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**DECISION**



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

**FILE:** B-196099

**DATE:** March 18, 1980

**MATTER OF:** Presentations South Inc.

DLG04135  
DLG04136  
DLG04137  
AGC00033

**DIGEST:**

1. Protester contends that awardee had unfair competitive advantage because awardee prepared interpretive master plan which was incorporated in instant follow-on procurement for design and fabrication of certain interpretive components. GAO has no basis to conclude that awardee had competitive advantage in view of complete information contained in RFP and other materials made available by agency. Further, GAO would have no basis to conclude that awardee's competitive advantage, if any, was obtained from preference or unfair action by Government.
  
2. Protester contends that awardee will have to subcontract over 85 percent of work. Where subcontracting was not prohibited or restricted by solicitation or applicable regulations, proposed plan to use subcontractors would not provide basis to cause awardee's plan to be rejected.

Presentations South Inc. (PSI) protests the award of a contract to Barry Howard & Associates Inc. (BH&A) under request for proposals (RFP) No. YA-512-RFP9-126, issued by the Department of the Interior, Bureau of Land Management, for design and fabrication of interpretive components for the Red Rock Canyon Recreation Lands Visitor Center. The interpretive components to be designed, fabricated and installed under the contract are items such as displays, exhibits, audio-visual scripts, productions and equipment, graphics, signs, and pamphlets. The contract was processed as a competitively negotiated supply procurement.

[Protest Against Contract Award] 111836  
009051

As background, under a prior contract for design of the Red Rock Canyon Recreation Lands Visitor Center a deliverable item was an interpretive master plan, which was prepared by BH&A as a subcontractor. That master plan was included as an attachment to the instant solicitation. PSI essentially raises two bases of protest: (1) the awardee had, by virtue of past performance on a related contract, received an unfair competitive advantage; and (2) the awardee's proposed extensive use of subcontractor effort should have disqualified the firm from receiving the award.

Regarding the first basis of protest, PSI specifically contends that BH&A prepared the master plan for a fee and, in doing so, it had the opportunity at Interior's expense to do much of the research and planning that any other firm would have to do starting now from scratch. BH&A's lower offer on the design and development portion of the project, in PSI's view, would be the cost to start up on the instant project. PSI also contends that BH&A was in a position as consulting engineers working with Interior in Denver to obtain information and other considerations not available to other offerors.

In response, Interior reports that while the master plan was an attachment to the solicitation, the specifications for the design of the interpretive components contained in the RFP were prepared by the Government and the specifications were considered to be the controlling element in the solicitation.

Interior further reports that while the protester's proposed firm fixed price for design was higher than BH&A's, the "Evaluation and Award Criteria, Cost Proposal Evaluation" of the RFP stated that although cost proposals will be evaluated to determine reasonableness, price was not a weighted evaluation criterion. Interior also notes that PSI's proposed price was not unreasonable. In sum, Interior reports that price alone was not the compelling factor in the determination to award to BH&A.

Regarding the availability of information, Interior reports that all information available to BH&A was also available to any other offeror upon request. The interpretive master plan was included as an attachment

to the RFP; the floor plan and the finish schedules were included as an attachment; the RFP also identified pertinent background data, too voluminous to be included in the RFP, which was available upon request to the contracting officer; finally, the RFP stated that other Government information, photographs, artifacts, etc., were available.

In addition, Interior cites two decisions of our Office for the point that no impropriety exists insofar as one offeror having a competitive advantage as long as the Government did not create the advantage by unfair action.

In reply, PSI raises an argument for the first time--that since the procurement involves the construction of walkways and viewing platforms and many other items, which are strictly brick and mortar in nature, Interior should have conducted this procurement as a construction project not a supply project. At this point, we note that the solicitation clearly stated that the procurement was being conducted under the regulations and procedures applicable to a supply project not a construction project; if anyone objected, the proper time to raise the objection under our Bid Protest Procedures was prior to receipt of initial proposals. Since PSI did not protest until long after that time, the matter is untimely and will not be considered on the merits. See 4 C.F.R. § 20.2(b)(1) (1979).

Next, PSI argues that Interior was obligated to notify all potential offerors of the fact that BH&A was planning to submit an offer. The record does not show Interior had advance knowledge that BH&A would submit an offer. Further, once proposals are received, Federal Procurement Regulations § 1-3.805-1(b) (1964 ed. Circ. 1) prohibits disclosure of the number or identity of the offerors participating. Thus, PSI's perception of Interior's obligation to disclose BH&A's participation is incorrect.

Finally, PSI states that no offeror could compete on price with BH&A without "buying-in" at a loss on the design and engineering portion.

We have recognized that certain firms may enjoy a competitive advantage by virtue of their incumbency or

their own particular circumstances and such an advantage is not improper unless it results from preference or unfair action by the Government. See, e.g., ENSEC Service Corp., 55 Comp. Gen. 656 (1976), 76-1 CPD 34. We have considered allegations of unfair competitive advantage on the basis that one offeror had performed a design study (Teledyne Ryan Aeronautical, 56 Comp. Gen. 635 (1977), 77-1 CPD 352), and one offeror had drafted plans or preliminary studies relevant to work currently being procured (H.J. Hansen Company, B-181543, March 28, 1975, 75-1 CPD 187). In such instances, protesters have had the burden of showing (1) that a competitive advantage existed, and (2) that it was obtained unfairly. Neither protester in the above-cited examples could meet that burden. Here, we have difficulty in ascertaining from the record precisely what competitive advantage BH&A could have had; the RFP contained extensive pertinent information and made other information available readily upon request. We note that the record indicates that PSI did not attempt to obtain information beyond that contained in the RFP. Next, even if BH&A's prior contact with the project could have been helpful to it, we have no basis to conclude that its prior participation resulted from preference or unfair action by the Government. Accordingly, this aspect of PSI's protest is denied.

Regarding the second basis of protest, PSI specifically contends that BH&A is a design firm and as such will have to subcontract over 85 percent of this project as opposed to the less than 10-percent subcontracting that a designer-builder such as PSI would have to do.

In response, Interior reports that while BH&A proposed to subcontract fabrication, the precise percentage of subcontracting is as yet unknown. Further, Interior notes that the solicitation placed no restrictions on subcontracting as any such requirement is usually considered to be restrictive of competition; it must also be recognized that subcontracting is a normal part of contracting and often allows the Government to obtain services superior to those that may be available from any single source. Finally, Interior notes that it is aware of no regulatory bar against subcontracting, especially where it is not prohibited

or controlled by solicitation provisions and, absent such restrictions, it would have no basis to reject BH&A's proposed subcontracting plan.

We agree with Interior's analysis of the matter; in the circumstances, the proposed use of subcontractors per se would not provide a basis to cause BH&A's plan to be rejected. This aspect of PSI's protest is also denied.



For the Comptroller General  
of the United States