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## Decision

**Matter of:** Walden Security

**File:** B-407022; B-407022.2

**Date:** October 10, 2012

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Jeffrey E. Weinstein, Esq., The Weinstein Law Group, PLLC, for Millennium Security Service, Inc., an intervenor.

Elise Harris, Esq., Department of Health and Human Services, Centers for Disease Control and Prevention, for the agency.

Tania Calhoun, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest challenging an agency's decision to set aside a procurement for small businesses is denied where the record shows that the contracting officer reasonably expected that at least two responsible small business concerns would compete for the award and that award would be made at a fair market price.

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### DECISION

Metropolitan Security Services, Inc. d/b/a Walden Security, of Chattanooga, Tennessee, protests the decision of the Department of Health and Human Services, Centers for Disease Control and Prevention (CDC), to issue request for quotations (RFQ) No. 2012-Q-14617, for security guard services at various locations in the metropolitan Atlanta, Georgia, area, as a small business set-aside.

We deny the protest.

### BACKGROUND

The CDC operates facilities at four federally-owned campuses, and utilizes multiple leased office facilities, in the metropolitan Atlanta area. Security must be provided at all of these facilities. Contracting Officer's (CO) Statement at 1. Walden, a large

business, is the incumbent contractor.<sup>1</sup> At issue here is the follow-on procurement to Walden's expiring contract.

In preparation for the procurement, the CO consulted with the CDC's small business officer and sent e-mails to small businesses with relevant General Services Administration schedule contracts requesting statements of their capabilities. CO Statement at 5 n.3. On February 9, 2012, the CDC published an initial sources sought notice for its security requirements and received capability statements from numerous firms. The CO states that an analysis of the responses indicated that at least two small businesses could meet the requirements, and the agency issued RFQ No. 2012-Q-14257 as a small business set-aside. Id. at 2 n.1. Walden filed a protest in our Office challenging this decision. After the CDC canceled the solicitation to add requirements, we dismissed Walden's protest as academic.

On June 8, the CDC posted a new sources sought notice to determine the availability of small businesses that could meet the agency's requirements. The notice summarized the requirement and attached the performance work statement (PWS). The notice explained that contractors must be certified and licensed to provide security guard services in the State of Georgia, and that all applicable licenses and certifications for armed guards were required. Prospective contractors were asked to respond to questions concerning their capabilities, and, where teaming arrangements were contemplated, to provide information for each teaming entity. AR, Exh. J, June 8, 2012, Sources Sought Notice, at BATES No. 0000199.

The CDC received 19 capability statements by the June 13 deadline. The contract specialist verified the small business status of the responding firms, and a program analyst determined that four firms met the RFQ's requirements. Supp. AR, Declaration of Contract Specialist at ¶¶ 4-6; CO Statement at 3. The only contemporaneous evidence of analysis underlying this determination is an e-mail to the contract specialist from the program analyst assigned to evaluate the capability statements. The e-mail states, "[h]ere are the results of the most recent sources sought," and lists the names of the firms that responded to the notice with a "yes" or "no" notation next to each name. AR, Exh. S, June 13, 2012 E-mail from Program Analyst to Contract Specialist, at BATES No. 0001362. The CO decided to set aside the procurement for small businesses based on the program analyst's evaluation, as well as market research and discussions with the Small Business Administration. AR, Exh. W, CO Declaration at ¶ 7.

The RFQ anticipates the award of a fixed-price contract, with separate labor hour line items for surge, emergency, and overtime requirements. RFQ at 2-7. The

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<sup>1</sup> According to the CO, Walden became the incumbent contractor when it was still a small business by receiving an award under a solicitation set aside for small business concerns. CO Statement at 4 n.2.

services are to be provided over one base year, with up to four 1-year option periods. The solicitation includes a 120-day transition period. Id. Award is to be made on a best value basis, considering technical factors and price.

Of relevance to the protest, contractors are required to have a business or corporate license to operate as a commercial security service on or before the date of award, and to ensure that each security guard/officer has obtained all licenses and certifications that are required by federal, state, and/or local laws 120 days after award. PWS ¶¶ 4.2.2, 4.1.8, 4.1.3. The PWS includes experience requirements; this experience could be met by either the prime contractor or a subcontractor. AR, Exh. E, July 11 E-mail from Contract Specialist to Vendors. In this regard, the RFQ allows for partnering agreements with non-qualifying entities provided that the prime contractor performs at least 51 percent of the labor costs. PWS ¶ 4.3.1.

Walden filed this protest prior to the RFQ's July 16 closing date. The CDC received eight quotations in response to the solicitation.

## DISCUSSION

Walden argues that the decision to set aside the procurement for small business participation was unreasonable, improper, and an abuse of the contracting officer's discretion. Walden asserts that the CDC did not contemporaneously evaluate whether there were two capable and qualified small business concerns that met the RFQ's requirements at a fair market price. Alternatively, Walden contends that the CDC's set-aside determination was unreasonable since no small business is capable of meeting the RFQ's licensing requirements, or providing the services at a fair market price.

Under Federal Acquisition Regulation (FAR) § 19.502-2(b), a procurement with an anticipated dollar value of more than \$150,000, such as the one here, must be set aside for exclusive small business participation when there is a reasonable expectation that: (1) offers will be received from at least two responsible small business concerns, and (2) that award will be made at a fair market price. The use of any particular method of assessing the availability of small businesses is not required so long as the agency undertakes reasonable efforts to locate responsible small business competitors. Med-South, Inc., B-401214, May 20, 2009, 2009 CPD ¶ 112 at 2; National Linen Serv., B-285458, Aug. 22, 2000, 2000 CPD ¶ 138 at 2.

The decision whether to set aside a procurement may be based on an analysis of factors such as the prior procurement history, the recommendations of appropriate small business specialists, and market surveys that include responses to sources sought announcements. Commonwealth Home Health Care, Inc., B-400163, July 24, 2008, 2008 CPD ¶ 140 at 3. In making set-aside decisions, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility; rather, they need only make an informed business

judgment that there is a reasonable expectation of receiving acceptably priced offers from small business concerns that are capable of performing the contract. Ceradyne, Inc., B-402281, Feb. 17, 2010, 2010 CPD ¶ 70 at 4. Because a decision whether to set aside a procurement is a matter of business judgment within the contracting officer's discretion, our review is limited to determining whether that official abused his or her discretion. KNAPP Logistics Automation, Inc., B-406303, Mar. 23, 2012, 2012 CPD ¶ 101 at 2. We will not question a small business set aside determination where the record shows that the evidence before the contracting officer was adequate to support the reasonableness of the conclusion that small business competition reasonably could be expected. Commonwealth Home Health Care, Inc., *supra*, at 3.

We first address Walden's argument that the CDC failed to conduct, or document, any contemporaneous analysis or evaluation to support its decision to issue the solicitation as a small business set-aside, and its companion argument that we should give the agency's post-protest analysis little or no weight.

The only contemporaneous evidence of the set-aside analysis is the e-mail from the program analyst to the contract specialist discussed above, with "yes" or "no" notations beside the names of firms responding to the sources sought notice. Walden challenged the agency's documentation in its comments on the agency report, and GAO asked the agency to respond. The CDC provided a declaration, and a supplemental declaration, from the program analyst.<sup>2</sup> The program analyst states that, after she received the capability statements, she read and evaluated each against a set of questions and responses established to ascertain a firm's capability to perform. She states that, during the course of this protest, she refreshed her memory of that evaluation by re-reading the capability statements of the firms found capable and recollected the reasons for her findings. AR, Exh. X, Supp. Program Analyst Declaration, at ¶¶ 3-10. She provided her documented recollections for each firm.<sup>3</sup>

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<sup>2</sup> In response to GAO's initial request for CDC's response, the program analyst's declaration stated that she evaluated the capability statements against a list of questions to which the answer had to be "yes" in order to consider the firm capable; based on her review, four firms were found capable. AR, Exh. W, Program Analyst's Declaration, at ¶¶ 3-7. Since the declaration did not explain why the firms were found to be capable, GAO sought an additional response from the CDC. This request elicited a supplemental declaration from the program analyst.

<sup>3</sup> The program analyst also attached her analysis of the capability statements submitted in response to the sources sought notice for the prior procurement. In its supplemental comments, Walden cites statements from that analysis of the prior capability statements to challenge the analysis conducted for the present procurement. As we ruled early in the protest, the prior capability statements, and analysis of those statements, are not relevant. The prior sources sought notice  
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Walden argues that the agency's post-protest analysis should be accorded no weight, as it was prepared during the adversarial protest process and does more than fill in limited gaps in the contemporaneous record. We do not agree.

As Walden acknowledges, GAO will not limit its review to contemporaneous evidence, but considers all the information provided, including a party's arguments and explanations. See Serco, Inc., B-406683, B-406683.2, Aug. 3, 2012, 2012 CPD ¶ 216 at 7. While we generally give little or no weight to reevaluations and judgments prepared in the heat of the adversarial process, Boeing Sikorsky Aircraft Support, B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91 at 15, post-protest explanations that provide a detailed rationale for contemporaneous conclusions, and simply fill in previously unrecorded details, will generally be considered in our review as long as those explanations are credible and consistent with the contemporaneous record. NWT, Inc.; PharmChem Labs., Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16.

Here, the contemporaneous conclusions were the "yes" notations in the program analyst's e-mail to the contract specialist. The program analyst's post-protest explanations provide detailed and credible rationales for those conclusions, and fill in the details she did not previously record. As a result, we consider these explanations in our review of the propriety of the agency's set-aside determination.<sup>4</sup>

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concerned a different procurement, and each procurement stands on its own. See Advanced Constr. Techniques, Inc., B-404847.6, Jan. 25, 2012, 2012 CPD ¶ 54 at 9. There is no evidence that the first set of capability statements were the same as those submitted here, and no indication that the program analyst relied on her prior analysis to conduct her present analysis. As a consequence, we need not address Walden's arguments stemming from the analysis for the prior procurement.

<sup>4</sup> The agency report included the capability statements received in response to the instant sources sought notice. In its comments on the agency report, Walden argued that its review of those submissions raised "numerous red flags" calling their capabilities into question, Comments at 18, but did not identify those "red flags." In its supplemental comments, Walden revisits its metaphor with more detail, arguing that certain firms are not eligible small businesses. Walden cites as its support comments made in the program analyst's analysis of the capability statements submitted in response to the previous sources sought notice. To the extent that Walden's arguments are premised on the content of the capability statements at issue here, the arguments are untimely. Our Bid Protest Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. 4 C.F.R. § 21.2(a) (2012); AINS, Inc., B-405902.3, May 31, 2012, 2012 CPD ¶ 180 at 6 n.12. To the extent that the arguments rely on the analysis of the

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Walden alternatively argues that the CDC's post-protest analysis does not show that there were two capable and qualified small business concerns that met the RFQ's requirements at a fair market price. Walden's principal argument is that there is no reasonable expectation that two or more small businesses can meet the solicitation's armed guard license requirements under Georgia law.

As noted above, the PWS requires the contractor to ensure that each security guard has obtained all licenses, permits and certificates required by federal, state and local laws 120 days after award. PWS ¶¶ 4.1.3, 4.1.8. The CDC does not dispute that armed security guards must be licensed under Georgia law. The CDC also does not dispute Walden's characterization of Georgia law as requiring that the security company, as the employer, must apply for and obtain the license on behalf of its employee. After properly registering its employees, the security company retains the license of its armed security guards. Georgia does not permit the transfer of such licenses between employers. Protest at 6.

Walden argues that no small business can meet this requirement because the 120-day transition period does not allow enough time to re-certify the security guards now working for Walden or a sufficient number of other security guards to perform the requirements. Walden argues that, to apply for a license, the employees must be employed by the contractor, and obtaining the licenses takes between 5 and 7 months, longer than the transition period. Walden's estimate is drawn from an October 2011 e-mail from a CDC supervisory contracting officer to the contract specialist. Protest, Tab C, at 43-45. In this e-mail, which concerned a planning meeting for the recompetition of these requirements, the supervisory contracting officer refers to the licenses at issue and states that "[i]t takes about 5 to 7 months to obtain the licenses from the State of Georgia . . ." Id.

The CDC counters that this e-mail is not dispositive because it does not reflect the time estimate of the State of Georgia, the licensing entity. The CO states that her independent investigation of timetables for obtaining licenses showed that the state's estimates for processing an application coincided with the transition period in the solicitation. CO Statement at 7. In this regard, the contract specialist states that she contacted the Georgia Secretary of State, Professional Licensing Board Division, to find out the timeframe for security guard companies to obtain guard licenses for their employees, so the CDC could set reasonable timeframes for contract transition. She states that on three occasions, including February and July of 2012, she contacted the state and was given the affirmative timeframe of 25 to 30

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capability statements submitted in response to a different procurement, as indicated above, that analysis is not relevant here. See note 3, supra.

days for a company to obtain licenses for employees to work under their company as security guards. AR, Att. 1, Declaration of Contract Specialist, at ¶¶ 3-5.

We agree with the CDC that the e-mail proffered by Walden is, at best, the supervisory contracting officer's estimate, and that the CDC reasonably relied on information obtained from the state of Georgia itself. Walden's argument that the contract specialist's declaration is not accompanied by more specific documentation affords us no basis to question its contents. Walden argues that the estimate of 25-30 days does not account for delays in filing applications or post-application delays due to incorrectly completed applications. However, Walden has not shown that any of these potential delays undercut the agency's determination that offers from two or more responsible small businesses can reasonably be expected.

Finally, Walden asserts that the agency did not analyze whether small businesses could offer fair market prices. Walden argues that, because of the licensing and other technical requirements, any small business would have to add a premium to its proposed pricing, thereby resulting in prices higher than fair market.

A contracting officer may reasonably rely on an expectation that there will be adequate price competition to conclude that the competition will result in a fair market price. KNAPP Logistics Automation, Inc., B-406303, Mar. 23, 2012, 2012 CPD ¶ 137 at 5. The FAR provides that adequate price competition exists where two or more responsible offerors submit proposals that satisfy the government's requirements, award is based on a best value determination where price is a substantial factor, and the price of the successful offeror is not unreasonable. FAR §§ 15.403-1(c)(1); 15.404-1(b)(2)(i). Here, the CDC concluded that four of 19 firms responding to the notice were small businesses capable of meeting the solicitation's requirements. Walden's speculation that small businesses would propose prices higher than fair market is just that. Under the circumstances, we conclude that it was reasonable for the CDC to anticipate adequate price competition, and that, as a result of that price competition, award would be made at a fair market price under the set-aside procurement.<sup>5</sup> National Linen Serv., *supra*, at 3-4.

The protest is denied.

Lynn H. Gibson  
General Counsel

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<sup>5</sup> The CDC's conclusions regarding the potential for obtaining competitive proposals from small businesses appear to have been validated by the fact that it received offers from eight small businesses. Commonwealth, *supra*, at 3 n.2.