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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

DOCUMENT FOR PUBLIC RELEASE

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Decision

Matter of: Mountain West Helicopters, LLC; Trans Aero, Ltd.

File: B-408150; B-408150.2

Date: July 1, 2013

Barry N. Johnson, Esq., and Joshua L. Lee, Esq., Bennett Tueller Johnson & Deere, PC, for the protesters.

Antonio Robinson, Esq., Department of Agriculture, Forest Service, for the agency.
Susan K. McAuliffe, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protests arguing that agency unreasonably set aside solicitation for small businesses because small businesses are incapable of performing the work are denied where the record shows that the contracting officer reasonably concluded that at least two small business concerns are capable of performing the solicitation requirements.

DECISION

Mountain West Helicopters, LLC, of Alpine, Utah, and Trans Aero, Ltd., of Cheyenne, Wyoming, protest the decision of the Department of Agriculture, Forest Service, to issue request for proposals (RFP) No. AG-82X9-S-13-0004, for aerial mulching services, as a small business set-aside.

We deny the protests.

BACKGROUND

On March 1, the agency issued the solicitation as a small business set-aside under North American Industrial Classification System (NAICS) Code 115310, Support Activities for Forestry, with a small business size standard of \$7 million. The solicitation contemplates the award of a fixed-price indefinite-delivery/indefinite-quantity (ID/IQ) contract to provide burned area emergency response work in

Region 2 of the Forest Service.¹ RFP at 13, 23, and 60. The awardee will be required to implement emergency and non-emergency land treatments, specifically aerial mulching services. The awarded ID/IQ contract will have a base year and four option years, and the agency estimates the value of the contract to be [deleted]. Contracting Officer's Statement of Facts at 1.

On December 3, 2012, prior to issuing the solicitation, the agency conducted market research to assess the interest and capability of small business concerns by posting a sources sought notice on the FedBizOpps website. The sources sought notice provided a detailed explanation of the agency's requirements, noting that the task orders for treatment areas can range from "10's to 1000's of acres" in size, and instructed interested small businesses to provide information regarding their capability to perform the solicitation's aerial mulching requirements. Agency Report (AR), Tab 4, Sources Sought Notice, at 2. In this regard, they were to include information about their largest helicopter (aerial) mulching contract and the number of acres treated. Id.

Multiple firms responded to the notice and most of them were found to be within the applicable \$7 million size standard. AR at 11. Several of the small businesses reported performing aerial mulching work, with at least two firms reporting recent projects for work in excess of 3,000 acres--the number of acres used in the RFP for a sample project and which served as a measure of contractor capability. RFP at 69. Based on the responses to the sources sought notice, as well as his knowledge of prior procurement history involving small business, the contracting officer decided to set the procurement aside for small businesses.²

After issuing the RFP as a small business set-aside, these protests followed, alleging that the agency could not have reasonably expected sufficient participation by capable small businesses to support the set-aside decision.

DISCUSSION

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

¹ Region 2 includes forest lands within the states of South Dakota, Nebraska, Colorado, Wyoming and Kansas.

² In considering prior procurement history, the contracting officer noted that [deleted] of the responses were from firms that had previously performed aerial mulching for Region 2, [deleted] firms had performed multiple aerial mulching contracts for the Forest Service over the last 3 years, ranging in size from 2,570 to 4,158 acres, and several of the firms had performed significant portions of mulching contracts as subcontractors. AR, Tab 3, at 8.

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 ¶ 137 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.

Here, the protesters argue that the market research conducted by the contracting officer was inadequate to support his conclusion that offers from at least two capable small business concerns could reasonably be expected.³ We have reviewed the protesters' allegations and find that they do not provide a basis to question the reasonableness of the agency's set-aside decision.

The record shows, as noted above, that at least two small businesses responded to the sources sought notice and had demonstrated experience on projects in excess of the sample 3,000-acre project established in the RFP. We note that the

³ The protesters provided information about a separate procurement for similar services in another geographical region of the Forest Service where a different contracting officer decided not to set aside the procurement. We do not consider the information persuasive here, as each procurement stands on its own. See Walden Security, B-407022, B-407022.2, October 10, 2012, 2012 CPD ¶ 291 at 4; Advanced Constr. Techniques, Inc., B-404847.6, Jan. 25, 2012, 2012 CPD ¶ 54 at 9.

protesters do not challenge the capability of one of these small businesses, [deleted]. Rather, the protesters challenge the second, [deleted], noting that it has allegedly claimed status as a woman-owned small business but reports having a president who is not a woman. In this regard, the protesters argue that if the firm's statement of its woman-owned status is questionable, the agency should have questioned the veracity of that firm's small business certification and its overall responsibility.

As an initial matter, the solicitation at issue is not a woman-owned set-aside procurement; rather, it has been set aside for small business concerns with annual receipts of less than \$7 million. The record shows that the contracting officer confirmed that the firm in question, [deleted], met the solicitation's \$7-million size requirement through the government's System for Award Management (at www.sam.gov). AR, Tab 6, at 7. Additionally, he found the firm capable of performing the contract where the firm reported having adequate equipment and personnel to perform the work, and where the firm recently completed a similar aerial mulching project.⁴ To the extent the protesters raise concerns regarding [deleted] integrity, as explained above, agencies need not make actual determinations of responsibility or decisions tantamount to determinations of responsibility in assessing expected small business competition; the agency here only needed to make an informed business judgment that there is a reasonable expectation of receiving acceptably priced offers from at least two small business concerns that are capable of performing the contract.⁵ See Ceradyne, Inc., supra. Based on the record in this case, we have no reason to question the reasonableness of the contracting officer's set-aside decision.

The protest is denied.

Susan A. Poling
General Counsel

⁴ The protesters have not challenged [deleted] capability to perform the requirements of the RFP.

⁵ The protesters also have not challenged the agency's expectation of receiving reasonably priced offers.