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DECISION

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

[Protest of HHS Contract Award]

FILE: B-198274 DATE: September 11, 1980

MATTER OF: Capital Systems Group, Inc.

DIGEST:

1. Because any interference with awarded contract might impair agency's ability to perform all required tasks before 1981 White House Conference, and since protester does not appear to be immediately in line for award on termination of contract, GAO will not recommend termination of contract even if awardee on small business set-aside contract is finally found to be other than small business.

2. Protest against inclusion of alternate late proposal provision in request for proposals is untimely because it was not filed with GAO until more than 10 days after date set for receipt of initial proposals.

3. Protest against application of late proposal provison to competitor's proposal and alleged "sham" permitted by consideration of late proposal is untimely because protest was not filed with GAO until more than 10 days after protester knew or should have known of bases of protest.

4. Significant issue exception to GAO's Bid Protest Procedures is not applicable where protester admits wording of contract clause in question permits protested action.

Capital Systems Group, Inc. (Capital), protests the Department of Health and Human Services' (HHS) award of a contract to Prospect Associates (Prospect) under request for proposals (RFP) No. NIH AG 79-04. The RFP was issued as a 100-percent small business set-aside procurement for the National Institute on Aging to support the 1981 White House Conference on Aging.

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In its protest to our Office, Capital argues that: (1) the contract should be terminated because Prospect has been determined to be other than small business for this procurement; (2) the RFP should not have included the alternate late proposal provision permitted by Federal Procurement Regulations (FPR) § 1-3.802-2 (1964 ed. amend. 193); (3) even if this provision was properly included in the RFP, the "technical advantage" exception of the provision was improperly applied to allow consideration of the late proposal submitted by Prospect; (4) Prospect is in fact a front for a large business and to permit it to compete is a "sham on the procurement process"; and (5) even if its protest to the General Accounting Office (GAO) is untimely, the protest raises a significant issue that GAO should consider under the significant issue exception to its timeliness rules.

For the reasons indicated below, we find several of Capital's grounds of protest untimely; moreover, despite the fact that Prospect may not be a small business, we are unable to recommend termination of Prospect's contract.

Background

The RFP was issued on March 9, 1979, with proposals due, after four amendments, on August 24, 1979. Fourteen proposals were received by that date and were shortly thereafter submitted to the technical evaluation team. Eventually, a suspense date of November 9, 1979, was established for the evaluation team to determine which proposals were technically acceptable. Meanwhile, on October 3, 1979, Capital protested the inclusion of CDP Associates' (CDP) proposal in the review because, according to Capital, CDP had become a large business as of its new fiscal year. The contracting officer then referred the question of CDP's size status to the Small Business Administration (SBA). However, on October 11, 1979, CDP withdrew its proposal. Then, on October 15, 1979, Prospect submitted a late proposal indicating that CDP would be a subcontractor.

The RFP contained the alternate provision for the consideration of late proposals as authorized by the above regulation. This provision permits the consideration of a late proposal if:

> "It offers significant cost or technical advantages to the Government, and it is received before a determination of the competitive range has been made."

HHS determined that Prospect's late proposal could be considered under this provision. Then, on November 9, 1979, the technical evaluation team found four firms, including both Capital and Prospect, technically acceptable. On December 20, 1979, the contracting officer determined these four firms to be in the competitive range for discussions.

Beginning in January 1980, negotiations were conducted with all offerors in the competitive range. Then, by letter dated February 22, 1980, to HHS, Capital protested Prospect's status as a small business because of claimed affiliation with CDP. Capital's letter also made the following arguments: (1) In the event its "size protest fails," Capital may "feel compelled to question whether * * * Prospect's [late proposal offers] either significant cost or technial advantages to the Government"; and (2) Prospect's late proposal lists "CDP [as] a major subcontractor * * * [in order to permit] CDP to continue to maintain a major role in the performance of * * * any resultant contract."

HHS referred the protest to SBA and, by letter dated February 29, 1980, notified Capital of this action. Negotiations were continued, and on March 24, 1980, HHS received best and final offers from all offerors. Then, on March 28, 1980, Capital filed its protest with our Office. Finally, on April 9, 1980, SBA's Philadelphia Regional Office issued a determination that Prospect was a small business concern for purposes of this HHS procurement. Capital then appealed this decision to SBA's Size Appeals Board.

On June 4, 1980, HHS awarded the subject contract to Prospect. On June 6, 1980, SBA's Size Appeals Board reversed the regional office decision and held that Prospect was other than a small business. Nevertheless, on August 3, 1980, the Size Appeals Board informed Prospect's attorney that the "case will be reconsidered" pursuant to Prospect's request.

Small Business Statutes

Although we have recommended that an agency terminate a contract award where the SBA has decided that the awardee was not a small business (See, for example, R.E. Brown Co., Inc., B-193672, August 29, 1979, 79-2 CPD 164), we do not believe a similar recommendation should be made here even if SBA's Size Appeals Board affirms its prior decision on reconsideration. We so conclude because we cannot question HHS's implicit position that any disruption of Prospect's contract might "seriously impai[r] HHS's ability to perform all the required tasks before the 1981 conference." Moreover, unlike the cited case, Capital apparently would not necessarily be immediately in line for any possible award upon termination.

Other Grounds of Protest

A. Late Proposal Provision

Our Bid Protest Procedures provide that a protest based upon alleged improprieties in a solicitation which are apparent prior to the date set for bid opening or the closing date for the receipt of initial proposals must be filed prior to such date. See 4 C.F.R. § 20.2(b)(1) (1980).

Here, the date set for the receipt of initial proposals was August 24, 1979. However, Capital did not file a protest with our Office challenging the propriety of the RFP's late proposal provision until March 25, 1980. Under our Bid Protest Procedures, therefore, this ground of protest is clearly untimely and not for consideration on the merits.

B. Application of Late Proposal Provision and "Sham Issue"

Our Bid Protest Procedures also provide that any protest not covered under section 20.2(b)(1) must be filed with our Office not later than 10 working days after the "basis for the protest" is known or should have been known. See 4 C.F.R. § 20.2(b)(2) (1980). A "basis for protest" exists if: (1) a protester's interests are "directly threatened under a then-relevant factual scheme"; and (2) the "agency conveys to the protester its intent on a position adverse to the protester's interest." Brandon Applied Systems, Inc., 57 Comp. Gen. 140 (1977), 77-2 CPD 486.

It is clear that as of the date of the February 22 letter, Capital, as noted above: (1) believed Prospect's proposal did not deserve consideration under the "significant cost or technical advantage" exception of the late proposals clause; and (2) knew that Prospect was proposing CDP as a major subcontractor for the work. Nevertheless, Capital's February 22 letter expressly disavowed any intent to lodge a protest about these facts since Capital insists they were only "rumors" as of that date.

Conceding that all of these facts were not for official disclosure since the negotiated procurement was before award as of February 22, we still consider that these facts constituted "bases of protest" as of that date under the above definition. Merely because a protester insists that it does not intend to file a protest cannot be held to extinguish base(s) of protest if, in fact, those bases exist. Moreover, it is our view that the facts recited in Capital's February 22 letter sufficiently threatened Capital's interests as of that date as to all later bases of protest subsequently filed with our Office; further, given the accuracy of these facts, it is beyond question that the source of Capital's knowledge must be sufficiently highly placed within HHS so that Capital should have reasonably accepted the facts as "official" from the beginning notwithstanding the breach of secrecy involved. Capital therefore must be charged as of Feburary 22 with notice of bases of protest as to the above grounds of protest.

Further, although Capital insists it was not given details surrounding HHS's determination of Prospect's technical advantage as of Feburary 22, it is our view that this position is inconsistent with the position implicit in its Febrary 22 letter that Prospect's proposal did not deserve consideration under the "cost or technical advantage exception" provision in question. In these circumstances, this position implies a knowledge of facts sufficiently detailed to give rise to a basis of protest notwithstanding Capital's continuing request to HHS for additional details regarding HHS's decision to allow Prospect's late proposal into the competition.

Assuming, for the sake of discussion, that Capital should not be charged with all these bases of protest as of Febrary 22, we nevertheless believe that Capital

may be charged with notice of all these bases of protest as of March 6, 1980, the date on which Capital admits to knowledge of a February 29 HHS letter. This HHS letter informed Capital that its size protest had been referred to SBA. Specifically, HHS stated its understanding that Capital was "protestin[g] the consideration of Prospect * * * as a possible recipient of award under the RFP" and informed Capital that Prospect's size status had been referred to SBA. Thus, we believe this letter expressly confirmed Capital's chief "rumor"--namely, that Prospect indeed was competing for the award. We consider that the explicit confirmation of this chief "rumor" should have reasonably led Prospect to an implicit realization that its other "rumored" facts were also correct and, for practical purposes, "official," thereby giving notice of all bases of protest now asserted. Indeed, even Capital admits that, when an HHS representative informed it by telephone on March 25, 1980, of the pendency of Capital's size protest, it was put on notice of all bases of protest later protested to our Office. In our view, the March 25 phone conversation conveyed no more information than was already known by Capital as a result of its receipt of HHS's February 29 letter.

Capital also argues that despite the February 29 letter, it was still not certain that Prospect had submitted a proposal. It cites FPR § 1-1.703-2(a) (1964 ed. amend. 192) for the proposition that once a contracting officer receives a size protest, he has absolutely no discretion, but must refer the matter to SBA regardless of whether the firm that has been challenged has submitted a proposal or not. Thus, Capital contends that it did not receive information that confirmed its belief that Prospect was one of the offerors until March 25, 1980.

We do not agree. Section 1-1.703-2(a) of the Federal Procurement Regulations provides:

> "(a) Any bidder or offeror or other interested party may challenge the small business status of any other bidder or offeror on a particular procurement * * *. Any contracting officer who receives a timely protest * * * shall promptly forward such protest to the SBA * * *." (Emphasis added.)

This provision does not require the contracting officer to refer all size status protests to SBA, but only those affecting a firm that also happens to be a bidder or offeror for the "particular procurement" involved.

Therefore, since HHS's letter of February 29, 1980, informed Capital that its size protest had been referred to SBA, Capital knew, or should have known, that Prospect was a competitor. Thus, as explained above, all the above grounds of protest should have been filed with our Office, at the latest, no later than 10 days after Capital's receipt (on March 6) of HHS's letter of February 29, 1980. But as indicated above, we did not receive Capital's protest until March 28, 1980. Under our Bid Protest Procedures, therefore, these other grounds of protest are untimely filed and not for consideration on the merits.

Significant Issue

Capital argues that even if the protest is untimely, it presents a significant issue under section 20.2(c) of our Bid Protest Procedures and should be considered under this exception to our timeliness rules. Capital contends that its protest "goes to the very heart of the competitive negoitation system of the United States Government." It believes that, regardless of the exact language of the RFP's late proposal provision, HHS should not be allowed to accept a proposal submitted 53 days late.

The significant issue exception is limited to matters which are of widespread interest to the procurement community. Wyatt Lumber Company, B-196705, February 7, 1980, 80-1 CPD 108. Since Capital admits the present wording of the clause permits consideration of a late proposal before the competitive range has been determined (which is the factual situation here), we do not consider the issue to be "significant."

Milton J. Socolar
General Counsel