DECISION

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

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FILE: B-210389.4; .5; .6 DATE: December 14, 1983

MATTER OF: Kings Point Mfg. Co., Inc.; Gibraltar Industries, Inc.; Geonautics, Inc.

DIGEST:

1. Firms against which debarment proceedings were pending were eligible for participation in a drawing held to determine the order of priority for negotiation on the labor surplus area set-aside portion of a solicitation. The terms of the solicitation required the inclusion in the drawing of all small business concerns which submitted responsive bids on the non-set-aside portion of the solicitation, and the fact that debarment proceedings are pending does not affect bid responsiveness. The proper time for determining the effect of such proceedings on a firm's eligibility for a set-aside award is the time of that award.

2. GAO rejects an argument that a bid does not evidence a clear and unambiguous commitment to meet the solicitation's labor surplus area (LSA) requirement because the bid price allegedly is inconsistent with the bidder's indication that it will perform as an LSA concern. Under the facts and circumstances of this case, the bid price was not obviously inconsistent with the bidder's express commitment to perform as an LSA concern.

3. A contracting agency was not required to conduct a second drawing, held to correct improprieties in the first drawing, in a manner which a protester argues would have been less disruptive to the results of the first drawing than the manner chosen.

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4. No merit is found to a protester's assertion that it reached a binding agreement with an agency after the agency phoned and offered it the opportunity to supply a quantity of items listed in the written solicitation, and the protester accepted this offer. The agency disputes the allegation that it made an offer to the protester, and the protester's interpretation of the phone conversation is inconsistent with both the terms of the solicitation and the ordinary rules concerning government contract formation.

Kings Point Mfg. Co., Inc. and Geonautics, Inc. protest under the Defense Logisitics Agency's (DLA) invitation for bids (IFB) No. DLA100-83-B-0097 for ground troop helmets. The IFB was a partial small business/labor surplus area (LSA) set-aside. The protesters contend that DLA improperly allowed bidders who either were the subject of debarment proceedings or were ineligible for consideration as LSA concerns to participate in a drawing for order of negotiation priority under the set-aside. We deny the protests.

Gibraltar Industries, Inc. originally joined in these protests. It has since indicated its agreement with the agency's position and thus, in effect, has withdrawn its protest.

Background

The IFB solicited bids on a total quantity of 267,450 helmets--133,730 on an unrestricted basis and the remaining 133,720 on a set-aside basis. The three lowest bidders on the unrestricted portion--Pintlar Manufacturing Corp., Aqua-Aire Products, Inc., and Marmac Industries, Inc.--were found ineligible for award because, after bid opening, DLA instituted debarment proceedings against them.

The finding of ineligibility for award was made pursuant to Defense Acquisition Regulation (DAR) § 1-605.1(d) (DAC #76-41, December 27, 1982). That provision states that if no suspension of the contractor is in effect at the time debarment is proposed, bids shall not be solicited from and contracts shall not be awarded to the contractor pending a debarment decision unless an authorized official determines there is a compelling reason to do so.

DLA subsequently awarded 7,500 units to Gibraltar on the unrestricted portion. The remaining unrestricted quantity was awarded to Gentex Corporation. Thereafter, Gibraltar was requested to offer on the restricted portion in accordance with clause LD7 of the solicitation, which provides:

> "(b) Procedures.
>
> (1) Determining Eligibility.
>
> (A) To be eligible to participate in the set-aside portion of this acquisition, a small business concern must submit a responsive offer on the non-set-aside portion. . . .
>
> (2) Determining Priority for Award. Small business concerns eligible under (1) above will participate in the set-aside in the following order of priority:
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> GROUP 1. LSA concerns which are also small business concerns.
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> (A) A concern in this group which has received an award on the non-set-aside portion of an item shall first be requested to offer the same percentage of the set-aside portion. If a percentage of the set-aside portion of the item remains to be awarded, a drawing by lot shall determine the order of priority within this group for negotiations for the balance of the items.
>
> (B) If any part of the set-aside portion remains. . . all LSA small business concerns may submit a best and final offer for the remaining portion."

Gibraltar was the only small business concern claiming LSA eligibility which received an award on the non-set-aside portion of the solicitation. Consequently, DLA held a drawing by lot in order to ascertain the order of priority, within the group of remaining small business concerns claiming LSA eligibility, for negotiations for the balance of the items. Pintlar, Aqua-Aire and Marmac, all small businesses

claiming LSA eligibility, were excluded from the drawing because of the debarment proceedings pending against them.

After the drawing was held, however, the debarment proceedings against Pintlar were terminated. As a result, Pintlar once again became eligible to receive contract awards.

In the course of considering the effect of Pintlar's changed status on the previously-established order of negotiation priority, DLA came to the conclusion that all three bidders who had been excluded from the drawing should have been allowed to participate in it. It based this conclusion on its reading of section (b)(1)(A) of clause LD7 (quoted above) which provided that to be eligible to participate in the set-aside portion of the procurement, a small business firm must submit a responsive offer on the non-set-aside portion. DLA found that since all three firms in fact submitted responsive bids on the non-set-aside, they should have been included in the drawing.

Accordingly, a new drawing was held in which the three previously excluded firms were included. As a result, the order of negotiation priority changed, and Kings Point and Geonautics found themselves in less favorable positions than they previously occupied.

Effect of Debarment Proceedings

Kings Point and Geonautics argue that Pintlar, Aqua-Aire and Marmac were properly excluded from the first drawing because of the debarment proceedings pending against them. Kings Point asserts that DLA's reading of section (b)(1)(A) of clause LD7 is incorrect. It contends that the section only precludes the inclusion of a firm which is not a small business or which did not submit a responsive bid on the non-set-aside, but does not require that a firm be included just because it meets those conditions. Geonautics argues that each of the firm's eligibility for award was established at the time of award on the non-set-aside, and was not properly subject to change.

DLA contends that the exclusion of the firms from the drawing amounted to a premature determination of nonresponsibility. It asserts that section (b)(1)(A) recognizes the classic distinction between responsibility and responsiveness by providing for a small business firm's participation in the dawing provided that it submits a responsive bid on the non-set-aside. It also argues that unlike a matter of

responsiveness, which must be established from the bid itself at the time of bid opening, a bidder's status due to pending debarment proceedings is subject to change prior to the time of contract award and therefore should be determined at the time of contract award.

We agree with Kings Point that on its face section (b)(1)(A) appears only to establish certain prerequisites for participation in the set-aside and does not require that a firm be included in it simply because those prerequisities are met. Nevertheless, we believe that when that section is read in conjunction with section (b)(2), the better reading of clause LD7 is that it clearly contemplates the inclusion in the drawing of all small businesses which submitted responsive bids on the non-set-aside portion of the procurement. For example, section (b)(2) provides that firms eligible under section (b)(1) "will participate in the set-aside in the following order of priority," with LSA small businesses being given first priority and the drawing by lot being provided to establish priority within that group. Consequently, we conclude that under the terms of the solicitation, Pintlar, Aqua-Aire and Marmac were eligible for participation in the set-aside drawing despite the debarment proceedings pending against them.

Further, we agree with DLA that the proper time for determining the effect of debarment proceedings on a firm's eligibility for a set-aside award is the time for that award. We believe our decision in B-168496, January 16,1970, supports that position.

In B-168496, we held that an agency properly could award a contract to a bidder that proposed to use a subcontractor who was on the Department of Defense Consolidated List of Debarred, Ineligible and Suspended Contractors at the time of bid opening, but was removed from the list prior to award. We noted that while the DAR provided that bids should not be solicited from and contract awards could not be made to suspended or debarred bidders, there was no proscription against a suspended or debarred firm submitting a bid even though it could not receive award unless removed from the list. We also noted that debarment of firms is solely for protection of the government when found warranted and that the agency could consent to a contract with a debarred firm when doing so was in the best interest of the government. We concluded on the basis of these facts that a firm's status at the time of contract award, rather than the time of bid opening, was determinative of its eligibility for contract award.

Although that decision involves a suspension made prior to bid opening and this case involves a proposed debarment instituted after bid opening, we believe that the same principles are applicable here. Therefore, in our view, the proper time for determining the effect of debarment proceedings on a firm's eligibility for award under the set-aside portion of this procurement was at the time of contract award rather than at the time of the drawing by lot or the time of award on the non-set-aside portion of the procurement.

This aspect of King Point's and Geonautics' protests is denied.

Pintlar's LSA Eligibility

Kings Point argues that Pintlar's bid did not evidence a clear and unambiguous commitment to meet the IFB's LSA requirement. Kings Point notes that a firm's commitment to meet an LSA requirement is a matter of responsiveness, which must be established at the time of bid opening. Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443. It contends that a bid which does not clearly and unambiguously make this commitment cannot properly be included in the first priority group for participation in the set-aside: "LSA concerns which are also small business concerns." Therefore, Kings Point asserts, Pintlar was not eligible to participate in, and should not have been included in, either the first or second drawings held to determine the order of priority for negotiation among those firms.

Kings Point's argument rests on the premise, first put forth by Geonautics, that at Pintlar's bid price of $75 per helmet, it is mathematically impossible for Pintlar to meet the required LSA commitment. In this respect, clause LD7(c)(3) of the IFB requires that to be considered an LSA concern, the aggregate costs incurred by a concern on account of manufacturing or production performed in LSAs must be more than 50 percent of the contract price. Kings Point calculates that the costs Pintlar must incur in non-LSAs exceed 50 percent of its bid price.

Kings Point notes that the specifications require the use of Kevlar fiber in the helmets, and asserts that the fiber is available only from a single source, which produces it in a non-LSA. According to Kings Point, the cost of the fiber is $11.65 per pound, the absolute minimum amount of fiber per helmet needed to meet the specifications is 3.19 square yards, and the absolute minimum weight per yard is 13.7 ounces. Kings Point then calculates that the absolute

minimum weight of the fiber for each helmet must be 2.73 pounds, which at a price of $11.65 per pound, yields a cost of $31.80 per helmet for fiber. After adding the cost of government-furnished material (GFM) of $6.63 per helmet,[1] Kings Point concludes that the non-LSA cost per helmet is at least $38.43, or more than 50 percent of the contract price of $75.

Consequently, Kings Point contends that even though Pintlar indicated in its bid that the aggregate costs it would incur in an LSA amount to more than 50 percent of its contract price, its bid is ambiguous because its bid price is inconsistent with that commitment. In support of its position, Kings Point cites our decisions in Kings Point Mfg. Co., B-205712, April 5, 1982, 82-1 CPD 310 and B-163181, February 7, 1968.

In Kings Point, a bidder indicated in its bid that more than 50 percent of its contract costs would be incurred in a designated LSA, but in another part of the bid identified a different place of performance which was not an LSA. We held that the bid was ambiguous as to whether the requisite LSA commitment had been made and that it could only be considered as a non-LSA bid.

In B-163181, a bid for 25 inch fluorescent fixtures was found nonresponsive because information included in the bid indicated a maximum shipping container dimension which was less than the required size of the fixture. We found that because a fixture of the required size could not fit into such a container, the bid was ambiguous and could not be accepted.

This case is distinguishable from the cases cited by Kings Point. In those cases, information included in the bids clearly established the existence of an amibiguity on the face of the bid. Here, we do not agree that it is obvious that Pintlar's bid price compromises the firm's express commitment to perform as an LSA concern. First,

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[1] Gibraltar, which does not want a redrawing, attempts to rebut Kings Point's calculations by arguing that GFM should not be treated as a non-LSA cost. However, the contracting officer advised each bidder in writing that GFM, transportation and profit were considered non-LSA costs. Therefore, for the purposes of argument, we will assume that Kings Point is correct.

Kings Point's conclusions are based on calculations that use self-serving assumptions about material cost to Pintlar, the amount of fiber needed, and fiber weight. Second, even if the contracting officer had seen fit to make the calculations Kings Point does, and had made the same assumptions as to fiber amount and weight, he also would have had to know the cost to the contractor of the Kevlar fiber. Finally, even assuming that the contracting officer knew the "going price" of the fiber, we cannot conclude he necessarily could presuppose that Pintlar paid that price for it. We believe it is possible that Pintlar could have negotiated a more favorable price with the manufacturer; already had the fiber as the result of an earlier purchase at a lower price; or could purchase it more cheaply from someone in that position.

In short, we do not accept Kings Point's argument that Pintlar's bid was ambiguous with regard to its LSA eligibility. We do not consider its $75 bid price as necessarily inconsistent with its commitment to perform as an LSA.

We note here that Geonautics suggests the cost breakdown requested by the contracting officer for the purposes of finally determining LSA eligibility should have been requested prior to determining a firm's eligibility for participation in the drawing, rather than afterwards. We disagree. Except for the promise to incur the requisite proportion of costs in LSAs, information pertaining to a firm's LSA eligibility concerns the firm's responsibility--its ability to meet the material terms of the contract--and need not be established until the time of contract award. See Uffner Textile Corporation, supra. Since the contracting officer's request for a cost breakdown from each bidder clearly was for the purpose of establishing the bidder's responsibility, we find nothing improper in the timing of his request. See Chemtech Rubber, Inc., 60 Comp. Gen. 694 (1981), 81-2 CPD 232.

Geonautics' and Kings Point's protests concerning Pintlar's LSA eligibility are denied. For the record, however, we note that the contracting officer found Pintlar nonresponsible and referred the matter to the Small Business Administration for possible issuance of a certificate of competency (COC). Pintlar, however, declined to file for a COC and was eliminated from further consideration for contract award.

Conduct of the Second Drawing

Kings Point argues that even if it was proper for the agency to hold a second drawing to include Pintlar, Aqua-Aire and Marmac, it should have been done in the manner which was least disruptive to the results of the initial drawing. The approach Kings Point suggests is to hold a supplemental drawing for the three bidders excluded from the first drawing. Each bidder would draw a number which would be used to establish its position within the order of priority already set by the initial drawing. Thus, if a firm in the supplemental drawing drew second position, it would be placed second in the order of priority established by the first drawing and the other firms would be moved down one position.

Kings Point asserts that a complete new drawing, since it is prejudicial to the bidders who participated in the first drawing, should not be undertaken merely because of a procedural irregularity. It cites our decision in 44 Comp. Gen. 661 (1965) which involved a drawing held to determine which of two tie bids would receive the award. We found that the agency's failure to allow the tied bidders to witness the drawing would not justify a redrawing even though this failure was inconsistent with the applicable regulatory requirements. We stated that:

> "Since the official record establishes that the award was made to the lowest eligible bidder, we would not be justified in disturbing the award because a procedural regulation of the type here in question was not strictly followed where to do so would give another eligible bidder a second opportunity to compete for the award."

The cited decision clearly is inapposite. The exclusion of Pintlar, Aqua-Aire and Marmac from the first drawing cannot fairly be characterized as a mere procedural irregularity. Their exclusion was contrary to the terms of the solicitation as well as inconsistent with a proper determination of their eligibility to participate in the set-aside. We do not regard these matters as of minor significance, and we believe that corrective action on the agency's part was clearly required here.

While Kings Point's concern over the disruption of the order of precedence established under the first drawing is understandable and its proposed alternative to a complete redrawing is attractive, we do not view that approach as a mandatory one. In our view, it was within the agency's discretion to conduct a complete new drawing, and we note that the agency did so in an attempt to achieve fairness to all bidders. Thus, although Kings Point's approach may have been less disruptive to the results of the original drawing, we cannot conclude that the agency's approach was unreasonable.

Alleged Binding Agreement
Between DLA and Geonautics

Geonautics contends that it received an offer from the agency after the first drawing to supply 10,000 helmets, and that it accepted this offer. It therefore argues that it has a binding agreement with the agency for the purchase of those helmets regardless of the results of the second drawing. The agency disputes this contention.

DLA states that after the first drawing, it did place phone calls to various firms, including Geonautics, and requested that they offer on various portions of the set-aside quantity. Thus, it is DLA's position that it requested an offer from Geonautics rather than making an offer to it.

The agency asserts that the terms of the solicitation support its position. It cites clause L63 of the IFB, which provides:

> "L63 Unilateral Award Procedures on Partial Set-asides . . .
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> (a) Offers obtained under the provisions of the set-aside clause. . . shall be in writing and shall include (i) agreement as to the established set-aside price . . . , (ii) agreement as to the required delivery, (iii) agreement that all other terms and conditions of the solicitation will apply. . . ." (Emphasis added.)

Subsection (c) of the clause goes on to provide that "award of the set-aside portion will be made utilizing Standard Form 26."

Generally, the intention of the parties determines whether a contract arises before a contemplated writing is executed. Motorola, Inc., B-191339, October 19, 1978, 78-2 CPD 287. Furthermore, in determining whether a binding commitment exists without a writing, we will focus on whether the actions of the government would lead a reasonable bidder to believe that such actions were intended for it to act upon without obtaining a written confirmation that it was the intended contractor. Id.

Here, as evidenced by clause L63, the solicitation clearly contemplated that written offers first would be solicited and obtained from eligible concerns and that contract award would then be made in writing. Consequently, while the exact content of DLA's phone conversation with Geonautics is in dispute, DLA's position is consistent with the terms of the IFB. It is also consistent with the ordinary rules of offer and acceptance in government contracting, in which the IFB is a request for an offer, the bid is the offer and the government's award is the acceptance. See Vanguard Industrial Corporation--Reconsideration, B-204455.2, March 1, 1982, 82-1 CPD 174.

We conclude that given the solicitation's clear indication of the agency's intent to solicit written offers prior to making a written award, as well as the ordinary rules concerning government contract formation, it was unreasonable for Geonautics to assume that a binding agreement arose from its phone conversation with DLA. Accordingly, its protest on this issue is denied.

Conclusion

Both Geonautics' and Kings Point's protests are denied.

Milton J. Socolar

for Comptroller General
of the United States