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DECISION



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

FILE: B-194388

DATE: August 10, 1979

MATTER OF: Opalack & Company

[Protest of Proposal Rejection Based on Suspension by Another Agency]
DIGEST:

When agency decides to suspend contractor, it must independently follow applicable regulations since ongoing suspension by one agency does not suspend contractor at all other agencies, but only provides basis for other agencies to impose concurrent suspension.

Opalack & Company (Opalack) protests the award of a contract to Leonard G. Birnbaum and Company (Birnbaum) under request for proposal (RFP) No. ADA-0A-79-0001 issued by the National Institute of Mental Health, Department of Health, Education, and Welfare (HEW). Although its proposal was found to be within the competitive range, Opalack was eliminated from consideration when the contracting agency learned that the Department of Labor (DOL) had suspended Opalack from DOL contracting as a preliminary step in a debarment proceeding. Opalack argues, however, that if HEW also wants to disqualify Opalack from receiving any contracts it must in turn follow the proper procedures for the suspension of contractors and may not, as done here, summarily suspend Opalack based on the information received from DOL. For the reasons indicated below, we sustain Opalack's protest.

The RFP was issued on October 6, 1978, requesting proposals to provide financial advisory services for the Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA). Specifically, these services are: (1) cost and price analyses of grant applications; (2) preaward and postaward surveys; (3) indirect cost verification; and (4) postaward reviews, reports and studies. Seven timely proposals were received and evaluated. As a result of this evaluation, the contracting officer established a competitive range consisting of four firms

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that included Opalack. However, prior to the opening of negotiations, the contracting officer learned that DOL had suspended Opalack as a preliminary step in a debarment proceeding. Acting upon the advice of his Office of General Counsel, the contracting officer decided that due to the DOL suspension he would not conduct negotiations with Opalack and would eliminate that firm from further consideration. Subsequently, negotiations were conducted with the three remaining offerors and on March 15, 1979, a contract was awarded to Birnbaum for the period of March 15 to September 30, 1979.

Upon learning of this award, Opalack filed a protest with our Office on March 16, 1979, arguing that once HEW decided to suspend Opalack the agency had to independently follow the procedures set forth in 41 C.F.R. Part 1-1.6 (1978) for the suspension of contractors and could not accept DOL's suspension of Opalack as also suspending Opalack from further contracts with HEW. In addition, Opalack maintains that this action violates the Small Business Act, as amended by Pub. L. No. 95-89, since as a small business Opalack was entitled to have this matter referred to the Small Business Administration (SBA) for a determination of responsibility.

HEW concedes that Opalack is qualified to perform the contract and that its proposal was lowest in estimated cost of those received. As to Opalack's contention that the contracting officer should have referred the matter to SBA for possible issuance of a certificate of competency (COC), HEW maintains that the validity of this argument is dependent on the merit of Opalack's allegation that it was improperly suspended. That is, if the suspension was proper then it is not a matter of responsibility and need not be referred to SBA for consideration under the COC program. In regard to the validity of the suspension, HEW agrees with Opalack that 41 C.F.R. §§ 1-1.605-1(b) and 1-1.605-3 indicate that the decision to suspend is an action which must be taken independently by individual agencies. However, HEW also maintains that a different conclusion may reasonably be reached by reading 41 C.F.R. § 1-1.605-5(a) which states:

"Bids and proposals shall not be solicited from suspended contractors. If received, bids and proposals shall not be considered and awards for contracts shall not be made to suspended contractors unless it is determined by the agency to be in the best interest of the Government."

In HEW's opinion, since an agency imposing a suspension would have the authority to remove that suspension, the phrase "unless it is determined by the agency to be in the interest of the Government" can reasonably be construed as applying to agencies other than the one which suspended the contractor. (Emphasis added.) This means, according to HEW, that a suspension by one agency suspends the contractor from contracting with any Government agency. Therefore, in light of what it believes to be ambiguities in the regulations, HEW emphasizes that while the decision to eliminate Opalack from further consideration may have been erroneous, it was not arbitrary, capricious or in bad faith. Consequently, while conceding that Opalack's protest has merit, HEW believes that due to these alleged ambiguities in the regulations as well as the adverse impact of termination, the short duration of the current contract, and the fact that a new solicitation is currently in process for which Opalack is eligible for award, the Birnbaum contract should not be terminated for the convenience of the Government.

We must determine, therefore, what relief is appropriate under the circumstances.

The record indicates that upon being notified by DOL of its immediate suspension and proposed debarment, Opalack requested a hearing on the matter. This hearing was held before a DOL Administrative Law Judge who on March 16, 1979, issued an order which immediately terminated Opalack's suspension. The judge found that DOL had failed to comply with its own rules and regulations with respect to the suspension of contractors and that the evidence of Opalack's alleged misconduct was

not of such a serious nature as to warrant suspension within the meaning of 41 C.F.R. § 1-1.605-1(a)(2). The debarment proceeding, however, was deferred until the judge could receive and consider both the hearing transcript and the briefs of counsel. We have been advised that this proceeding is still pending.

It is clear, therefore, that HEW's decision to eliminate Opalack from consideration for award of this contract was based upon an improper DOL suspension. While we do not question HEW's right to accept the validity of the DOL suspension when first notified of its existence, we also believe that the regulations for the suspension of contractors were established to help avoid problems such as the one that developed here.

A "suspension" is a disqualification from Government contracting for a temporary period because the contractor is suspected upon adequate evidence of engaging in criminal, fraudulent or seriously improper conduct. 41 C.F.R. § 1-1.601-1(b) (1978). The regulations recognize that suspension is a drastic action and, as such, should not be based upon an unsupported accusation. 41 C.F.R. § 1-1.605(b) (1978). However, a suspension invoked by one agency may be the basis for the imposition of a concurrent suspension by another. 41 C.F.R. § 1-1.605-1(b) (1978). But whatever the basis for the suspension, the Government is required to insure fundamental fairness to the firm or individual involved since the loss of Government business may cause a suspended contractor severe economic problems. Horne Brothers, Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972). Such fairness requires that the contractor be given specific notice of at least some of the charges against it and be given, in the usual case, an opportunity to rebut those charges. Horne Brothers, Inc. v. Laird, *supra*, at 1271; see also 41 C.F.R. § § 1-1.605-3 and 1-1.605-4 (1978).

HEW's explanation for this failure is that it believes that 41 C.F.R. § 1-1.605-5(a) creates an ambiguity over whether the suspension of a contractor by one agency suspends that contractor at all other Government agencies.

We believe, however, the only reasonable interpretation of section 1-1.605-5(a) is that after an agency has followed the proper procedures for suspending a contractor, the agency shall not consider any bid or proposal submitted by that contractor or award it any contract unless the agency first determines that this action would be in the best interest of the Government. Nothing in this section relieves an agency of its duty to provide a suspended contractor with the procedural rights mentioned above. We believe, therefore, that read as a whole, the regulations pertaining to the suspension of contractors clearly indicate that each agency must determine on its own whether or not a particular contractor should be suspended. And although this determination may be based on a suspension imposed by another agency, each agency must follow the regulations in making that determination and in providing the contractor with the necessary procedural rights.

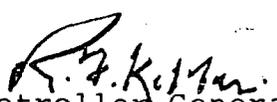
In Opalack's case, HEW had intended to suspend that firm at the time it decided to eliminate it from further consideration for award. Opalack was never notified of this action or given an opportunity to rebut the charges against it. As shown above, this was contrary to the regulations. Opalack now requests that the contract with Birnbaum be terminated for the convenience of the Government and the balance of that contract be awarded to it.

In our decision of Opalack & Company, B-193634, May 8, 1979, 79-1 CPD 319, we held that since DOL had found Opalack to be nonresponsible prior to any suspension or debarment, it was required under the Small Business Act (15 U.S.C. § 637(b)(7) (1976 & Supp. I 1977)) to refer the matter to SBA for consideration under the COC program because, under that act, the SBA is empowered to certify conclusively

to Government procurement officials with respect to all elements of responsibility. Here, since the regulations were not followed, Opalack was never actually suspended, but was in effect found nonresponsible. HEW could not have rejected Opalack's proposal, if the best proposal after negotiations, without referring the matter to SBA for possible issuance of a COC. We note that the SBA recently issued Opalack a COC for the solicitation which was the subject of Opalack & Company, supra.

Since it would be necessary to reopen negotiations and subsequently reevaluate proposals before terminating the existing contract and since there is a brief time remaining before the completion of the contract on September 30, no recommendation is being made for corrective action at this time. However, by separate letter of today, we are advising the Secretary of HEW of the deficiency in the conduct of this procurement and recommending that steps be taken to avoid any similar occurrence in the future.

Protest sustained.


Acting Comptroller General
of the United States