract.

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### DECISION

DCT Incorporated protests the decision of the Centers for  
Disease Control (CDC), Department of Health and Human  
Services to issue request for proposals (RFP) No. 93-33(N)  
for the operation and maintenance of its Virology Laboratory  
Building, Atlanta, Georgia, on an unrestricted basis. DCT  
contends that the solicitation should have been issued as a  
small business set-aside.

We sustain the protest.

### BACKGROUND

The Virology Laboratory Building at the CDC in Atlanta is a  
state-of-the-art research laboratory housing potentially  
biohazardous medical research activities. The building is a  
self-contained complete laboratory facility with environ-  
mental systems, hoods, medical gasses and vacuum, breathing  
air systems, incinerator, autoclaves, and all other systems  
and equipment required to support the research activities.  
Included within the Virology Laboratory Building are areas

designated as biosafety level P-3 and P-4 laboratories, which require the highest degree of operations standards.<sup>1</sup>

The contractor selected to perform the maintenance services for the Virology Laboratory is required to maintain and repair the mechanical, electrical, and physical building plant systems, and to monitor the conditions of the building's environmental systems, freezers, and incubators on a 24-hour basis. The contractor is also required to perform shop support services, including, for example, partition relocation due to changes in office/laboratory layout and related electrical, heating/air conditioning system changes, and installation of research and test equipment. Additionally, the contractor is responsible for daily, weekly, and special janitorial/cleaning services, pest control services, and grounds maintenance.

In December 1992, CDC published a notice in the Commerce Business Daily announcing the upcoming solicitation. In response CDC received 62 requests for the solicitation. Also in December, CDC officials considered whether to restrict the procurement to small business participation. CDC explains that it declined to set the procurement aside for small business because the contracting officer determined that there was no reasonable expectation of receiving offers from two responsible small businesses.

CDC explains that, because providing these maintenance services requires unique capabilities, finding vendors with specific experience is difficult. The agency reports that its determination not to set aside the procurement was based on its knowledge of operation and maintenance contractors,

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<sup>1</sup>The designation of laboratories as P-3 or P-4 indicates the level of precautions required with respect to ensuring the safe operation of research facilities. In a P-3 laboratory, researchers work with indigenous or exotic agents which may cause serious disease; in a P-4 laboratory, researchers work with highly contagious, life-threatening pathogens. At the Virology Laboratory Building, the P-4 laboratory is located in an isolated area with specialized engineering and containment features, including secondary barriers to prevent hazardous materials from escaping into the environment. Although the contractor does not work in this area--its operation and maintenance workers only enter this laboratory once every 1 or 2 years, and only after the laboratory is decontaminated--the contractor must maintain the air supply, negative air pressure, and filtering systems so that the laboratory remains operational and pathogens are not permitted to escape.

and its survey of the offerors who competed under the prior solicitation for these services.<sup>2</sup> Specifically, the contract specialist contacted the four technically acceptable offerors that participated in the 1987 acquisition to inquire about their current size status. The agency found that, consistent with their previous status, three of these offerors were large; one, the incumbent contractor, was small. Based on this information the agency concluded that there were not two small business firms capable of performing the contract. The agency also explains that it reviewed the current source list of facilities maintenance contractors which had indicated an interest in procurement opportunities before concluding that none of these contractors was capable of performing the contract.

After issuing this RFP on an unrestricted basis on January 27, 1993, CDC held a preproposal conference and site visit at the Virology Laboratory on February 9. The meeting was attended by representatives of 12 firms. According to the agency, since the purpose of the meeting was to answer technical questions, the contracting officer did not inquire about the size status of the attending firms.

On February 17, DCT, a small business, requested that the agency set aside the procurement for exclusive small business participation because a number of small businesses attended the preproposal conference, indicating sufficient small business interest in the procurement. By letter dated February 23, the agency denied DCT's request. According to the agency letter denying the request, nine small business firms<sup>3</sup> had contacted CDC seeking facility management procurement opportunities, but given the complexity of the procurement, "[t]here was no assurance that with a small business set-aside we would receive adequate response at

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<sup>2</sup>CDC reports that only one prior procurement for these services has been conducted, with the solicitation for that procurement issued in October 1987, when the Virology Laboratory Building was constructed. This earlier solicitation was issued on an unrestricted basis and responses were received from six offerors, four of which were determined to be technically acceptable. Of these four technically acceptable offers, one was from a small business which was subsequently awarded the contract.

<sup>3</sup>While the agency states that 9 firms contacted the CDC small business specialist regarding contracting opportunities, the list of these firms compiled by the small business specialist and forwarded to the contract specialist includes 10 firms.

[a] reasonable price from qualified small businesses." In addition, the letter recited CDC's experience with the 1987 solicitation when only one qualified small business offeror--now the incumbent--responded to the RFP. On February 25, DCT filed a protest with our Office contending that the RFP should have been issued as a small business set-aside.

#### ANALYSIS

An acquisition of services is required to be set aside for exclusive small business participation if the contracting officer determines that there is 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. Federal Acquisition Regulation (FAR) § 19.502-2(a). Generally, we regard such a determination as a matter of business judgment within the contracting officer's discretion which we will not disturb absent a showing that it was unreasonable. Neal R. Gross & Co., Inc., B-240924.2, Jan. 17, 1991, 91-1 CPD ¶ 53. However, an agency must undertake reasonable efforts to ascertain whether it is likely that it will receive offers from at least two small businesses with the capability to perform the work and we will review a protest to determine whether an agency has done so. Library Sys. & Servs./Internet Sys., Inc., B-244432, Oct. 16, 1991, 91-2 CPD ¶ 337; The Taylor Group, Inc., B-235205, Aug. 11, 1989, 89-2 CPD ¶ 129. In this regard, we have found unreasonable the determination to issue a solicitation on an unrestricted basis where that determination is based upon outdated or incomplete information. Library Sys. & Servs./Internet Sys., Inc., supra.

Here, the record does not show that the contracting officer met her duty to investigate whether the procurement could be set aside for exclusive small business participation. First, CDC contacted only the four firms which responded to the 1987 solicitation, three of which did not certify as small businesses at the time. This market survey--limited to a pool of businesses identified 5 years ago, and limited to a pool already known to contain only one small business--was not an adequate review of the potential small business market. See FKW Inc. Sys., 68 Comp. Gen. 541 (1989), 89-2 CPD ¶ 32.

Second, although CDC reviewed a list of the names of other small businesses which had indicated interest in facilities maintenance procurements, CDC did not contact any of these firms to ascertain if they were qualified. Rather, it viewed these small businesses as not having the requisite experience to perform this contract. The agency, however,

has provided no evidence to indicate that it was familiar with these small business firms. For example, while the agency report refers to the small business specialist's "knowledge of facilities maintenance contractors with whom he has had contact," the agency has provided no explanation as to why none of these firms is qualified, nor has it provided any information regarding the experience of the firms. Furthermore, CDC's own experience suggests that small business status is not an impediment to being qualified for this procurement--as noted above, a small business won the previous competition and there is no indication in the record that the agency is dissatisfied with the incumbent's performance.

We recognize that CDC has legitimate concerns about the capability of small business firms to safely operate the Virology Laboratory. The solicitation advises prospective offerors that they must have experience in:

- "(1) P-4 laboratory support systems for P-4 laboratories not less than 3000 square feet in size,
- (2) P-3 laboratory support systems for P-3 laboratories not less than 8000 square feet in size, and
- (3) push-pull variable air volume systems, in which relative air pressure relationship in laboratories are automatically maintained."

We do not question the legitimacy of that requirement or reach any conclusion as to whether there actually are two or more small businesses that can meet the requirement. We hold only that CDC was required to investigate the capabilities of at least a representative number of interested small business firms before determining, based only on unhelpful procurement records and the complexity of the requirement, that no other small business concerns would be able to perform the work.

#### CONCLUSION AND RECOMMENDATION

Because CDC has failed to make reasonable efforts to ascertain whether small business operation and maintenance firms are capable of performing the contract, we conclude that the decision not to set this procurement aside for exclusive small business competition is not adequately supported, and therefore the protest is sustained.

For the record, we note that DCT's comments on the agency report also complain that the agency applied an improper Standard Industrial Classification (SIC) code to this

procurement which led the agency to decide there were not two qualified small businesses to perform the work.<sup>4</sup> Since the code was apparent upon issuance of the solicitation, if DCT believed the code was improper it should have appealed the contracting officer's determination to the Small Business Administration pursuant to the rules for challenging SIC codes, FAR § 19.303(c). On the other hand, it appears from the statement of work that DCT's challenge to the SIC code may have some validity.<sup>5</sup>

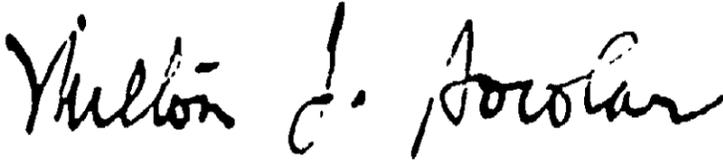
Accordingly, we recommend that the contracting officer adequately investigate the potential small business interest in this procurement and the responsibility of interested small business firms. We also recommend that the agency, as part of its review, reconsider its choice of a SIC code, and, if necessary, consult with the SBA regarding the appropriate size standard for this procurement. If the contracting officer finds that there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns (and that award can be made at a fair market price), the agency should take the necessary steps to set aside this procurement for small business. We

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<sup>4</sup>This argument was also raised by one of the interested parties.

<sup>5</sup>The SIC code incorporated in this RFP, SIC-8744, has two categories: base maintenance, with a small business size ceiling of \$13.5 million in annual receipts; and facilities support maintenance services, with a small business size ceiling of \$3.5 million. The base maintenance category is reserved for services which include, among other things, three or more activities such as janitorial and custodial service, protective guard service, commissary service, fire prevention service, safety engineering service, messenger service, and grounds maintenance and landscaping service. FAR § 19.102, n.17. The facilities support management services category is reserved for support services needed to manage a specific building including three or more specified activities such as secretarial services, typing, telephone answering, reproduction or mimeograph services, mailing services, travel planning, word processing, and switchboard operation. FAR § 19.102, n.20. Since the statement of work incorporated in the RFP requires the contractor to perform equipment maintenance, shop services, janitorial services, groundskeeping and pest control services, it appears that the base maintenance category may more closely reflect the RFP's requirements. This change in categories would raise the small business size ceiling from \$3.5 million to \$13.5 million.

also find that DCT is entitled to be reimbursed its protest costs. 4 C.F.R. § 21.6(d)(1) (1993). In accordance with 4 C.F.R. § 21.6(f), DCT's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to CDC within 60 days after receipt of this decision.

*for*   
Comptroller General  
of the United States