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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-190778

DATE: April 17, 1978

MATTER OF: Blakeslee Prestress, Inc., Formigli Corporation, and Dow-Mac Concrete, Ltd.

DIGEST:

1. Protest by potential subcontractor is properly considered where Department of Transportation (DOT) was so actively involved in selection of subcontractor as to cause or control rejection, or, alternatively, where contractor, National Railroad Passenger Corporation, was acting "for" DOT in awarding subcontract for Northeast Corridor Improvement Project work package.
2. Protest of rejection of step one technical proposal in two-step formally advertised procurement is timely where filed within 10 working days after protester learned of basis for rejection, despite protester's earlier knowledge of deficiencies in proposal.
3. Protest alleging improper rejection of protester's technical proposal in step one of two-step formally advertised procurement is denied where protester fails to show clear evidence of fraud, abuse of authority or arbitrary action by agency.

Blakeslee Prestress, Inc., Formigli Corporation, and Dow-Mac Concrete, Ltd., a joint venture (collectively Blakeslee), protest the award of contract NIST 7340-1826 for 1.1 million concrete railroad ties by the National Railroad Passenger Corporation (Amtrak), Northeast Corridor Improvement Project (NECIP), to its competitor, Santa Fe-Pomeroy, Inc./San-Vel Concrete Corp., a joint venture (Santa Fe/San-Vel). The contract was awarded pursuant to contract DOT-FR-T3003 between Amtrak and the Federal

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Railroad Administration, Department of Transportation (DOT), under the authority of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801, et seq. (1970) (RRRR Act).

The basis of the protest is Blakeslee's contention that it was improperly excluded from participation in step two of the two-step formal advertising procedure used here because Amtrak wrongly determined that Blakeslee had not provided an adequate Minority Business plan as required by the request for technical proposals (RFTP) issued on August 9, 1977.

Jurisdiction

It appears that DOT played a significant role in the award of the subcontract. The NECIP Project Director is a DOT employee. The agreement between DOT and Amtrak provides for notification to DOT of any proposed subcontract over \$100,000, for DOT advance approval of the method by which Amtrak will select subcontractors and award subcontracts, and for specific written DOT consent prior to awarding any subcontract exceeding \$1 million (the contract price here is \$37,807,000, with an option involving an additional \$10,450,800).

Further, Amtrak is required to consult with the Architect-Engineer for the NECIP (Deleuw, Cather/Parsons (DCP)), which itself is a DOT contractor. A committee consisting of representatives of Amtrak, DOT and DCP was responsible for reviewing and approving or disapproving the technical proposals.

Under the circumstances, we believe that this is a case in which:

* * * it has been shown that the Federal Government has so directly or actively participated in the selection of the subcontractor that the net effect of the Government participation

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was to cause or control the rejection or selection of a potential subcontractor, * * * * Optimum Systems, Incorporated, 54 Comp. Gen. 767, 773 (1975), 75-1 CPD 166.

See, also, 51 id. 678 (1972).

Alternatively, this case would appear to be one in which, under the terms of the Amtrak-DOT contract, Amtrak is acting "for" DOT in managing NECIP construction, and specifically the present Work Package. See Optimum Systems, Incorporated, supra, at 774; 4 C.F.R. § 20.1(a) (1977). Under either rationale, the present protest is cognizable under our Bid Protest Procedures.

Timeliness

DOT suggests that this protest is untimely in light of the contracting officer's letter to the protester of September 26, 1977, and a subsequent inquiry from Amtrak's Manager of Minority Business Development, dated October 10, 1977, both noting deficiencies in the protester's minority business submission. However, the gist of the protest is the determination that the protester's technical proposal was inadequate. Blakeslee did not learn of this determination until it received a mailgram from Amtrak on November 16, 1977, and it did not discover the basis therefor until a meeting in Philadelphia on November 21, 1977. Our Bid Protest Procedures provide that a protest is timely if filed within 10 working days after knowledge of the basis therefor is or should have been obtained. 4 C.F.R. § 20.2(b)(2) (1977). Since the protest was received on November 30, 1977, it is timely.

Adequacy of the Technical Proposal

The principal argument advanced by Blakeslee is that it was led by statements at the preproposal conference to believe that the on-site criterion for acceptability of a minority plan was assurance of

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15-percent minority participation in contract performance. Since Blakeslee averred in its proposal and supplements thereto that it intended to meet or exceed this figure, it believes that its proposal should have been acceptable to Amtrak.

The RFTP required that technical proposals include:

"Minority Business and Minority Employment Plan to include joint venture agreements, subcontracting agreements, and licensing agreements which have been executed with minority firms."

The RFTP also provided that:

"It is the policy of the Government that minority business firms and minority persons have the maximum practical opportunity to participate in the performance of Government contracts. Amtrak fully supports such a policy. Therefore, it is the objective of Amtrak that a procurement program be developed and implemented at the prime contractor and subcontractor levels to ensure substantial participation of minority firms and minority persons in this effort.

* * * * *

"Based on the foregoing, your technical proposal must also include a minority business and minority employment program plan, describing the manner in which your firm proposes to implement the policy stated above. Amtrak will carefully review the plan and consider it in the assessment of

prospective contractors during the first stage of this two-step procurement."

Finally, the RFTP stated that the technical proposal must be acceptable with respect to each of several assessment criteria, including:

"Adequacy of minority business and minority employment program plan to provide the maximum practicable opportunity of minority business firms and minority persons to participate in the fulfillment of the requirements of these specifications."

Notwithstanding the protester's allegations, we can find no evidence that any representative of Amtrak or DCT specifically or by implication waived or amended the above-quoted requirements of the RFTP. Indeed, the Amtrak Manager of Minority Business Development reiterated at the preproposal conference that proposers would have to submit actual contracts, letters of intent or other documentary evidence of arrangements with minority businesses in support of their practical plans to meet minority participation goals.

The protester's technical proposal included a 1-1/4-page summary statement of its intention to comply with the Government's minority business policy by entering an arrangement with an unnamed "minority consultant," who would introduce minority firms as potential subcontractors. The agency did not, as it had the right to do under the terms of the RFTP, evaluate the proposal as submitted. Rather, it queried the protester on at least two occasions to give Blakeslee an opportunity to supplement its proposal. Other than naming several minority business contacts that it had initiated, Blakeslee failed to supply evidence of specific contracts, understandings or arrangements undertaken to assure

minority business participation. For this reason, Amtrak determined Blakeslee's proposal to be inadequate, and it disqualified the protester from participation in step two of the procurement.

On January 24, 1977, DOT issued regulations codified at 49 C.F.R. part 265 (1977), to implement the requirements of section 905 of the RRRR Act relating to nondiscrimination in projects funded under the act. Pursuant to 49 C.F.R. § 265.3, these regulations are specifically applicable to "contracts awarded to implement the Northeast Corridor Project." The term "contractor" is defined in 49 C.F.R. § 265.5(f) to include "a subcontractor who will be paid in whole or in part directly or indirectly from financial assistance provided under the * * * [RRRR Act]."

Blakeslee, as a prospective subcontractor within the meaning of the quoted regulation, would be subject to the requirements of 49 C.F.R. part 265. The regulations require that:

"Recipients of financial assistance under the Rail Acts and their contractors, as specified herein, shall develop and maintain an affirmative action program to insure * * * that minorities and minority businesses receive a fair proportion of employment and contractual opportunities which will result from such programs, projects and activities." 49 C.F.R. § 265.9 (1977).

The contents of a contractor's affirmative action program are described in 49 C.F.R. § 265.13(c)(3), which requires in pertinent part that:

"The affirmative action program will set forth in detail * * * contractor's plan to insure that minority businesses are afforded a fair and representative opportunity to do business with * * * contractor (both in terms of number of

contracts and dollar amount involved) during the program period. Such plan shall designate specific actions to be taken to:

"(i) Designate a liaison officer who will administer the minority business program;

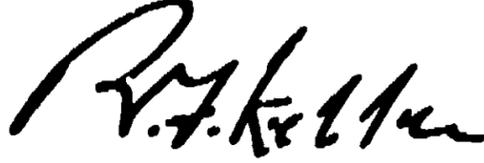
"(ii) Provide for adequate and timely consideration of the availability and potential of minority businesses in all procurement decisions;

"(iii) Assure that minority businesses will have an equitable opportunity to compete for contracts, by arranging solicitation time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation of minority businesses and by assisting minority businesses who are potential contractors in preparing bid materials and in obtaining and maintaining suitable bonding coverage in those instances where bonds are required
* * *."

Without further listing the extensive requirements for an affirmative action program, we must conclude that Blakeslee's submission, even as amended after Amtrak's inquiries, does not meet the legal or contractual standards for such a plan. Even if we had some reasonable doubt, though, we would not generally question an agency's evaluation of a technical proposal, absent clear evidence of fraud, abuse of authority or arbitrary action. See 48 Comp. Gen. 49, 56-57 (1968). The protester presents no such evidence, and we believe that the provisions of the RFTP plus the published regulations and Amtrak's subsequent correspondence gave Blakeslee a more than fair opportunity to comply with the solicitation requirements.

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Accordingly, the protest is denied.

A handwritten signature in black ink, appearing to read "R. F. Keller". The signature is written in a cursive style with a large initial "R".

Deputy Comptroller General
of the United States

