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DECISION



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

FILE: B-202759

DATE: July 21, 1981

MATTER OF: Solis Enterprises

DIGEST:

1. Protest is timely where filed within 10 working days of adverse agency action on protest initially filed with agency in timely fashion.
2. Protest alleging bad faith in agency decision to withdraw solicitation set aside under section 8(a) of Small Business Act is denied where agency explanations support agency's position that it did not act in bad faith, and record does not contain "well-nigh irrefragable proof" required to meet judicially established standard for finding of bad faith.

Solis Enterprises protests the Department of Transportation's (DOT) withdrawal of request for proposal (RFP) No. 81-6-R10, which was set-aside for award under the Small Business Administration's (SBA) 8(a) program. The requirement, which was for construction work related to a highway improvement project, was subsequently solicited on a competitive basis.

Solis contends that DOT's action was arbitrary and capricious. Further Solis argues that DOT acted in bad faith by delaying consideration of a competitive procurement until after it had engaged in protracted negotiations with Solis, and had induced Solis to incur substantial proposal preparation costs. In this regard, Solis alleges that DOT withdrew the 8(a) set-aside for reasons that were apparent from the outset.

[Protest of Agency Decision to Withdraw RFP]

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As a preliminary matter, DOT argues that Solis' protest is untimely. DOT contends that this is so since it notified SBA on February 23, 1981 that RFP 81-6-R10 was being withdrawn but Solis did not protest to this Office until April 3, 1981. (Actually Solis filed its protest here on April 6, 1981.) We disagree.

Protesters are urged to seek resolution of their complaints initially with the contracting agency. If a protest is filed initially with a contracting agency, a subsequent protest to this Office filed within ten working days of formal notification of or actual or constructive knowledge of initial adverse agency action will be considered provided the initial protest was timely filed. 4 C.F.R. § 20.2(a) (1980). While the record in this case does not show when Solis was itself notified that the set-aside had been withdrawn, it does show that Solis initially protested this matter to DOT by letter dated March 5, 1981, 8 working days after DOT notified SBA of the withdrawal. Under these circumstances, and since DOT has not shown that it received the protest more than 10 working days after Solis learned that the set-aside had been withdrawn, we must conclude that Solis filed an initial timely protest with DOT. See Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65.

Further, the record shows that Solis' protest to DOT was denied by letter dated March 31, 1981. Accordingly, since the protest to this Office was received on April 6, or within 10 working days of adverse agency action, Solis' protest is timely and for consideration on the merits. See 4 C.F.R. § 20.2(a), supra.

DOT also contends GAO should decline to consider this protest because this Office does not have the authority to review the contracting officer's discretionary decision to withdraw an 8(a) set-aside. In support of its position, DOT cites several of our prior decisions in which we have held that a determination to withdraw a procurement from the 8(a) program is not subject to legal review by this Office and is a matter to be decided by SBA and the procuring

agency. Newton Private Security Guard and Patrol Service, Inc., B-186756, November 30, 1976, 76-2 CPD 457; Arcon Construction and Engineering Company, B-185859, March 31, 1976, 76-1 CPD 213; Baltimore Electronics Associates, Inc., B-185042, February 17, 1976, 76-1 CPD 105.

Those decisions are based on the broad discretionary authority of contracting agencies under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (Supp. III 1979), which authorizes SBA to enter into contracts with any Government agency having procurement powers and authorizes the contracting officer of such agency "in his discretion" to let the contract to SBA upon such terms and conditions as may be agreed upon between SBA and the procuring agency. Nevertheless, we have also held that in very limited situations, such as where bad faith is alleged, we will examine the circumstances surrounding the withdrawal of a procurement from the 8(a) program. W.M. Grace, Inc., B-201248, February 10, 1981, 81-1 CPD 89; Arcata Associates, Inc., B-195449, September 27, 1979, 79-2 CPD 228. This is such a case.

The Court of Claims has held that in order to support a finding of bad faith the record must show "well-nigh irrefragable proof" that the agency has a specific and malicious intent to injure the party alleging bad faith. Kalvar Corporation, Inc. v. United States, 543 F.2d 1298, 1301 (Ct. Cl. 1976). We do not believe that the record supports such a finding here.

DOT denies any intent to injure Solis, and justifies its withdrawal of the 8(a) set-aside on the following grounds: (1) there was a substantial likelihood that the Government would save in excess of \$500,000 if the project was awarded through competitive bidding, (2) it was unclear who would be managing the project especially due to a subcontracting arrangement between Solis and a large business, which raised questions as to whether the contract award would carry out the intent of the 8(a) program, and (3) the Idaho State Department of Transportation, which is a cooperating agency on the project under 23 U.S.C. § 209 (1976), strongly opposed the 8(a) set-aside due to the significant role of the large, non-minority subcontractor.

Solis argues that the "presence of competition", which provides DOT's primary justification for its withdrawal decision, was apparent at all times before, during and following its selection for the 8(a) set-aside and that DOT therefore acted in bad faith by unnecessarily and capriciously inducing it to incur proposal preparation costs. It is clear, however, that DOT's decision to withdraw the 8(a) set-aside was not based on the presence of competition per se but rather on a change in competitive conditions which resulted in lower prices.

In that respect, DOT states that its estimate was prepared on October 18, 1980, about a week after it offered the project to SBA under the 8(a) program, and was based on median bid prices received on comparable work over a prior period of time. DOT further states that between October 1980 and February 1981 there was a marked change in bid prices for highway construction work in Idaho, and recent bids on federal aid projects (examples of which are cited) were from 16 to 32 percent below the engineer's estimate. Further, Solis' final proposed price submitted on January 30, 1980, after several rounds of negotiations, exceeded the engineer's estimate by 7 percent. Consequently, we find no merit to Solis' contention that this basis for withdrawing the 8(a) set-aside was apparent from the outset, nor do we find anything to support the assertion that DOT acted in bad faith in this regard.

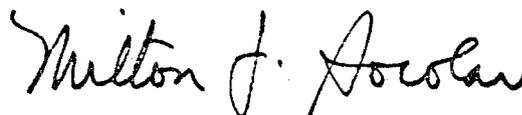
Solis also asserts that it was improper for DOT to consider the extent to which that firm intended to subcontract work to a large business as that is a matter solely within the discretion of SBA. In addition, Solis contends that any intervention by the State of Idaho into the 8(a) set-aside award was highly improper. However, Solis has made no showing that DOT's consideration of these matters was tantamount to bad faith nor does anything in the record so suggest.

Finally, Solis suggests that DOT's decision was improperly influenced by the local branch of the Associated General Contractors (AGC) who opposed the award of the project as an 8(a) set-aside. DOT admits that the contracting officer was contacted

by "various individuals and organizations" who objected to the negotiations with Solis for a variety of reasons. Further, it is acknowledged that the contracting officer met with a representative of the AGC to discuss its objections. However, the contracting officer also met with representatives of the local SBA office, Solis' President, the Idaho Transportation Board, and members of an interested Senator's staff. While the contracting officer apparently considered the views of these various sources in reaching his decision to withdraw the 8(a) set-aside for the reasons set forth above, we find no basis on which to conclude that undue weight was given to the position of the AGC or that the contracting officer acted with a "specific and malicious intent to injure" Solis in this regard.

The protest is denied.

Solis also requests reimbursement for the cost of preparing its proposal. In view of our conclusions above, we find no basis on which to sustain this claim.



Acting Comptroller General
of the United States