



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Exquisito Services, Inc.
File: B-222200.3
Date: July 17, 1986

DIGEST

Determination to set aside procurement for full food services at military base under section 8(a) of the Small Business Act may be made after bid opening where agency reasonably determined that cancellation of total small business set-aside procurement and subsequent 8(a) award were clearly in the government's interest due to urgency of the requirement and the necessity of maintaining continuous food services after expiration of incumbent's contract which did not allow sufficient time to complete small business set-aside procurement.

DECISION

Exquisito Services, Inc. (ESI), protests the post-bid-opening cancellation of invitation for bids (IFB) No. F41800-86-B-A059, issued as a total small business set-aside by the Department of the Air Force for full food services at Lackland Air Force Base, Texas. ESI also protests the subsequent sole-source award by the Air Force of a contract for this same requirement to Aleman Food Services, Inc. (Aleman), pursuant to the Small Business Administration's (SBA) section 8(a) program.^{1/} ESI, which is itself an eligible minority-

^{1/} 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. Marine Industries Northwest, Inc.; Marine Power and Equipment Co., 62 Comp. Gen. 205, 208 (1983), 83-1 CPD ¶ 159.

owned small business under SBA's section 8(a) program,^{2/} contends that the Air Force illegally canceled the competitive solicitation under which ESI was potentially in line for award. ESI requests that the section 8(a) contract be terminated, that the canceled solicitation be reinstated, and that the Air Force proceed to select the low, responsive and responsible bidder under the competitive solicitation.

ESI also filed suit in the United States District Court for the Eastern District of Louisiana, Exquisito Services, Inc. v. United States of America, Civil Action No. 86-1847, seeking injunctive and declaratory relief. The court has expressed an interest in our decision and performance of the contract has been stayed pending our ruling.

We deny the protest.

BACKGROUND

The solicitation was issued on January 17, 1986, and, as amended, established March 18, 1986, as the bid opening date. Seven bids were received as follows:

Bidder	Total Price--basic and 2 option years
Mid-East	\$25,679,844.20
Dragon	\$26,385,771.70
Exquisito	\$27,258,303.00
Aleman	\$27,902,622.76
WD & M	\$29,273,013.00
Taylor Group	\$30,832,008.61
Falcon	\$30,907,049.50

The low bidder withdrew its bid because of a mistake in its bid and the second low bidder was found to have submitted a nonresponsive bid, leaving ESI and Aleman as the low bidder and the second low bidder, respectively. In early April, the Air Force requested ESI to verify its bid. ESI did so, but concurrently alleged that certain clerical errors existed in

^{2/} We have been advised by the Air Force that on June 6, 1986, the Dallas Regional Office of the SBA made a determination that ESI is no longer a small business for the purposes of food services requirements and that ESI is currently appealing this determination.

its bid.^{3/} Also, on April 17, the contracting officer informed ESI that the individual sureties listed in its bid bond did not have sufficient net worth; this deficiency was corrected by ESI on April 21. At about this time, an Air Force procurement official was informed by officials at Barksdale Air Force Base, Louisiana, where ESI was performing a \$1.2 million mess attendant contract, that ESI was experiencing financial problems meeting employee payrolls, that its company checks were "bouncing," that the Department of Labor was considering an investigation, and that ESI had recently filed for bankruptcy.

The Air Force, on April 8, issued a "preliminary notice" to the incumbent, Falcon Management, Inc., that the Air Force "may" exercise an option to extend the food services being performed under the existing contract, which otherwise was to expire on April 30. However, because of oversight, the Air Force failed to exercise the option until April 17, even though the contract specifically required that such an extension "be effected by written notice mailed . . . to the contractor not less than 15 calendar days prior to expiration of the contract." Falcon refused to honor the late exercise of the option and, instead, submitted what the Air Force considered to be an unreasonable "counter-offer" on April 21, 1986.^{4/} Faced with time constraints and the necessity of maintaining continuous food services for military personnel, the contracting officer considered canceling the solicitation and performing the services in-house or canceling the solicitation and awarding a contract to the SBA under the 8(a) program. The contracting officer chose not to negotiate a contract or a modification of the existing contract on a sole-source basis with the incumbent for an interim period pending completion of the competitive procurement because he

^{3/} In response to the Air Force request, ESI submitted "verification" letters, which included the alleged clerical errors, on three separate occasions to the Air Force--April 2, 10, and 22, 1986. The clerical errors amounted to approximately \$3,000 out of a total bid price of approximately \$27 million and would have had no effect on the relative standing of bidders.

^{4/} The "counter-offer" by Falcon was in the amount of \$853,950.75 per month for 2 months. This represented an increase of \$154,440.98 per month compared with the previous contract. The Air Force rejected the "counter-offer" and did not attempt to negotiate a more reasonable price.

believed that unspecified provisions of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175, prohibited him from doing so. The contracting officer also did not attempt to competitively negotiate an interim contract pending completion of the competitive procurement because he believed there was insufficient time. Rather, the contracting officer awarded the contract to the SBA which had submitted an 8(a) subcontract proposal on behalf of Aleman even though an Air Force official had previously proposed to the SBA that the 8(a) subcontract award be split between ESI and Aleman.^{5/} The protest by ESI followed.

CONTENTIONS BY ESI

The thrust of ESI's complaint is that the Air Force did not have a "compelling reason" to cancel the solicitation after bid opening. ESI argues that the Air Force's requirement to provide for interim food services during the short period of time necessary to complete the competitive procurement did not provide a valid basis for canceling the competitive solicitation and awarding a sole-source 8(a) contract. ESI maintains that the Air Force had a variety of possible alternative contract actions available to it in order to provide for any short-term need for continuous food services. According to ESI, the cancellation therefore was arbitrary and capricious. ESI also challenges the validity of the 8(a) award, alleging that the award was tainted by bad faith and by violation of various regulations and SBA's standard operating procedures.

ANALYSIS

ESI is correct as to the general rule that governs the cancellation of a solicitation after bid opening: award should be made to the responsible bidder which submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the solicitation. See Federal

^{5/}The section 8(a) award to Aleman was made at a price of \$27,580,462, computed for the three year performance period (basic year and 2 option years) contained in the competitive solicitation. This figure is \$322,161 less than Aleman's previous bid price but is \$341,359 more than ESI's bid price (without correcting for any alleged mistakes) under the competitive solicitation. The record does not contain an explanation of how the specific final price was arrived at by the parties.

Acquisition Regulation (FAR), 48 C.F.R. §14.404-1(a)(1) (1985). However, this does not mean that a decision to invoke the section 8(a) process may not be made after bid opening has occurred. The FAR specifically permits cancellation, consistent with the compelling reason standard, where cancellation is clearly in the government's interest. 48 C.F.R. §14.404-1(c)(9) (1985). Moreover, our Office has specifically upheld the propriety of canceling a solicitation after bid opening for the purpose of setting aside a procurement under the section 8(a) program. See A.R.&S. Enterprises, Inc., B-194622, June 18, 1979, 79-1 CPD ¶ 433; American Dredging Co., B-201687, May 5, 1981, 81-1 CPD ¶ 344. The "compelling reason" standard, relied upon by the protester, is based in part upon the obvious detrimental effect on the competitive bid system of a cancellation and resolicitation after exposure of bid prices. See, e.g., Gill Marketing, Co. Inc., B-194414.3, Mar. 24, 1980, 80-1 CPD ¶ 213 at 2. Here, however, because of the 8(a) award, there will be no resolicitation and there will be no future auction situation resulting from exposure of bid prices.

The Air Force experienced a number of delays in the present procurement, including: issuing five amendments changing or clarifying the requirements; resolving a potential contracting agency-level protest and a protest filed with our Office; resolving a mistake in bid claimed by Mid-East, the apparent low bidder, and allowing withdrawal of its bid; and determining that the second low bidder, Dragon, was nonresponsive. Also, in view of the information the contracting officer had received from various sources reporting ESI's possible financial difficulties and payroll problems at Barksdale Air Force Base, the contracting officer foresaw that a preaward survey and potentially a certificate of competency proceeding might be required before the matter of ESI's responsibility could be determined. Since this and resolution of the alleged mistakes in ESI's bid might further delay a possible award, the contracting officer attempted unsuccessfully to exercise the Air Force's option to extend the incumbent's contract for 2 months.

When the incumbent refused to accept the Air Force's late exercise of the option and the Air Force received what it considered to be an exorbitant counteroffer from the incumbent on April 21, the Air Force was faced with an urgent

and difficult situation since only a little more than 1 week remained before expiration of the incumbent's contract. The contracting officer considered it imperative that the Air Force maintain continuous food services for personnel at the base since lack of such services would have an adverse impact on the base's mission and would be detrimental to the health, morale and welfare of Air Force personnel. The contracting officer considered several alternative ways to avoid a lapse in food services. Ultimately, the contracting officer determined that the SBA's 8(a) program was a prompt and viable solution to the problem. The Air Force referred the requirement to the SBA, identified both Aleman and ESI as candidates for an 8(a) subcontract, and recommended that the requirement be split equally between the two firms. The SBA selected Aleman for the 8(a) award and, on April 23, the original set-aside procurement was canceled and the 8(a) contract was awarded to the SBA and Aleman.

We think it is clear that the contracting officer was faced with an urgent need to maintain continuous food services. In view of the extremely short time period within which it was necessary to award the follow-on contract, the probable adverse effects on the health, welfare and morale of Air Force personnel, and the broad discretion conferred upon the SBA and the contracting agency to decide when and to whom to award an 8(a) contract, we find the contracting officer's determination that cancellation of the original procurement was clearly in the public's interest to have been reasonable under the circumstances. Marine Industries Northwest, Inc.; Marine Power and Equipment Co., 62 Comp. Gen. at 208, 83-1 CPD ¶ 159 at 4; FAR, 48 C.F.R. § 14.401-1(c)(9) (1985). In this regard, the protester argues that several reasonable alternatives, other than an 8(a) award, existed which could have satisfied the Air Force's interim need for food services and, at the same time, permitted completion of the procurement. Even if we assume this to be true, we cannot say that the contracting officer, faced with urgent circumstances, acted unreasonably in opting for another viable alternative clearly available to the Air Force: an 8(a) award to the SBA. Accordingly, we conclude that all of the above circumstances taken together did in fact provide the contracting officer with a compelling reason to cancel the initial procurement and to award to Aleman under the auspices of the SBA's 8(a) program.

ESI also argues that SBA, in selecting Aleman, violated certain internal standard operating procedures (SOP) which, according to ESI, evidences bad faith. A protester alleging bad faith by government officials bears a very heavy burden of proof. To establish bad faith, the courts and our Office

require virtually irrefutable proof that either Air Force or SBA officials had a specific and malicious intent to injure ESI. See Kalvar Corporation, Inc. v. United States, 543 F.2d 1298 (Ct. Cl. 1976); Bradford National Corporation, B-194789, Mar. 10, 1980, 80-1 CPD ¶ 183. ESI asks that we infer bad faith from the alleged SOP violations. However, contracting officials are presumed to act in good faith, Arlandria Construction Co., Inc.-Reconsideration, B-195044 et al., July 9, 1980, 80-2 CPD ¶ 21, and inference and supposition are not sufficient to meet this burden. Janke and Company, Inc.--Request for Reconsideration, 64 Comp. Gen. 63 (1984), 84-2 CPD ¶ 522.^{6/}

ESI also argues that the Air Force failed to comply with 48 C.F.R. § 19.506(a) (1985), which requires notification to the small and disadvantaged business utilization specialist and the assigned SBA representative of the withdrawal of the small business set-aside. While the Air Force may not have notified the SBA officials identified in this section of the FAR, it is abundantly clear that appropriate officials of the SBA were consulted by the contracting officer regarding withdrawal of the solicitation and especially regarding the feasibility of awarding an 8(a) contract to either ESI or Aleman, or both. Thus, we think that even though the exact notification procedure may not have been followed, the Air Force complied with this requirement in substance.

Finally, ESI also objects to the award of the 8(a) contract at a price higher than its own. However, the fact that an 8(a) firm's price under the set-aside may be higher than the protester's in the canceled procurement is not legally objectionable. Under the 8(a) program, it is not unusual for contracts to be funded in amounts exceeding prices that would

^{6/}It is not clear from the record why SBA decided to select Aleman for the section 8(a) award rather than ESI. Nevertheless, in view of the the broad discretion conferred upon the SBA and the contracting agency to decide when and to whom to award an 8(a) contract, our Office will not question the selection of an 8(a) contractor unless the protester demonstrates fraud or bad faith on the part of government officials or that applicable regulations have not been followed. Arawak Consulting Corp., 59 Comp. Gen. 522 (1980), 80-1 CPD ¶ 404. An allegation that SBA's SOP's were violated does not satisfy this requirement, Janke and Company, Inc., B-216152, Aug. 30, 1984, 84-2 CPD ¶ 242, since the SOP's are primarily for the internal guidance of agency employees and may be waived or revoked by the SBA. Jets Services, Inc., B-199721, Mar. 11, 1981, 81-2 CPD ¶ 300.

be obtained through unrestricted competition. See, e.g., Kings Point Manufacturing Co., Inc., 54 Comp. Gen 913 (1975), 75-1 CPD ¶ 264. Such 8(a) set-aside contracts are made in order to assist small business concerns owned and controlled by socially and economically disadvantaged persons to achieve a competitive position in the marketplace. The government, by increasing the participation of such firms in federal procurements, anticipates that these firms eventually may become self-sufficient, viable businesses capable of competing effectively in unrestricted procurements. Whatever additional price the government may pay when it uses 8(a) set-asides is merely the cost of furthering this socioeconomic goal. Thus, a higher priced contract may be awarded under the 8(a) set-aside.

The protest is denied.

Harry R. Van Cleve

Harry R. Van Cleve
General Counsel