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DECISION

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

FILE: B-215472.2 **DATE:** April 12, 1985

MATTER OF: Atlantic Petroleum Corporation

DIGEST:

1. GAO does not review decisions to effect procurements under the 8(a) program and does not consider protests of 8(a) awards, absent a showing of possible fraud or bad faith on the part of government officials, or an allegation that the Small Business Administration violated its regulations. In order to show bad faith, a protester must offer irrefutable proof that an agency's action was taken with the specific and malicious intent to injure the firm.

2. Although an agency's decision to refuse to adjust an estimated fair market price for fuel oil in an 8(a) firm's favor is not shown to be an action taken in bad faith, it is nonetheless held to be unreasonable where the weight of the evidence shows that the 8(a) firm could not have performed at the agency's offered price without suffering a loss on the subcontract.

Atlantic Petroleum Corporation (Atlantic) protests that the Defense Logistics Agency, Defense Fuel Supply Center (DFSC), has acted in bad faith by failing to negotiate with the Small Business Administration (SBA) a fair market price (FMP) for a particular fuel oil item under request for proposals (RFP) No. DLA600-84-R0134, reserved for 8(a) subcontracting. Atlantic asserts that DFSC's action was taken with the specific intent to harm Atlantic by prohibiting the firm from accepting an award to which it was entitled.

We deny the protest.

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Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982), authorizes the SBA to enter into contracts with any government agency with procuring authority and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. The contracting officer is authorized "in his discretion" to let a contract to the SBA upon such terms and conditions as may be agreed upon by the procuring agency and the SBA. Hence, we do not review decisions to effect procurements under the 8(a) program, and we do not consider protests of 8(a) awards, absent a showing of possible fraud or bad faith on the part of government officials, Washington Patrol Service, Inc.--Reconsideration, B-214568.2, July 17, 1984, 84-2 CPD ¶ 57, or an allegation that the SBA violated its regulations. M&M Fuel Co., B-215472, Aug. 2, 1984, 84-2 CPD ¶ 147. Because Atlantic's initial submission to this Office made a showing of possible bad faith, we have considered the protest on the merits. However, the firm's charge that DFSC willfully intended to deny it the award for this item cannot be substantiated.

Background

Under the subject RFP, four fuel items were reserved for Atlantic through the SBA's proposed contract with DFSC. The SBA (with Atlantic's concurrence) agreed to accept three of the items at the FMPs established by DFSC, but would not accept the FMP established for the fourth item, which required the delivery of 15 million gallons of number 6 fuel oil to the Norfolk Naval Shipyard for the period from August 1, 1984, through July 31, 1985.

In accordance with a Memorandum of Agreement dated December 5, 1979, between the SBA and the Defense Logistics Agency (DLA), FMPs for 8(a) contracts are to be computed by means of the following formula:

A. The procuring agency determines the highest anticipated low bid award price for a similar product to be awarded within the commercial market area; (from which is subtracted)

B. The freight rate from the supplier to the using activity for the competitive bid; (to which is added)

C. The freight rate from the 8(a) subcontractor's source of supply to the using activity.

Under this formula, the original FMP for the fuel oil item in question was computed as follows:

A.	\$ 0.67071/gallon	- The highest competitive low bid award price in the Norfolk area.
B.-	\$ 0.030971/gallon	- The truck transportation cost of the competitive bidder.
C.+	\$ 0.005952/gallon	- The transportation cost of the 8(a) subcontractor (required to be by barge, and anticipated to be from the Amoco terminal in Chesapeake, Virginia, to the Norfolk Naval Shipyard).
=	\$ 0.645691/gallon	

The SBA and Atlantic complained that this FMP was too low, principally because DFSC had computed an overly high figure for the competitive bidder's truck transportation cost. In response, DFSC reduced this figure to \$0.018625/gallon, and, accordingly, the new FMP was set at \$0.658037/gallon.

However, the SBA then asked for a further increase in the FMP because Atlantic would have to pay substantial "through-put," or storage and transit charges, if it obtained the fuel oil item from the Amoco terminal in Chesapeake, Virginia. Instead, the SBA requested that DFSC recompute the FMP by allowing Atlantic additional barge transportation costs so that the firm could obtain the fuel oil from a Richmond, Virginia, supplier without having to pay "through-put" charges and have the fuel oil shipped down the James River to the Norfolk facility. Atlantic proposed that the adjusted FMP under this transportation scheme should be $0.667567/gallon.

DFSC refused to accede to the request on the grounds that the highest anticipated award price in the Norfolk area included all costs such as "through-put" charges[1/] and because barge shipment from Richmond to Norfolk was simply not a normal commercial business practice; in DFSC's view, such a shipment would reflect needless transportation of the fuel oil both up the James River to Richmond and then back down the river to Norfolk.[2/] Essentially, DFSC concluded that an FMP established under the SBA's scheme would be artificially inflated.

The SBA continued to assert that the $0.658037/gallon FMP offered by DFSC was not reasonable since Atlantic would suffer a loss if it were forced to accept the 8(a) subcontract at that price. The SBA appealed under the administrative process to the Director of DLA, who, by final decision of October 5, 1984, refused to allow any upward adjustment of the FMP and denied SBA's appeal.

1/ The record sets forth no conclusive evidence on this point. The SBA asked DFSC to confirm that the FMP (with supply from Chesapeake) included "through-put" charges. DFSC responded that the barge rate from Chesapeake to Norfolk did not include such charges because the per gallon cost of the product normally includes them.

2/ According to DFSC, in 1982, some 2.2 million gallons of the fuel oil item were shipped by barge from Richmond to Norfolk, representing only 15 percent of the present requirement.

The SBA conducted no further negotiations on the issue with DFSC,[3] and Atlantic subsequently protested DFSC's action to this Office. The firm asserts that the $0.658037/gallon price was so low that it was less than the actual per gallon origin, or cost, price for the fuel oil that Atlantic would have had to pay if it had obtained the item from suppliers in the Norfolk area, rather than from its supplier in Richmond. Atlantic asserts that this fact was known to DFSC and, thus, is clear evidence of the agency's bad faith in refusing to adjust the FMP so that Atlantic would be able to accept the 8(a) subcontract award with even a minimum degree of profitability. Atlantic contends that DFSC showed bad faith in refusing to allow for transportation costs from Richmond to Norfolk, since the Memorandum of Agreement between the SBA and DLA indicates that the 8(a) subcontractor has the discretion to choose its own source of supply.

Prior to our resolution of the matter, DFSC has awarded the fuel oil requirement in issue to another firm on the open market. DFSC states that it has made the award in the face of the protest because of the urgent need for this fuel oil item for steam generation used in shipyard operations.

Analysis

DFSC urges that this Office should dismiss the protest because we do not have bid protest jurisdiction in the

3/ The SBA's Standard Operating Procedures, section 80-05, paragraph 68.f. (September 4, 1979), provide that if the price proposed by the procuring agency is not considered to be "fair and reasonable" or to constitute a "fair market price," further negotiations will be conducted or negotiations will be suspended, whichever is considered most appropriate in the situation. (In a recent report, we criticized this procedure, since it was our view that the procuring agency is responsible for setting the "fair market price," while the SBA is responsible for assuring that the 8(a) firm receives a "fair and reasonable" price. We believed that the SBA was erroneously equating the two concepts. See "Proposals for Minimizing the Impact of the 8(a) Program on Defense Procurement" (GAO/PLRD-83-4, October 12, 1982).)

matter and relies upon our decision in Amertex Enterprises Ltd., 63 Comp. Gen. 22 (1983), 83-2 CPD ¶ 461, as support for its position. That reliance is misplaced. In Amertex, we dismissed a protest against the Defense Personnel Support Center's determination of a particular FMP because the administrative appeal process for resolution of 8(a) FMP disputes between the SBA and DLA had not yet been exhausted. The present situation is fundamentally different because the SBA Administrator has already appealed to the Director of DLA for adjustment of the FMP in issue, which appeal has been denied by the Director in a final decision. Therefore, this Office has jurisdiction to consider Atlantic's protest alleging bad faith on the merits since the administrative appeal process has been exhausted.

In order to show bad faith, however, a protester must offer irrefutable proof that an agency action was taken with the specific and malicious intent to injure the firm. Washington Patrol Service, Inc.--Reconsideration, B-214568.2, supra; Jack Roach Cadillac, Inc., B-210043, June 27, 1983, 83-2 CPD ¶ 25. We do not believe that Atlantic has made such a showing here. The firm has already accepted, through the SBA, DFSC's offered FMPs for three out of the four fuel oil items under the RFP. Thus, we cannot conclude that DFSC intended to deprive Atlantic of an award for the remaining fuel oil item by setting an unacceptable FMP, and the charge of bad faith cannot be substantiated. However, the record indicates that DFSC acted unreasonably in refusing to adjust the FMP of $0.658037/gallon as originally established.

The Defense Acquisition Regulation (DAR), § 1-705.5(b)(2), reprinted in 32 C.F.R. pts. 1-39 (1983), applicable to this procurement, provides that estimated FMPs shall be established on the basis of "likely costs under normal competitive conditions rather than on the basis of the lowest possible cost."4/ In DFSC's view, the FMP was fairly computed under the formula set forth in the Memorandum of Agreement between the SBA and DLA, and DFSC's refusal to adjust the FMP in Atlantic's favor was founded on the belief that transportation of the fuel oil from Richmond to Norfolk was not a "normal competitive condition" of supplying the requirement. DAR, § 1-705.5(b)(2). Accordingly, DFSC concluded that the per gallon price should not be artificially raised to permit Atlantic the use of a Richmond supplier so as to enable the firm to avoid the "through-put" charges that would result from using a Norfolk-area supplier.

However, we find evidence that Atlantic could not have procured its fuel oil supplies in the Norfolk area at the per gallon FMP of $0.658037 without suffering a loss on the 8(a) subcontract (an assessment which the SBA concurred in and repeatedly brought to DFSC's attention). Two Norfolk area suppliers, ATC and Ultramar, had, at the time, respective per gallon posted origin prices of $0.6845 and $0.6592; in each case, a per gallon cost to Atlantic which would have exceeded DFSC's original FMP. Although DFSC states that there are six other suppliers in the Norfolk area from whom Atlantic could have obtained the fuel oil, the agency has not identified those other suppliers. Atlantic believes that these suppliers would be small-volume firms whose per gallon origin prices would be higher than those posted by ATC and Ultramar.

Since DFSC has not identified the other six suppliers and their posted origin prices applicable at the time, which we think it was incumbent upon the agency to do in

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4/ DFSC states that the contracting officer, in computing the FMP, relied upon the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.806-1(a) (1984). In our view, the FAR is not applicable to this procurement because the RFP was issued prior to April 1, 1984, the FAR's effective date. In any event, § 9.806-1(a) closely follows the language of DAR, § 1-705.5(b)(2) by providing that the estimated FMP "shall be based on reasonable costs under normal competitive conditions and not on lowest possible costs."

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responding to the protest, the only evidence on the record thus supports Atlantic's assertion that the firm would have lost money on the 8(a) subcontract at DFSC's offered FMP if it had obtained the fuel from a Norfolk-area supplier. For that matter, as Atlantic points out, DFSC has never established that there were non-8(a) firms in the Norfolk area who could have supplied DFSC directly at the $0.658037/gallon price. Hence, the facts as set forth indicate that DFSC acted unreasonably in not adjusting the FMP to reflect the position in which Atlantic, as a disadvantaged firm, found itself with respect to the existing market conditions in the Norfolk area, despite the fact that the FMP itself may have been computed in accordance with the formula set forth in the Memorandum of Agreement.

Therefore, although we deny the protest under our standard of review with regard to 8(a) procurements because a showing of bad faith has not been made, we are advising the agency by means of this decision of our concerns in the matter.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel