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DECISION



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

FILE: B-199578 DATE: September 2, 1980

MATTER OF: C. Engel's Sons, Inc.

DIGEST:

1. Protest challenging propriety of solicitation provision which is not filed prior to bid opening is untimely.
2. Whether provision of District of Columbia Minority Contracting Act of 1976 is unconstitutional is matter for determination by courts; GAO does not consider constitutional attacks on statutes.
3. Agency could not properly accept bid from non-minority firm where solicitation, pursuant to law, limits award to certified minority bidder.
4. GAO will not review affirmative determination of responsibility in absence of allegation of fraud or noncompliance with definitive responsibility criterion contained in solicitation.

C. Engel's Sons, Inc. (Engel's) protests the award of contract No. 0464-AA-89-0-0-KM to Hood's General Contracting Service (Hood's) by the District of Columbia (D.C.) for the procurement of fresh foods. Engel's contends that the provision appearing in the "Invitation, Bid and Contract" form which limited award to those certified as minority bidders is unduly restrictive and is imposed by an unconstitutional law. Engel's, which is not a minority business, contends that it should have received the award, and that the awardee does not have the resources and specialized facilities necessary to comply with the specifications and conditions of the contract.

[Protest Against Contract Award]

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We dismiss the protest in part and summarily deny it in part.

First, our Bid Protest Procedures provide that a protest based upon an alleged impropriety in a solicitation which is apparent prior to bid opening must be filed prior to bid opening. 4 C.F.R. § 20.2(b)(1) (1980). Bid opening was on June 18, 1980; Engel's filed its protest on July 11, 1980. Therefore, to the extent that Engel's challenges the solicitation provision restricting award to minority firms, the protest is untimely. Moreover, we do not generally consider constitutional attacks on statutes, but view them as matters to be dealt with by the courts. See, e.g., Mashburn Electric Company, Inc., et al., B-189471, April 10, 1978, 78-1 CPD 277. Although here what is involved is a District of Columbia law rather than a law passed by Congress, we believe the same approach by this Office is warranted, particularly given the Congressional role in the process by which a District of Columbia enactment becomes law. See D.C. Code § 1-147(c)(1) (Supp. II 1976).

Second, under the terms of the solicitation, award could be made only to a certified minority bidder. Engel's concedes that it is not such a bidder; thus, under the rules applicable to advertised bidding, award could not properly be made to Engel's. Its protest on this point is summarily denied.

Third, with respect to Engel's assertion that Hood's lacks the resources and facilities necessary to comply with the contract and therefore should not have been determined a responsible bidder, we do not review affirmative determinations of responsibility, since those determinations are basically subjective business judgments, unless either fraud is alleged on the part of the procuring agency or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Aerosonic Corporation, B-193469, January 19, 1979, 79-1 CPD 35. Neither exception applies here.

Moreover, whether Hood's actually complies with the specifications of the contract is a matter of contract administration which is the responsibility of the procuring agency. The Perkin Elmer Corporation, B-193146, August 6, 1979, 79-2 CPD 80.

Finally, Engel's alleges that it was led by certain D.C. Government representatives to believe its prior contract would be extended by 35 days, that it relied to its detriment on these representations to purchase large quantities of food for servicing the contract for that additional period, and that shortly before the extension period was to begin it learned that award had been made to Hood's and that "the extension agreement was cancelled."

Engel's, however, does not indicate what happened to that food, nor does it specifically state whether it suffered a financial loss in disposing of it. In any event, if Engel's believes it has a claim for such a financial loss, we believe the claim should be filed with the contracting officer in the first instance. In this regard, we understand that the original contract contained a termination for convenience clause, so that if the D.C. Government agrees that its actions gave rise to an extension of that contract, the claim would seem to be one appropriately made pursuant to termination settlement provisions.

~~For the~~

Harry R. Jan Cleave
Comptroller General
of the United States