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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Si-Nor, Inc.

File: B-286910

Date: January 5, 2001

Sam Z. Gdanski, Esq., for the protester.

Col. Michael R. Neds, and Raymond M. Saunders, Esq., Department of the Army, for the agency.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester, a small disadvantaged business (SDB), was not prejudiced by agency's failure to apply 10-percent SDB evaluation preference provided for in solicitation, where (1) awardee was SDB, against which the preference would not apply in any case, and (2) there is no basis to conclude that protester inflated its bid price in reliance on application of preference.

DECISION

Si-Nor, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. DAPC50-00-B-0002, issued by the Department of the Army. Si-Nor maintains that the Army improperly failed to apply a 10-percent price evaluation adjustment for small disadvantaged businesses (SDB), contrary to the terms of the IFB.

We deny the protest.

The IFB included the clause at Federal Acquisition Regulation (FAR) § 52.219-23, "Notice of Price Evaluation Adjustment for [SDB] Concerns." Under this clause, the bids of all non-SDB bidders were to be evaluated at a price 10 percent higher than the actual bid. After bids were opened on October 11, 2000, the agency realized that the FAR clause had been included in the IFB in error, because the preference no longer applied to Department of Defense solicitations. FAR Deviation, subpart 19.11. The Army thus notified all bidders that their bids would be evaluated without application of the 10-percent adjustment.

Si-Nor, an SDB, asserts that it is improper for the agency to make award under the IFB without applying the 10-percent SDB evaluation preference, since it prepared its bid in reliance on the preference being applied; Si-Nor claims it would have priced its proposal more competitively had it known that the preference would not be applied. Si-Nor concludes that either the preference should be applied in accordance with the terms of the IFB, or the IFB should be canceled and the requirement resolicited on an unrestricted basis, without the SDB preference.

The Army observes that two SDBs submitted bids lower than Si-Nor's, and states that it intends to award the contract to the SDB that submitted the lowest bid. In the Army's view, since the preference was not applied in comparing Si-Nor's bid and the low SDB bid, Si-Nor was not prejudiced by the failure to apply the preference.

Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, that but for the agency's actions it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996).

We agree with the agency that Si-Nor was not prejudiced by the agency's failure to apply the preference. First, because the award is to be made to an SDB with a lower bid regardless of the preference, Si-Nor would not have had a substantial chance of receiving the award based on its original bid even if the agency had applied the preference. Further, while Si-Nor now generally claims that it would have better "sharpen[ed] our pencil" had it known the preference would not be applied--and concludes that it therefore should have the opportunity to rebid--we find no support for this position. Si-Nor knew, or should have known, that it was competing, not only against large businesses and non-SDB small businesses--to which the adjustment would apply--but also against other SDBs--to which the adjustment would not apply. This being the case, it is not apparent--and Si-Nor has not explained--how Si-Nor reasonably could have relied upon the preference in deciding to inflate its bid, without knowingly taking the risk that it would be underbid by other SDBs. Having taken this risk, Si-Nor cannot now legitimately assert that the preference, rather than its own judgment, was the cause of its failure to submit the low bid. See DataVault Corp., B-223937, B-223937.2, Nov. 20, 1986, 86-2 CPD ¶ 594 at 3 (bidder proposing an inflated price in what is on its face a competitive procurement, based on an assumption concerning the impact of a solicitation provision on the nature of the competition that it faces, does so at its own risk when the assumption proves to be wrong).

Accordingly, since the preference had nothing to do with Si-Nor's bid relative to the bids of other SDBs, and since award is to be made to an SDB, Si-Nor was not prejudiced by the agency's failure to apply the preference.¹

The protest is denied.

Anthony H. Gamboa
Acting General Counsel

¹ Si-Nor contends that, given the agency's determination that an SDB preference does not apply and the presence of at least two small business bidders, the agency is required to determine whether a small business set-aside is warranted for this procurement. This protest ground is untimely because it was first raised more than 10 days after the protester knew or should have known the basis of protest. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (2000). In this regard, Si-Nor learned of the existence of other small business competitors on November 21, but did not raise this argument with the agency until December 14, or in our Office until December 18.