The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D.E.W., Incorporated

File: B-232460

Date: October 19, 1988

DIGEST

The General Accounting Office (GAO) will not consider protester's contention that provision of Federal Acquisition Regulation on which agency relies for rejecting protester's bid constitutes a denial of due process, since it is a function of the courts, not GAO, to determine matters of constitionality.

DECISION

D.E.W., Incorporated protests the rejection of its bid under invitation for bids (IFB) No. DACA63-88-B-0066, issued by the Army Corps of Engineers (Corps) for expansion of a computer room at Kelly Air Force Base, Texas. D.E.W. contends that the rejection of its bid pursuant to Federal Acquisition Regulation (FAR) § 9.406-3(c)(7) (1984) violates its constitutional right to due process.

We dismiss the protest.

On March 24, 1988, the IFB was issued as a 100-percent small business set-aside and D.E.W. submitted the low bid on May 12. On June 28, the contracting officer declared D.E.W. to be nonresponsible and referred the matter to the Small Business Administration (SBA) for consideration of a certificate of competency (Corps). The determination of nonresponsibility was based upon D.E.W.'s unsatisfactory performance on a prior Corps contract that was terminated for default on October 26, 1987.1/ Prior to the issuance of the IFB, the contracting officer also had filed a report with the appropriate authority proposing that D.E.W. be debarred.

1/ D.E.W. has appealed this default termination to the Armed Services Board of Contract Appeals.

On July 20, 1988, the SBA's Dallas Regional Office recommended issuing a COC to D.E.W. and, on July 29, the contracting officer requested the SBA to suspend action on issuing the COC and to refer the matter to the SBA central office for a determination. By letter of August 12, the Corps informed D.E.W. that it had been proposed for debarment and that it had 30 days to submit any opposition. On August 19, the contracting officer rejected D.E.W.'s bid and awarded the contract to the second low bidder. D.E.W. then filed its protest with our Office.

The Department of Defense Supplement to the FAR (DFARS) § 9.406-1(70) (DAC 86-7) provides:

> "If no suspension is in effect under FAR 9.407 at the time debarment is proposed by a Department, bids or proposals shall not be solicited from, contracts shall not be awarded to, existing contracts shall not be renewed or otherwise extended with, and subcontracts shall not be consented to or approved ntractor by any DOD component pending a debarment decision unless the Secretary concerned or authorized representative states in writing the compelling reason to do so."

See also FAR § 9.406-3(c)(7). Generally, we have upheld agency decisions not to award contracts to firms proposed for debarment. See e.g., Ben M. White Co., B-230033, May 19, 1988, 88-1 CPD ¶ 476; Avanti Enterprises, Inc., B-227835.2, June 30, 1987, 87-2 CPD ¶ 5; Semtex Industrial Corp., B-222527, May 13, 1986, 86-1 CPD ¶ 457.

In its original protest, D.E.W. claimed that the Corps used the proposed debarment as a device to circumvent the COC process. In a later submission, responding to the agency's request that the protest be dismissed, D.E.W. stated that it did "not challenge whether the agency's actions were conducted in accordance with the applicable FAR and DFARS provisions, only whether the agency action was proper in law." That is, "whether the regulations . . . satisfy minimum constitutional requirements," specifically, the Fifth and Fourteenth Amendment guarantees to due process. Similarly, in its comments on the agency report, D.E.W. repeatedly emphasizes that its objection is to the constitutionality of a "regulatory scheme" it considers "overbroad."

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3552 (Supp. IV 1986), our Office is authorized to decide protests concerning alleged violations of a procurement statute or regulation. D.E.W., however, claims not a violation of statute or regulation, but rather that the applicable regulations violate the United States Constitution. D.E.W. cites several cases in support of its position. However, those cases concern de facto debarments and accompanying denials of due process. Unlike a de facto debarment, D.E.W. officially has been proposed for debarment and given the opportunity to submit matters in opposition. Further, D.E.W. itself admits that denial of an award to a firm proposed for debarment is in accordance with applicable regulations. As in cases where a protester challenges a statute or a provision of a solicitation as unconstitutional, we decline to consider D.E.W.'s challenge to the FAR and DFARS on constitutional grounds; the issue is a matter for the courts, not our Office, to decide. DePaul Hospital and the Catholic Health Association of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173; Onshore SOG, Inc.--Request for Reconsideration, B-210406.3, Feb. 15, 1984, 84-1 CPD ¶ 203.

In view of the fact that the contracting officer requested that D.E.W. be proposed for debarment on March 4, 1988, 20 days prior to when the IFB was even issued, obviously well before D.E.W. was known to be the low bidder, we find no merit to D.E.W.'s claim that the debarment was being used to circumvent the COC procedures of the SBA. We will not attribute improper motives to procurement personnel based on inference or supposition. TCA Reservations, Inc.--Reconsideration, B-218615.2, Oct. 8, 1985, 85-2 CPD ¶ 389.

Accordingly, the protest is dismissed.

Robert M. Strong
Associate General Counsel