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DECISION

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

FILE: B-201333 DATE: October 8, 1981

MATTER OF: Environmental Growth Chambers

DIGEST:

Because the unreasonable failure of civilian agency to refer determination of nonresponsibility of small business-protester to Small Business Administration (SBA) in reliance on agency procurement regulation violated the Small Business Act and the implementing Federal Procurement Regulations, the protest against the award of a completed contract is sustained. Since SBA declined to decide hypothetically the protester's compliance with definitive responsibility criterion, in this limited circumstance, GAO decides matter and finds reasonable basis for nonresponsibility determination. Therefore, bid preparation costs are not allowable.

Environmental Growth Chambers (EGC), a small business, protests the award of a contract to another firm by the National Institutes of Health (NIH), Department of Health and Human Services (HHS), under invitation for bids (IFB) No. 263-80-B(84)-0232, for the installation of environmental cold rooms.

EGC contends that NIH's rejection of its low bid as nonresponsible without referral of the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) program violates the Small Business Act (15 U.S.C. § 637(b)(7)(1976)), as amended by section 501 of Pub. L. No. 95-89, 91 Stat. 557, effective August 4, 1977, and implementing regulations (13 C.F.R. § 125.5 (1980)). EGC maintains that the award of the contract is illegal, the contract should be canceled, and the work awarded to EGC. In the alternative, EGC claims bid preparation costs incurred in responding to the solicitation.

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The protest is sustained, and the claim is denied.

The solicitation contained the following definitive responsibility criterion:

> "Bidder shall submit evidence [references for rooms built and installed] with bid that he has built, installed, and successfully had in operation environmental chambers similar to the -70 Centigrade rooms described herein, and of an equivalent level of performance for not less than one year prior to the date of this advertisement."

Upon investigation of EGC's references, NIH determined that EGC was nonresponsible for failure to satisfy the criterion. NIH did not refer the question of EGC's competency to perform the contract to the SBA because HHS Procurement Regulations (41 C.F.R. § 3-1.708-2(a)(1) (1980)) provide that no referral need be made if, as the agency concluded, urgent circumstances existed. The contract was awarded to Forma Scientific, the second low bidder.

The Small Business Act, as amended, provides that a small business may not be precluded from award on the basis of nonresponsibility without referral of the matter to the SBA for final disposition under COC procedures. The language and legislative history of the act, SBA's implementing regulations, and the Federal Procurement Regulations (FPR) provide no apparent exceptions to this referral procedure. See H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 18 (1977); H. Conf. Rep. No. 95-535, 95th Cong., 1st Sess. 21 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 838, 851; 13 C.F.R. § 125.5 (1980); FPR § 1-1.708-1(a)(1) (1964 ed. amend. 192). Therefore, the protest is sustained.

In a letter of today to the Secretary, we are recommending that HHS Procurement Regulations § 3-1.708-2(a)(1), which is in the process of revision, be revised as soon as possible to eliminate the exception on the basis of urgency. In the interim, contracting activities should be advised to follow the holding of this decision.

Since the contract has been performed, no award to EGC is possible. Consequently, EGC's claim for bid preparation costs will be considered.

The recovery of bid preparation costs is based on the theory that the Government, when issuing an IFB, enters into an implied contract with bidders to fairly and objectively consider bids submitted in response. Heyer Products Co. v. United States, 140 F. Supp. 409 (Ct. Cl. 1956). In Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974), the court stated that the ultimate standard for recovery of these costs is whether the agency was arbitrary or capricious toward the bidder-claimant, which could be found where the Government acted without a reasonable basis. See, also, Mark A. Carroll and Sons, Inc., B-194419, November 5, 1979, 79-2 CPD 319; Ultra Publicaciones, S.A., B-200676, March 11, 1981, 81-1 CPD 190. Further, even if arbitrary or capricious conduct is found, these costs cannot be recovered unless the claimant had a "substantial chance" for award of the contract except for the agency's action. See Decision Sciences Corporation - Claim for Proposal Preparation Costs, B-196100.2, October 20, 1980, 80-2 CPD 298.

Prior decisions of our Office sustaining protests for nonreferral because of conflicts between the Defense Acquisition Regulation (1976 ed.) (DAR) and the act have not recommended remedial action because we found that the agency relied reasonably and in good faith on that regulation. See International Business Investments, Inc.; Career Consultants, Inc., 60 Comp. Gen. ____ (B-198894, February 23, 1981), 81-1 CPD 125; Z.A.N. Co., 59 Comp. Gen. 637 (1980), 80-2 CPD 94. However, in this case, we cannot make a similar finding of reasonable, good-faith reliance. While the DAR amendments to comply with the act evolved over several years, the FPR, which applies to this and all civilian procurements, was amended to comply with the act shortly after its effective date. On June 14, 1978, the FPR eliminated the urgency exception it had previously allowed. FPR § 1-1.708-1(a)(1) (1964 ed. amend. 192). This occurred over 2 years prior to the nonreferral here, ample time for HHS to delete the exception. Furthermore, from that date, there was no basis for not referring any finding of nonresponsibility

to the SBA, despite the preexisting HHS regulation upon which NIH relied. The contracting officer had no basis to disregard the FPR implementation of the act because, absent an approved deviation or lack of coverage, the FPR governs. See FPR §§ 1-1.002, 1.003, 1.004, 1.008, 1.009 (1964 ed. amends. 9, 141); 41 C.F.R. §§ 3-1.104, 1.106 (1980). Moreover, in Martel Laboratories, Inc., B-194364, August 7, 1979, 79-2 CPD 91, we held that a civilian agency, the Department of Commerce, must refer all nonresponsibility concerns to the SBA since the act and the FPR, as amended, no longer allowed exception to referral on the basis of urgency.

In light of the foregoing, we conclude that the rejection of EGC's low bid on the basis of nonresponsibility without referral to the SBA was unreasonable and tantamount to arbitrary or capricious action.

Before bid preparation costs can be allowed, however, it must be determined whether EGC had a "substantial chance" of award of the contract. Therefore, we requested that SBA hypothetically consider EGC's responsibility at the time of award. However, SBA declined. Therefore, the matter will be resolved by our Office. We emphasize that our review of this matter is for claims purposes only and is to be considered an exceptional undertaking limited to these facts.

In deciding compliance with similar definitive responsibility criteria, our review is limited to ascertaining whether the evidence submitted reasonably shows compliance with the criteria because the quality and sufficiency of evidence are judgment matters reserved to the contracting officer. Johnson Controls Inc., B-191262, April 27, 1978, 78-1 CPD 442.

The agency's technical personnel checked the references in EGC's bid. The installed room in a non-Government facility (corporate) failed to contain various material components and failed to operate under conditions called for by the criterion. An NIH reference advised that EGC installed several rooms which,

while apparently similar, did not operate satisfactorily to show compliance with the criterion. In response, EGC charges that the NIH rooms' unsatisfactory performance is due to Government fault, and an appeal has been filed with the Armed Services Board of Contract Appeals relating to one of the rooms. EGC states only that the corporate room is conceptually similar to that being procured.

As for the corporate room, EGC has failed to rebut specifically the findings upon which the contracting officer relied. With respect to the NIH rooms, EGC merely contends that Government fault caused noncompliance with the criterion, rather than showing compliance with the criterion. The fact that EGC has an appeal pending on one of the rooms does not prevent the contracting officer from relying upon the information subject to the appeal. 43 Comp. Gen. 323 (1963). Based on the above, we conclude that the contracting officer reasonably determined that EGC did not comply with the definitive responsibility criterion.

Accordingly, the claim is denied.

Milton J. Socolar

For the Comptroller General
of the United States

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

B-201333

October 8, 1981

The Honorable Richard S. Schweiker
Secretary of Health and Human Services

Dear Mr. Secretary:

Enclosed is a copy of our decision of today sustaining the protest and denying the claim of Environmental Growth Chambers (EGC) under solicitation No. 263-80-B(84)-0232, issued by the National Institutes of Health, Department of Health and Human Services (HHS).

We recommend that HHS Procurement Regulations § 3-1.708-2(a)(1) be amended promptly to remove the exception to referral of nonresponsibility determinations to SBA on the basis of urgency. Until the revision occurs, all contracting activities should be directed to follow our decision.

Please advise us of the action taken on the above.

Sincerely yours,

Milton J. Socolar

Acting Comptroller General
of the United States

Enclosure