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# Decision

**Matter of:** EDWOSB Transformer Services, LLC

**File:** B-416683

**Date:** October 15, 2018

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## DIGEST

1. Protest challenging the agency’s decision not to set aside a solicitation for women-owned small business (WOSB) concerns is denied where the agency met the requirement to consider whether to set aside the procurement for WOSB concerns before setting aside the solicitation for small business concerns, and where the decision to set aside a solicitation for WOSB concerns is discretionary.

2. Protest challenging the agency’s decision not to award a sole-source contract to the protester is denied where the agency met the requirement to consider a sole-source award under the WOSB program, and where the decision to make a sole-source award to a WOSB concern is discretionary.

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## DECISION

EDWOSB Transformer Services, LLC,<sup>1</sup> of Jacksonville, Florida, a woman-owned small business (WOSB), protests the terms of invitation for bids (IFB) No. 89503218BWA000007, which was issued by the Department of Energy (DOE) for electrical substation construction. The protester argues that the agency failed to reasonably consider either a set-aside for WOSB concerns or a sole-source award to the protester.

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<sup>1</sup> Although the protester’s name includes the term “EDWOSB,” the protester self-certifies as a WOSB, rather than an economically-disadvantaged woman-owned small business (EDWOSB). Protester’s Comments, Sept. 10, 2018, at 3 n.3.

We deny the protest.

## BACKGROUND

DOE's Western Area Power Administration (WAPA) "markets and delivers reliable, cost-based hydroelectric power, and related services, across 15 central and western states." Contracting Officer's Statement/Memorandum of Law (COS/MOL) at 1. The WAPA's Rocky Mountain Region (RMR) is responsible for "selling federal hydropower, and operates and maintains electrical infrastructure in Colorado, Wyoming, and Nebraska." Id. The challenged solicitation seeks construction at the Ault electrical substation, in Ault, Colorado. Agency Report (AR), Tab A.1, Conformed IFB, at 1.<sup>2</sup>

As discussed in detail below, the agency assigned the acquisition North American Industry Classification System (NAICS)<sup>3</sup> code 237130 (Power and Communication Line and Related Structures Construction), and conducted market research prior to the issuance of the pre-solicitation notice to determine whether the requirement should be set aside for small business concerns. Consistent with the requirements in the FAR and Small Business Administration (SBA) regulations, the agency considered whether the market research supported a sole-source award or set-aside for small business concerns in one of the following small business programs identified in FAR part 19: SBA 8(a) business development (BD), service-disabled veteran-owned (SDVOSB), Historically Underutilized Business Zone (HUBZone), and WOSB. AR, Tab B.1, Small Business Review, at 2. The agency found that there was no basis to set aside the solicitation for 8(a), SDVOSB, HUBZone, or WOSB concerns, but that there was a reasonable expectation of receiving at least two bids from two responsible small business concerns at fair and reasonable prices. Id.

The agency issued the IFB on July 5, 2018, seeking bids to provide the required work at the Ault substation. The solicitation requires the contractor to provide construction services including the removal and replacement of a government-furnished 600 megavolt transformer, seven government-furnished 230 kilovolt breakers, six 13.8 kilovolt government-furnished reactors, as well as other related construction work. IFB at 5-7. The solicitation was set aside for small business concerns. Id. at 1.

On July 25, EDWOSB Transformer contacted DOE and requested that the contract be awarded to the protester on a sole-source basis pursuant to the WOSB program. AR, Tab C.3, Email from Protester to Agency, July 25, 2018, at 4-7. The contracting officer

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<sup>2</sup> Citations to documents refer to the page numbers added by the agency in its report.

<sup>3</sup> NAICS codes are used by the federal government to identify and classify specific categories of business activity that represent the lines of business a firm conducts. See Federal Acquisition Regulation (FAR) § 19.102; see BlueStar Energy Solutions, B-405690, Dec. 12, 2011, 2011 CPD ¶ 275 at 3 n.2.

contacted the DOE SBA procurement center representative (PCR), and advised the PCR of the protester's request. AR, Tab C.1, Email from DOE to SBA PCR, July 25, 2018, at 1. The PCR did not object to the agency's market research or conclusions that the procurement should be set aside for small business concerns, rather than awarded as a sole-source contract to the protester. See COS/MOL at 3 (citing AR, Tab C.1, Email from SBA PCR to DOE, July 26, 2018, at 1; Tab C.5, Email from SBA PCR to Protester, Aug. 6, 2018, at 1).

EDWOSB Transformer filed this protest on August 13, prior to the August 14 deadline for receipt of bids. The agency received and opened bids on August 14. COS/MOL at 4. The protester's bid was the 4th lowest-priced of the five bids received. Id. The agency advises that award of the contract is stayed, pending resolution of this protest.<sup>4</sup>

## DISCUSSION

EDWOSB Transformer primarily argues that DOE's market research was not reasonable, and that the agency therefore unreasonably concluded that it could not set aside the procurement for WOSB concerns. The protester also argues that the agency unreasonably decided not to issue a sole-source award to a WOSB concern. For the reasons discussed below, we find no basis to sustain the protest.<sup>5</sup>

### WOSB Set-Aside Determination

EDWOSB Transformer argues that DOE failed to reasonably consider setting aside the IFB for WOSB concerns. Protest at 7-8; Protester's Comments, Sept. 10, 2018, at 3-4. The protester argues, in essence, that the agency's market research was unreasonable, and that the agency therefore failed to "consider" whether to set aside the requirement for WOSB concerns, as required by FAR § 19.203(c). For the reasons discussed below, we conclude that the record shows that the agency met its obligations to consider WOSB concerns, and therefore find no basis to sustain the protest.

We first address the standard for set-aside determinations. The small business "Rule of Two" describes a long-standing regulatory policy set forth in the FAR to implement provisions in the Small Business Act, 15 U.S.C. § 644(a), requiring that small business concerns receive a "fair proportion of the total purchases and contracts for property and services for the Government." 49 Fed. Reg. 40,135 (Oct. 12, 1984). Agencies must review acquisitions and conduct market research to determine whether they should be

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<sup>4</sup> At the request of the agency, and with the concurrence of the protester, we resolved this protest pursuant to the express option schedule in our Bid Protest Regulations, which provides for the issuance of a decision by our Office within 65 days of the filing of the protest. Bid Protest Regulations, 4 C.F.R. § 21.10(b).

<sup>5</sup> The protester also raises other collateral arguments. Although we do not address every argument, we have reviewed them all and find no basis to sustain the protest.

set aside for small business concerns. FAR § 19.501(c). The Rule of Two requires agencies to set aside for small business participation an acquisition valued over \$150,000 if market research shows there is a reasonable expectation of receiving fair market offers from at least two responsible small business concerns. FAR § 19.502-2(b).

Prior to setting aside a procurement for small business concerns valued above \$150,000, however, the agency “shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVOSB, or WOSB programs.” FAR § 19.203(c); see also 13 C.F.R. § 127.503(f)(2). There is no order of precedence among the 8(a) BD, HUBZone, SDVOSB or WOSB programs. Id. § 19.203(a); see also 13 C.F.R. § 127.503(f)(2). In determining which socioeconomic program to use, the contracting officer is required to consider, at a minimum: (1) the results of market research performed to determine if there are concerns in the relevant programs capable of satisfying the agency’s requirement, and (2) the agency’s progress in fulfilling its small business participation goals.<sup>6</sup> FAR § 19.203(d); see also 13 C.F.R. § 127.503(f)(2)(consider progress in fulfilling the various small business goals, market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history).

With regard to WOSB concerns, the Small Business Act states that contracting officers “may” restrict competition for WOSBs under certain circumstances. 15 U.S.C. § 637(m)(2), (3). The implementing regulations explain that agencies “may restrict competition to WOSB concerns eligible under the WOSB Program (including EDWOSB concerns), for requirements in NAICS codes designated by SBA as substantially underrepresented,” where (1) based on market research, the agency reasonably expects two or more WOSB concerns to submit offers, and (2) contract award “may be made at a fair and reasonable price.” FAR § 19.1505(c); see also 13 C.F.R. § 127.503(b).

EDWOSB Transformer contends that the requirement for an agency to “consider” a set-aside for WOSB concerns requires that the agency conduct the same type of market research that would be required to justify a small business set-aside. See Protest at 7-8; Protester’s Comments, Sept. 10, 2018, at 3-4. The protester argues, in effect, that the requirement to “consider” a set-aside obligates the agency to affirmatively demonstrate through market research that the requirements for a set-aside for WOSB concerns under FAR § 19.1505(c) are not satisfied. In support of its argument, the protester cites decisions by our Office where we conclude that an agency has failed to conduct adequate market research to meet its obligation under the small business rule

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<sup>6</sup> The Small Business Act requires each agency to set goals for participation of small business concerns. 15 U.S.C. § 644(g)(2)(A).

of two or similar mandatory set-aside provisions.<sup>7</sup> Protester's Comments, Sept. 10, 2018, at 3 (citing Information Ventures, Inc., B-294267, Oct. 8, 2004, 2004 CPD ¶ 205).

We find no requirement in the FAR or SBA regulations that the market research required to satisfy the small business rule of two must also be conducted to satisfy the requirement under FAR § 19.203(c) to consider a set-aside for WOSB concerns. Although agencies "shall" consider set-asides for WOSB concerns prior to setting aside a procurement for small business concerns, neither the FAR nor SBA's regulations ultimately require agencies to set aside the procurement--even if agencies find that the requirements for a set-aside are met. See FAR §§ 19.203(c), 19.1505(c); see also 13 C.F.R. §§ 127.503(b), (f). Instead, agencies "may" set procurements aside for WOSB concerns. Id. In contrast, the small business rule of two requires the agency to conduct market research in order to support one of two mandatory outcomes: (1) setting aside a procurement valued over \$150,000, or (2) using full and open competition (or an authorized exception to full and open competition). FAR § 19.502-2(b). Additionally, as relevant to the discussion below, an agency must set aside any procurement valued above \$150,000 where it finds that the small business rule of two has been met, regardless of whether the agency has met or exceeded its small business participation goals for the year. See id. No such requirement exists for WOSB participation. See FAR §§ 19.203(c), 19.1505(c).

Moreover, the FAR does not define any minimum requirements for the consideration of whether to set aside a solicitation for WOSB concerns, aside from stating that the agency "should consider, at a minimum," market research and the agency's small business participation goals. FAR § 19.203(d); see also 13 C.F.R. § 127.503(f)(2). As our Office has explained, agencies need not use any particular methodology when conducting market research, and measures such as prior procurement history, market surveys, and advice from the agency's small business specialist, may all constitute adequate grounds for a contracting officer's decision. Guardian Moving & Storage Co., Inc., B-410171, Nov. 6, 2014, 2014 CPD ¶ 334 at 3. We will therefore review whether the agency has conducted market research, considered its small business participation goals, and exercised its discretionary business judgment as to whether to set aside a solicitation for WOSB concerns.

DOE's market research here relied on two primary sources of information: (1) the SBA's Dynamic Small Business Research (DSBS)<sup>8</sup> database, and (2) a review of prior

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<sup>7</sup> For example, the Veterans Benefits, Health Care, and Information Technology Act of 2006 requires the Department of Veterans Affairs (VA) to set aside procurements for veteran owned small business (VOSB) concerns or SDVOSB concerns if the VA determines that there is a reasonable expectation that offers will be received by at least two such concerns and that award can be made at a fair and reasonable price. See 38 U.S.C. § 8127(d); Aldevra, B-405271, B-405524, Oct. 11, 2011, 2011 CPD ¶ 183.

<sup>8</sup> The SBA explains that the DSBS "is a database that government agencies use to find small business contractors for upcoming contracts." SBA How to Win Contracts, (continued...)

procurements for the WAPA RMR. COS/MOL at 2-3. The agency explains that it conducted a search of the DSBS database to identify all WOSB concerns who self-certified under NAICS code 237130, Power and Communication Line and Related Structures Construction. COS/MOL at 2 (citing AR, Tab B.1, Small Business Review, at 2; Tab B.2, DSBS Search Results, at 6-7). The agency then narrowed those results using the search term “transformer” to “better ensure that the businesses found would be capable of performing the work.” Id. Based on these search criteria, the agency identified 21 WOSB concerns. Id. The agency then reviewed the capabilities narratives provided by the WOSB concerns in DSBS to identify which concerns would be capable of performing the work. Id. The agency found that only one of the 21 WOSB concerns, Infratech International, LLC, provided a relevant capabilities narrative. COS/MOL at 3 n.4. The agency noted that several firms identified in the DSBS search, such as the protester, did not include a capabilities narrative. COS/MOL at 7; AR, Tab B.2, DSBS Search Results, at 7.

The agency then “reviewed similar historical RMR projects to determine if any of the firms found in the DSBS search results had bid on RMR projects in the past.” COS/MOL at 7 (citing AR, Tab B.1, Small Business Review, at 2). The agency states that none of the WOSB concerns identified in the DSBS search had bid on RMR projects previously, and that the agency “therefore could not determine whether any of the identified companies were capable of performing this work, likely to bid on the work, or likely to have reasonable prices, based on historical data.” COS/MOL at 8 (citing AR, Tab B.1, Small Business Review, at 2).

The agency does not dispute that SBA has designated NAICS code 237130 as one where WOSB concerns are “substantially underrepresented.” See COS/MOL at 8; see also 82 Fed. Reg. 47277, Oct. 11, 2017. The agency’s market research concluded, however, that there was not an expectation of receiving two or more bids from WOSB concerns at a fair and reasonable price. AR, Tab B.1, Small Business Review, at 2. The agency also states that, as of July 1, 2018, prior to the issuance of the IFB, the WAPA had already exceeded its WOSB participation goal for the year. COS/MOL at 12 (citing AR, Tab B.3, WAPA Small Business Percentage Participation Goals, at 7). For these reasons, the agency concluded that it would not set aside the procurement for WOSB concerns. AR, Tab B.1, Small Business Review, at 2.

EDWOSB Transformer first argues that DOE’s review of information from the DSBS database was unreasonable because it ignored numerous WOSB concerns that the protester contends are capable of performing the work. As set forth above, DOE states that it identified 21 WOSB concerns through its search of the DSBS, and then reviewed

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<https://www.sba.gov/federal-contracting/contracting-guide/how-win-contracts> (last visited October 10, 2018). The DSBS is populated with information from small business’ profiles entered into the System for Award Management, and the SBA advises small business to “create a comprehensive business profile.” Id.

the capabilities narratives provided by those firms on the DSBS profile. COS/MOL at 2 (citing AR, Tab B.1, Small Business Review, at 2; Tab B.2, DSBS Search Results, at 6-7). The protester argues that in addition to the one WOSB concern identified by the agency as providing a capabilities narrative that appeared to meet the agency's requirements, four other firms identified in the DSBS search also should have been found to meet the agency's requirements: (1) the protester, (2) Substations, Inc., (3) RJS Construction, Inc., and (4) Power Distribution Supply, Inc. Protester's Comments, Sept. 10, 2018, at 1, 5-6. The protester, however, does not explain why the capabilities narratives for these firms should have led the agency to conclude that they could meet the requirements. See id. For example, the protester's DSBS entry did not contain a capabilities narrative, and therefore did not provide a basis for the agency to assess its capabilities.

As discussed above, neither the FAR nor SBA regulations set forth specific criteria for the requirement to "consider" a WOSB set-aside, prior to setting aside a solicitation for small business concerns, aside from considering market research and the agency's small business participation goals. See FAR § 19.203(d). We therefore find that the agency reasonably reviewed the capabilities narratives of the firms identified through the NAICS code and key work search of the DSBS database as part of its assessment of whether a set-aside for WOSB concerns was appropriate.<sup>9</sup> The protester's disagreement with the agency's judgment regarding the narratives, without more, does not provide a basis to conclude that the agency's judgment was unreasonable. See Guardian Moving & Storage Co., Inc., supra, at 4.

Next, the protester argues that the agency unreasonably considered information regarding whether WOSB concerns identified in the DSBS database had previously bid on relevant projects.<sup>10</sup> As discussed above, the FAR requires that agencies have a

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<sup>9</sup> As our Office has explained, an agency's market research for small business set-aside determinations cannot rely on firms' self-certification within NAICS codes, alone, where the relevant code covers a broad range of activities or goods in a manner that precludes a meaningful consideration of a firm's capabilities. See Triad Isotopes, Inc., B-411360, July 16, 2015, 2015 CPD ¶ 220 at 8-9. As relevant here, NAICS code 237130 covers a broad range of construction activities ranging from "Telephone line stringing" to "Nuclear power plant construction." NAICS Manual, [https://www.census.gov/eos/www/naics/2017NAICS/2017\\_NAICS\\_Manual.pdf](https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf) (last visited October 10, 2018).

<sup>10</sup> In its comments on the agency report, EDWOSB Transformer argues that DOE's consideration of prior procurements was limited to the RMR, which consists of Colorado, Wyoming, and Nebraska, and is therefore an improper geographic limitation. Protester's Comments, Sept. 10, 2018, at 8-10. This argument regarding the agency's use of information regarding prior RMR bidding is untimely because it was not raised prior to the time for receipt of bids. See 4 C.F.R. § 21.2(a)(1). In this regard, the protester was aware prior to the date for receipt of bids that the agency had relied upon its finding that "historically WOSB and EDWOSB firms have not provided responses to  
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“reasonable expectation” that at least two WOSB concerns will submit offers or bids and that the contract will be awarded at a fair and reasonable price. FAR § 19.1505(c)

As our Office has explained, agencies may reasonably consider prior procurement information to determine whether the agency was likely to receive proposals or bids. See Guardian Moving & Storage Co., Inc., *supra*. Our Office has also explained that agencies may reasonably use broad search terms to identify potential small business offerors or bidders, but then apply more specific, relevant categories to ensure that the searches are applicable to the work. See ISC Int’l, Ltd., B-409471.2, June 20, 2014, 2014 CPD ¶ 185 at 6. On this record, we find no basis to conclude that the agency’s review of the bidding history for the WAPA RMR was an unreasonable measure for purposes of assessing whether there was a reasonable expectation of receiving offers from WOSB concerns and making an award at a fair and reasonable price.<sup>11</sup>

In sum, we conclude that DOE’s actions here meet the requirement to “consider” setting aside the procurement for WOSB concerns under FAR § 19.203(c). We therefore find no basis to sustain the protest.

#### WOSB Sole-Source Award

Next, EDWOSB Transformer argues that DOE failed to properly exercise its business judgment and consider awarding the contract to the protester on a sole-source basis.<sup>12</sup>

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Western’s Rocky Mountain Region construction projects.” AR, Tab C.5, Email from Agency to Protester, Aug. 3, 2018, at 5.

<sup>11</sup> In addition to these arguments, EDWOSB Transformer notes that the agency’s market research cited Substations Inc. as a small business capable of performing the work and that Substations was likely to submit a bid. Protester’s Comments, Sept. 10, 2018, at 5. The protester contends that this firm had been previously awarded contracts by the agency as a WOSB, and that it therefore should have been considered a WOSB for the agency’s market research. This argument is untimely because the agency made an early document production to the protester on Aug. 21, 2018, which disclosed this information. See AR, Tab B.1, Small Business Review, at 2. The protester first raised this argument about the agency’s reliance on Substations to support the WOSB set-aside, in its comments on the agency report, which were filed 21 days after receiving the relevant documents from the agency. Protester’s Comments, Sept. 10, 2018, at 5. See 4 C.F.R. § 21.2(a)(2) (requiring protest issues be filed within 10 days after the basis is known or should have been known); Lanmark Tech., Inc., B-410214.3, Mar. 20, 2015, 2015 CPD ¶ 139 at 5 n.2 (dismissing piecemeal presentation of protest arguments).

<sup>12</sup> As discussed above, EDWOSB Transformer also argues that at least one other WOSB concern, Substations, Inc., was capable of performing the work. For this reason, the protester contends that the agency failed to reasonably consider whether to issue a sole-source contract. Protester’s Comments, Sept. 10, 2018, at 13. Even if Substations  
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Protest at 3-6; Protester's Comments, Sept. 10, 2018, at 3-4. Here again, the protester argues that the agency's market research was unreasonable, and that the agency therefore failed to "consider" whether to award the contract on a sole-source basis to a WOSB. For the reasons discussed below, we conclude that the record shows that the agency met its obligations under the FAR and SBA regulations, and therefore find no basis to sustain the protest.

As discussed above, agencies "may" restrict competition for WOSBs under certain circumstances. 15 U.S.C. § 637(m)(2), (3). The implementing regulations explain that agencies must consider setting aside a solicitation for WOSB concerns prior to setting the solicitation aside for small business concerns. FAR § 19.203(c); 13 C.F.R. § 127.503(f)(2). In addition, agencies "may" issue a sole-source contract to WOSBs. 15 U.S.C. § 637(m)(8). Accordingly, agencies must also "consider a contract award to a WOSB concern . . . on a sole source basis," before considering a small business set-aside where: (1) the acquisition is assigned a NAICS code in which SBA has determined that WOSB concerns are substantially underrepresented in Federal procurement, (2) the contracting officer does not have a reasonable expectation that offers would be received from two or more WOSB concerns (including EDWOSB concerns), (3) the award is anticipated not to exceed \$6.5 million for a construction NAICS code or \$4 million for any other NAICS code, (4) the WOSB concern "has been determined to be a responsible contractor with respect to performance," and (5) the contract award "can be made at a fair and reasonable price." FAR § 19.1506(b), (c); see also 13 C.F.R. § 127.503(d). Even where the agency concludes that all of the conditions required for a sole-source award are satisfied, however, there is no requirement for the agency to award a sole-source contract. 15 U.S.C. § 637(m)(8); see also FAR § 19.1506(b) ("[a] contracting officer shall consider a contract award to a WOSB concern . . .").

As discussed above, DOE concluded that there was no information demonstrating that EDWOSB Transformer was capable of performing the work. COS/MOL at 7; AR, Tab B.2, DSBS Search Results, at 7. Although the protester disagrees with the agency's assessment, we find that the record reasonably supports the agency's judgment and that the protester's disagreement does not provide a basis to conclude

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were considered a firm eligible for a WOSB sole-source award, and even if the protester were correct that the agency had erred in not specifically considering Substations for the award of a sole-source contract, EDWOSB Transformer is not an interested party to raise this issue on behalf of Substations. See 4 C.F.R. § 21.0(a)(1) (only an "interested party" may file a protest); Piedmont Propulsion Sys., LLC, B-410914.2, Mar. 17, 2015, 2015 CPD ¶ 119 at 14-15 n.12 (protesters are not interested parties to argue that a sole-source contract should have been awarded to a different firm).

otherwise. For this reason, the protester cannot demonstrate that the agency failed to consider awarding it a sole-source contract. See FAR § 19.1506(b), (c).

The protest is denied.

Thomas H. Armstrong  
General Counsel