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DECISION

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

FILE: B-202510.2 DATE: August 3, 1981

MATTER OF: Northern Virginia Chapter, Associated Builders and Contractors, Inc.--Reconsideration

DIGEST:

1. Burden is on protester to file complete--i.e., fully briefed--initial protest submission since all issues raised by submission are reviewed to determine if agency report is necessary or, if it is clear, protest is without merit and should be decided on that basis.

2. Requirement that bidder be certified as minority firm at time of bid opening was correctly characterized in prior decision as matter of eligibility to compete for particular procurement.

3. Request for conference in connection with request for reconsideration will be granted only where, unlike present case, matter cannot be promptly resolved without conference.

The Northern Virginia Chapter, Associated Builders and Contractors, Inc. (Associated Builders), requests reconsideration of our decision, Northern Virginia Chapter, Associated Builders and Contractors, Inc., et al., B-202510, April 24, 1981, 81-1 CPD 318, in which we dismissed the protest to the extent that it challenged the validity of the laws of the District of Columbia (D.C.) and summarily denied the remainder of its protest which alleged that D.C.'s actions were contrary to the applicable principles of procurement law.

Associated Builders argues that GAO's summary denial, coming after D.C.'s request that the protest be dismissed since GAO does not consider the constitutionality of statutes, was unreasonable and precluded Associated Builders from adequately presenting its position on the other issues raised by its protest. Associated Builders contends that our decision

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incorrectly characterized the certificate of registration requirement as a matter of responsiveness and, further, that the conflict between 41 U.S.C. § 5 and 5(A) (1976) and the District of Columbia's Minority Contracting Act of 1976, as amended, DC Code § 1-851, et seq. (Supp. V, 1978), was not resolved by our decision. The last argument made is that Virginia law, specifically Virginia's competitive bidding statutes, should apply to the instant solicitation.

Concerning Associated Builders' complaint that the summary denial of its protest precluded Associated Builders from adequately presenting its position concerning the issues which were not of a constitutional nature, when a protest is filed with our Office all of the issues raised are initially reviewed to determine, among other things, if an agency report will be necessary. Where it is clear from the protester's initial submission that the protest is without merit, we will decide the matter on that basis. The burden is on the protester to submit a complete--i.e., fully briefed--protest to our Office.

In support of the contention that our decision erroneously characterized the Minority Contract Act certificate of registration as a matter of responsiveness, Associated Builders argues that since D.C. Code § 1-858 (Supp. V, 1978) requires evidence of financial standing, ability and character, clearly responsibility criteria, the certificate must be treated as a matter of responsibility. Associated Builders also points to page SP-10 of the invitation for bids (IFB) which sets forth the Sheltered Market Project (SMP) provision, requiring certification prior to opening of bids and contends that this "provision is designated as a responsibility criteria by modifying the qualification of bidders provision."

Actually, what Associated Builders has focused its attention on is the procedures that must be followed in order to obtain a certificate, ignoring the true purpose of the certificate. The Minority Business Opportunity Commission (MBOC) reviews the information submitted by each minority firm or joint venture to

determine whether the applicant is a viable business. Such review is not performed for any specific solicitation; rather, it gives the agencies of D.C. a list of those viable firms interested in contracting with D.C. under the SMP. The issuance of a certificate does not mean that the recipient minority business is capable of performing any and all work solicited for under the SMP. That determination is made by the contracting agency once all the acceptable bids have been reviewed and the apparent awardee has been selected.

Our prior decision characterized the requirement that bidders obtain a certificate prior to bid opening as a matter of eligibility to compete, not responsiveness, and analogized the requirement to the small business certification requirements for small business set-asides in that the bidder must be small at the time of bid opening. It is still our view that it was proper to require that the certificate be obtained prior to bid opening. In order for a firm to participate in the SMP, the certificate requirements must be satisfied. Once that is done, the firm has an opportunity to compete for the solicited work.

Associated Builders also argues that our prior decision did not resolve the "conflict" between the requirement for competitive procurements under 41 U.S.C. §§ 5 and 5(A) (1976) and the restrictive nature of the Minority Contracting Act, supra. Associated Builders' position is that our decision should have considered 41 U.S.C., supra. Concomitantly, Associated Builders, once again, attacks the Minority Contracting Act and D.C.'s authority to enact such legislation.

Even though our decision did not specifically cite 41 U.S.C. §§ 5 and 5(A), we did in fact consider those sections. However, no useful purpose would have been served by citing those sections in our decision since D.C. Code § 1-808 (Supp. V, 1978) is, with minor exceptions (the provision to foster local minority business opportunity and the omission of the paragraph on wholly owned Government corporations), a restatement of 41 U.S.C. § 5.

With respect to Associated Builders' attack on the act and D.C.'s authority, we must reiterate that we will not consider this allegation since it is for the courts to resolve this issue rather than this Office. However, we note that Associated Builders takes issue with our statement that "Congress did review both the original enactment and the recent amendments." In this regard, we call Associated Builders' attention to D.C. Code § 1-147(C)(1) and (2) (Supp. V, 1978), which provides in part:

> "(c)(1) * * * the Chairman of the Council shall transmit to the Speaker of the House of Representatives and the President of the Senate a copy of each act passed by the council and signed by the Mayor * * *
>
> "(c)(2) no act shall take effect until the end of the 30-day period * * * and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act."

These sections, while not using the word "review," make it clear that Congress has the authority to reject acts passed by the D.C. Government by adopting a concurrent resolution disapproving the act. Obviously, Congress must first look at the specific act transmitted by the Chairman of the Council to determine whether or not to approve by inaction, or to adopt a concurrent resolution disapproving the act. This process is effective congressional action which our Office will defer to.

Associated Builders' last argument is that since the work to be performed will occur at a Virginia site and Virginia jurisdictions may ultimately pay for a portion of the project through user fees, Virginia's competitive bidding statute should have been applied here. Further, Associated Builders contends that the authority of D.C. does not extend beyond its boundaries and Virginia law is supreme. It is Associated Builders' position that our decision did not address the fact that D.C. was applying its laws in Virginia.

We believe that Associated Builders' argument confuses the formation of contract and performance stages of this procurement. The instant procurement was issued by D.C., will use D.C. funds, and will benefit D.C. Therefore, up to and including the award of a contract, the contract formation stage of the procurement, the laws of D.C. are the appropriate laws to be applied. It is after the contract has been awarded and performance is to be commenced that the Virginia laws become applicable to the performance of the contract within Virginia.

While Associated Builders has requested a conference, our Bid Protest Procedures do not specifically provide for the holding of conferences on requests for reconsideration. See 4 C.F.R. § 21.9 (1981). We believe a conference should be granted in connection with a request for reconsideration only where the matter cannot be resolved without a conference. General Electric Company--Reconsideration, B-190632, September 11, 1979, 79-2 CPD 185. In our judgment, this is not such a case.

Accordingly, our prior decision is affirmed.

Milton J. Socolar

Acting Comptroller General
of the United States