

DECISION

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

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FILE:

B-213310.2

DATE: November 30, 1984**MATTER OF:**

D. J. Findley, Incorporated

DL606990

DIGEST:

1. Bid submitted in a corporate name may be accepted even though the corporation had not paid its Ohio franchise tax at the time of bid opening and was therefore subject to having its articles of incorporation canceled because Ohio had not in fact proceeded with cancellation and the bidder paid the tax prior to award.
2. Post-bid opening protest alleging that it would be improper to permit contractor to commence performance without required security clearances is untimely because that situation was anticipated in the solicitation, which provided for federal employees to screen correspondence for classified materials and to accompany the contractor's personnel in secure areas, pending clearance. If the protester thought such an arrangement improper, it was incumbent upon it to protest the solicitation provision prior to bid opening.
3. Protest that award to firm which employs a former government employee resulted in that individual's violation of the Ethics in Government Act of 1978 (18 U.S.C. § 207), a criminal statute, does not come within GAO's jurisdiction, since the interpretation and enforcement of criminal laws are for the Department of Justice. GAO's role is to determine whether the former employee's presence resulted in bias on behalf of the awardee, and the protester has not offered evidence of that situation.
4. New bases of protest presented after filing of initial protest must independently satisfy timeliness criteria. Consequently,

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when initial protest questions propriety of one of the low bidder's representations, subsequent protest questioning propriety of other representations filed 3 months later is untimely.

5. Where, in a protest filed 2 months prior to bid opening, the then-incumbent contractor questioned whether the historical workload figures in the IFB were the most current available and then withdrew its protest prior to bid opening, and the current protester was a party to that earlier protest, the current protester may not revive the same issue and again protest the currency of the solicitation historical workload figures 3 months after bid opening, since it gained actual notice of the alleged deficiency through its participation in the earlier protest.

D. J. Findley, Inc., protests award to Caro, Inc. under invitation for bids No. F33601-83-B-9161 issued by Wright-Patterson Air Force Base for a contractor to order, store, and distribute Air Force forms and publications. Findley contends that the solicitation should be canceled because the Air Force did not use the best workload estimates available and that Caro's bid should be rejected in any event because that firm (1) was unincorporated at time of bid opening; (2) lacks the necessary security clearances; and (3) employs an ex-Air Force employee in violation of the Ethics in Government Act. We deny the protest in part and dismiss it in part.

The solicitation, issued September 16, 1983, as a 100 percent set-aside for small business firms, provided for award of a 1-year contract with two 1-year options. Four bids were received by the scheduled bid opening date, February 6, 1984, with Caro's bid of \$1,053,000 low and Findley's bid of \$1,088,000 second low. Findley filed a protest with this Office within 10 working days of bid opening and has supplemented that protest a number of times subsequently.

In its initial protest, Findley alleged that Caro's bid was "nonresponsive" because it failed to bind any company to perform since Caro allegedly had not paid its required franchise tax to Ohio and therefore could not exercise powers to act as a corporation. Findley further argued that Caro lacks integrity and therefore is non-responsible because it falsely certified that it was a corporation under the laws of Ohio when it had forfeited its corporate status by failing to pay the Ohio franchise tax.

In reply, the Air Force argues that although the relevant Ohio statute (Ohio Rev. Code Ann. § 5733.20 (Page 1980)) directs the Secretary of State to cancel articles of incorporation upon receiving notice from the state revenue authorities that a firm's franchise tax remains unpaid 90 days after the due date, Caro's articles of incorporation were not in fact canceled. Additionally, the Air Force reports that Caro has furnished a certification from the State of Ohio dated February 23, 1984 stating that the firm is current in its payment of all Ohio franchise taxes.

As a general rule, an advertised award may not be made to an entity different from that which submitted the bid, Protectors, Inc., B-194446, Aug. 17, 1979, 79-2 CPD ¶ 128, and where a bid represents that it was submitted by a corporation, it should be disregarded if no such corporation exists. 41 Comp. Gen. 61 (1961). Otherwise, irresponsible parties could undermine sound competitive bidding procedures by submitting bids that could be avoided or backed up by the real principals as their interests might dictate. Protectors, Inc., supra.

Here, however, Caro's articles of incorporation were never revoked, so that the firm's legal existence was continuous throughout the time period in question. Consequently, Caro's bid fully bound the corporation and was therefore responsive. This being the case, its representation as to its corporate status was also proper.^{1/}

^{1/}In any event, Findley's argument that Caro is non-responsible because the filing of an allegedly "false" representation as to its corporate status reflects a lack

In its initial protest, Findley also maintained that the solicitation gave an unfair competitive advantage to bidders which do not have cleared personnel because the Air Force will provide substitute personnel for 90 days without a reduction in price. Findley also argued that Caro could not obtain the required security clearances for its employees within the time needed for contract performance.

With respect to the first allegation, solicitation paragraph H-98B advised bidders that government personnel would supplement the contractor's work force to screen mail for classified material and to provide escort in restricted areas as required if security clearances were not received by the start of the contract. Whether the contractor would bear the cost of the supplemental government personnel would depend on whether the delay in receipt of security clearances was caused by the contractor's late submission of requests for clearances of its employees. Since the possible use of supplemental government personnel was explained in detail in the solicitation, this aspect of the protest concerns an alleged impropriety in the solicitation which was apparent prior to bid opening and Findley's protest, filed after bid opening, is untimely.^{2/} 4 C.F.R. § 21.2(b)(1)

^{1/}(cont) of integrity represents a challenge to the contracting officer's affirmative determination of responsibility, which our Office normally does not review absent circumstances not shown to be present here. Furthermore, since Caro is a small business, any determination by a contracting officer that it is nonresponsible would have to be referred to the Small Business Administration for consideration under its Certificate of Competency procedures.

^{2/} In a supplement to its protest filed with our Office a month later, Findley argued that any use of government personnel to assist the contractor would violate the restrictions against personal service contracts. This argument is also untimely.

(1984). As to the allegation that Caro will not be able to obtain security clearances in time to commence contract performance, the Air Force's provision of supplemental government personnel while clearances are being obtained obviates the need for the contractor's employees to be cleared by the date performance commences. This is consistent with our position that the procuring agency may allow reasonable time for the awardee to obtain required security clearances even though performance is delayed. See Career Consultants, Inc., B-200506.2, May 27, 1981, 81-1 CPD ¶ 414. In any event, contract award has been delayed pending resolution of Findley's protest, allowing more than enough time for Caro to obtain the required clearances under any analysis.

The final argument raised in Findley's initial protest concerns the Ethics in Government Act of 1978, 18 U.S.C. § 207 (1982). According to Findley, because Caro's program manager on this contract worked in the Wright-Patterson Publication and Distribution Center as a government employee within the last 2 years, award of the contract to Caro would result in violation of those provisions of the Act prohibiting a former government employee from representing anyone before the government in any matter in which he participated personally and substantially or which was under his official responsibility.

The Air Force replies that the individual in question was a relatively low-grade employee who was formerly employed in the Publications and Distribution Branch when that function was performed in-house, who was discharged when the function was converted to contract, and who has been an employee of the incumbent contractor for the past year. The Air Force further advises that this former employee's duties did not involve contracting for these services and that he never participated in any way in any matter related to the contract for publication distribution services.

We dismiss this aspect of the protest. 18 U.S.C. § 207 is a criminal statute whose enforcement is not encompassed by our jurisdiction. Sterling Medical Associates, B-213650, Jan. 9, 1984, 84-1 CPD ¶ 60. The

B-213310.2

interpretation and enforcement of this statute is primarily a matter for the Department of Justice. Polite Maintenance, Inc., B-194669, May 10, 1979, 79-1 CPD ¶ 335.

Our interest, within the confines of a protest, is to determine whether any action on the part of this former government employee resulted in prejudice for, or bias in behalf of, the proposed awardee. National Service Corporation, B-205629, July 26, 1982, 82-2 CPD ¶ 76. The protester has submitted no evidence to suggest that this former employee exerted any improper influence on the award outcome or that Caro received any improper consideration. Because the protester has presented no evidence on this issue, we find no basis within our review standard to question the award.

In a supplement to its protest, Findley questioned Caro's representations that it (1) is a small business concern owned and controlled by socially disadvantaged individuals; (2) is a woman-owned business; and (3) has filed all required compliance and affirmative action reports required under the Equal Opportunity clause. These objections to Caro's bid, first filed with this Office on May 14, 1984, more than 3 months after the February 6 public bid opening and a month after Findley's initial protest questioning another representation in Caro's bid, are not timely. We believe that, in general, a protester which is challenging an award or proposed award on one ground should diligently pursue information which may reveal additional grounds of protest. S.A.F.E. Export Corporation, B-213026, Feb. 10, 1984, 84-1 CPD ¶ 165. In this regard, separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of our Bid Protest Procedures. Annapolis Tennis Limited Partnerships, B-189571, June 5, 1978, 78-1 CPD ¶ 412. Consequently, whatever objections Findley had concerning Caro's representations should have been presented with its initial protest, not piecemeal.

Findley also protests the workload estimates contained in the solicitation, arguing that they do not represent the best data available. By letter of May 10, 1984, Findley asserts that it was first made aware of this alleged deficiency when it received the historical workload figures for 1982 and 1983 as a result of a Freedom

of Information Act inquiry. Findley further contends that the only recent workload estimates, for November 1983, which were added by amendment as a result of an earlier protest, are incomplete and inaccurate.

An earlier protest involving this same procurement was filed by the incumbent contractor, Crown Laundry & Dry Cleaners, Inc. with this Office on October 5, 1983, during the period between issuance of the solicitation and receipt of bids. Crown requested that more current and accurate figures than the 1980 workload figures be used in the solicitation. Crown's protest included a copy of its workload report for the period October, 1982, through September, 1983, setting forth the actual number of transactions for each item in that period. The Air Force then amended the solicitation by adding a column labeled "November, 1983" to the workload figures; Crown withdrew its protest; and we closed the case.

Our files show that Findley had actual knowledge of Crown's protest and asked to be made a party to that earlier protest. Findley, therefore, was aware in early December 1983, 2 months prior to bid opening, that the incumbent contractor had protested the currency and accuracy of the workload figures contained in the IFB. When the incumbent withdrew its protest, Findley did not independently pursue the matter. Its protest on this issue was not filed with our Office until 3 months after bid opening. Findley asserts that it was not aware of this basis of protest until early May 1984 when it was told by a former employee of the incumbent contractor that the workload figures were understated and that it protested promptly after it had requested, and received, certain materials under the Freedom of Information Act. In view of the fact that on its face the solicitation provided 1980 workload figures and that well before bid opening Findley was aware that the incumbent contractor had raised the issue of their accuracy, we do not believe a protest on this basis filed some 3 months after bid opening has been diligently pursued and it is dismissed.

for 
Comptroller General
of the United States