Brian Kilday

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DECISION

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

[Protest of Minority Contractor Eligibility Restrictions]

FILE: B-202510 DATE: April 24, 1981

MATTER OF: Northern Virginia Chapter, Associated Builders and Contractors, Inc., et al.

DIGEST: DLG 06590

1. District of Columbia agency has reasonable basis for restricting solicitation to local minority business firms despite general requirement for competition since District's Minority Contracting Act of 1976 requires set-aside of portion of agency contracts for local minority business firms.

2. Whether provisions of District of Columbia Minority Contracting Act of 1976 are unconstitutional, are beyond authority granted by Congress, or are contrary to the Civil Rights Act of 1964 are matters for determination by the courts; GAO does not consider fundamental attacks on statutes of District of Columbia.

3. Virginia law is not applicable to District of Columbia procurement for work to be performed in Virginia. District must follow it own laws when awarding contracts.

4. Requirement that bidder be certified as minority firm at time of bid opening and that bid so indicate is not improper treatment of alleged responsibility matter. Rather, it is similar to certification requirement pertaining to small business status.

Introduction

The Northern Virginia Chapter, Associated Builders and Contractors, Inc. (Associated Builders), on behalf of itself and three member firms, protests the minority

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contractor eligibility restrictions of invitation No. 0303-AA0201LA issued by the District of Columbia, Department of General Services, for the enclosure of Mills Branch and associated drainage construction work. Associated Builders contends that this eligibility restriction is contrary to the basic principles of procurement law, the equal protection and interstate commerce provisions of the Constitution, the Civil Rights Act of 1964, Congress's grant of authority to the District, and the competitive bidding statutes of the Commonwealth of Virginia (where the contract will be performed). The solicitation is further challenged as deficient on the grounds that it improperly treats a matter of responsibility as one of bid responsiveness.

The District of Columbia (District), by the Minority Contracting Act of 1976 as amended, D.C. Code § 1-851 et seq. (Supp. V 1978), established a sheltered market program which requires each agency of the District to allocate 25 percent of the dollar volume of its contracts to "local minority business enterprises." In addition to satisfying criteria demonstrating control by minority members, eligible firms must be located in and licensed to do business within the District. Under this law, the District's Minority Business Opportunity Commission certifies qualified firms in advance of solicitation as eligible for participation in the sheltered market program. The instant solicitation advised that it was restricted under this program to certified minority firms and that bids from other firms would be considered nonresponsive.

Competition

Associated Builders first contends that the total set-aside of the Mills Branch work for minority firms is contrary to the full and free competition mandated for all procurements by D.C. Code § 1-808. What this argument overlooks, however, is the fact that the set-aside is itself authorized by another provision of the D.C. Code. Although protester contends that the Minority Contracting Act does not amend or reference prior acts requiring the District to advertise on the basis of maximum competition and that the restriction imposed by the Act is therefore "not warranted," we think the Act carves

out an exception to the competition requirements inherent in D.C. Code § 1-808 and that it must be given effect as the most recent expression of legislative intent. See Maybank Amendment, 57 Comp. Gen. 34 (1977), 77-2 CPD 333.

Constitutional Question

Associated Builders asserts that the Minority Contracting Act violates the "equal protection component" of the Fifth Amendment of the Constitution and, by isolating 25 percent of the District's procurements from interstate Commerce, impedes the free flow of commerce protected by the Constitution.

In support of its equal protection argument, the protester cites Fullilove v. Klutznick, _____ U.S. _____, 65 L. Ed. 2d 902 (1980), which upheld a provision of the Public Works Employment Act of 1977 requiring that bidders on federally funded projects under the Act have 10 percent of the work performed by minority-controlled firms. The protester states that Fullilove establishes two crucial elements for sustaining the legislation which are missing here. The first element, the protester states, is that the legislation be an Act of Congress, which has broad remedial power that the District of Columbia Council does not. The second element is a specific finding regarding the past discrimination which is sought to be remedied; the protester asserts that the District Council's findings recited in the Act do not meet this requirement.

We will not consider these arguments. We do not believe it is the function of this Office to declare statutes unconstitutional; rather, we view attacks on statutes to be matters for the courts. Mashburn Electric Company, Inc., et al., B-189471, April 10, 1978, 78-1 CPD 277. Although we originally took that position with respect to Congressional enactments, we recently adopted that same approach with respect to District of Columbia law in light of the Congressional involvement in the process by which District enactments become effective. C. Engels Sons, Inc., B-199578, September 2, 1980, 80-2 CPD 167. Although the protester refers to the Minority Contracting Act solely as a District enactment, both the original Act and its 1980 amendments were subject to the Congressional review process, pursuant to D.C. Code § 1-147(c)(1) (Supp. III 1976).

Authority

Associated Builders argues that the Minority Contracting Act exceeds the authority granted the District by the Congress. In this regard, we need merely repeat that the Congress plays a role in the process by which District of Columbia enactments become law, see D.C. Code § 1-147 (c)(1)(Supp III 1976), and that the Congress did review both the original enactment and the recent amendments. Consequently, we will not consider this attack on the Act either, but again believe the issue to be more appropriate for resolution by the courts rather than this office.

Civil Rights Act

The protester argues that the Minority Contracting Act violates the Civil Rights Act of 1964 because it provides for discrimination on the basis of race. This again is a direct attack on an enactment which has been reviewed and implicitly approved by the Congress. Consequently, for the reasons indicated above, we believe the Mashburn principle applies and this argument too is more appropriate for judicial consideration.

Virginia Law

Associated Builders contends that Virginia's competitive bidding statutes should apply to this solicitation since the work is to be performed at a Virginia site and Virginia jurisdictions may ultimately pay for a major portion of the project through user fees. The protester cites no law or cases to support this proposition and we are not persuaded that the District of Columbia, relying upon District authorities and funds to have the work performed for the benefit of the District in connection with a District-owned facility in Lorton, Virginia, is bound by the advertised bidding statutes of Virginia simply because the project is physically located within that jurisdiction. To the contrary, under D.C. Code § 1-808 all construction contracts "for supplies or services for the Government" are encompassed within the District advertising requirement, with certain stated exceptions bearing no relation to the site of the work.

Responsiveness Issue

The protester contends that the solicitation is defective because it improperly treats "the attainment of a certificate as a local minority business enterprise as an issue of responsiveness." In this regard, the protester cites Kleen-Rite Janitorial Service, Inc., B-179652, January 18, 1974, 74-1 CPD 15, for the proposition that affirmative action requirements involve bidder responsibility, not bid responsiveness.

The proposition is erroneous. In Kleen-Rite, a bidder failed to complete a certification relating to the bidder's prior experience in maintaining an affirmative action plan. Because the certification dealt with prior experience, we held that the agency properly treated the matter as one of bidder responsibility. In other cases, however, where affirmative action requirements are imposed on a bidder as a matter of contract performance and a specific commitment to requirements must be reflected in the bid, they have been treated as involving bid responsiveness. See, e.g., Veterans Administration re Welch Construction, Inc., B-183173, March 11, 1975, 75-1 CPD 146; 52 Comp. Gen. 874 (1973); 50 Comp. Gen. 844 (1971).

In this case, the requirement that bidders be certified eligible prior to bid opening is an eligibility requirement and is somewhat similar to the small business certification requirements for small business set-asides in that the bidder must be small at time of bid opening. See Defense Acquisition Regulation § 1-706.5(b); CADCOM, Inc., 57 Comp. Gen. 290 (1978), 78-1 CPD 137, and a bid indicating the contrary is required to be rejected. Hendry Corp., B-195197, March 31, 1980, 80-1 CPD 236. Similarly, we believe the District's requirement that a bidder be certified at bid opening and so indicate in its bid is not improper.

Conclusion

It is clear from Associated Builders' submission that the protest concerns matters which are either legally without merit or not subject to our review. Therefore, we have decided the protest without obtaining an agency report and without the conference requested by Associated Builders, since they

would serve no useful purpose. Gateway Van & Storage Company, B-198900, July 1, 1980, 80-2 CPD 4. To the extent the protest alleges that the actions in this case are contrary to the applicable principles of procurement law, it is summarily denied; to the extent that the protest challenges the validity of the laws of the District of Columbia, it is dismissed.

Milton J. Socolar

Acting Comptroller General
of the United States