



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: J.F. Henderson Industries  
File: B-234089  
Date: April 18, 1989

### DIGEST

Statute requiring agencies to negotiate prices for certain unpriced options does not apply to options which had by their terms expired prior to the enactment of the law.

### DECISION

H.F. Henderson Industries protests a procurement by the Naval Regional Contracting Center, Philadelphia. Henderson argues that the Navy should cancel request for proposals (RFP) No. N00140-88-R-1712 for mobile electrical power plant test sets because the procurement violates section 303(f) of the Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853. According to the protester, the Navy is obligated under the statute to negotiate with Henderson in an attempt to establish a price for an option provision contained in a 1986 contract for the test sets in lieu of fulfilling its needs through the use of a competitive solicitation.

We deny the protest.

On August 26, 1986, the Naval Aviation Supply Office in Philadelphia awarded a contract for 60 test sets to the Small Business Administration (SBA) under section 8(a) of the Small Business Act 1/; Henderson was the 8(a)

1/ 15 U.S.C. § 637(a) (1982 and Supp. IV 1986). Section 8(a) authorized SBA to enter into contracts with other federal agencies and to subcontract for the performance of those contracts with socially and economically disadvantaged small business firms. See Lee Associates, B-232411, Dec. 22, 1988, 88-2 CPD ¶ 618.

subcontractor. The contract contained an option clause which permitted the government to increase the quantity up to 100 percent at a price not to exceed the basic per unit contract price. The clause provided that the option must be exercised within 120 days of award. The term expired on December 24, without exercise of the option. Although Henderson "graduated" from the 8(a) program in October 1986, performance under the contract has yet to be completed.

The subject unrestricted RFP for 70 test sets with an option for up to 70 additional sets was issued by another Navy office on June 29, 1988. On November 15, the Business Opportunity Development Reform Act of 1988 was enacted. Section 303(f) of the Act provides in pertinent part:

"(2) Within sixty days after the enactment of this Act, the Small Business Administration, and the appropriate Federal agency, shall make substantial and sustained efforts to negotiate contract modifications for fair market price for any and all unpriced options contained in contracts previously awarded pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)) with the contractor that was initially awarded such contract.

"(3) During the period of time described in paragraph (2), such agencies shall refrain from procuring such requirements from alternative sources except that, no delay may be incurred pursuant to this paragraph that would cause substantial harm to a public interest."

The principal basis of Henderson's protest is that the statutory language referring to "any and all unpriced options" was intended to, and does in fact, apply to expired options. Simply put, the Navy's position is that the Act was never intended to, and does not, apply to expired options which the government has no legal right to exercise. Both parties rely on the following language concerning section 303(f), which appears in H.R. Rep. No. 100-460, 100th Cong., 1st Sess. 44 (1987):

"In April 1986, the General Accounting Office (GAO) issued a report that questions the validity and enforceability of unpriced options. In response to this opinion, the SBA, on October 2, 1987, issued a directive to Regional Administrators restricting the exercise of unpriced options. As a result of the SBA directive, many graduated firms may lose valuable contract options

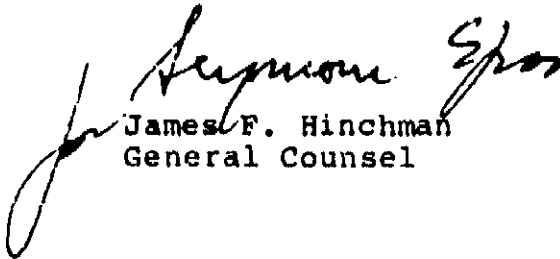
for which they have made significant investments. Many of these firms were told during contract negotiations that there was no need to price the options. However, under the present SBA interpretation, if the option is not priced it must, in effect, be treated as a sole source contract and cannot be awarded unless a sole source justification exists (48 C.F.R. Part 6). For graduated firms and those that have exceeded the size standard, section 8(a) cannot be cited as an authority since under that section SBA may contract only with small disadvantaged businesses that are in the program. Consequently, legislation is needed to prevent an injustice to firms that reasonably relied upon representations made to them by the government."

Thus, it appears that Congress added section 303(f) in response to an SBA directive which, in effect, foreclosed the exercise of unpriced options under 8(a) contracts with firms that had graduated from the program absent an independent sole-source justification. It is true that Henderson is still performing as a program graduate under an 8(a) contract awarded in 1986 which originally contained an unpriced option; however, as the Navy points out, the option under the 1986 contract expired by its own terms more than 9 months prior to the issuance of the SBA directive from which section 303(f) is designed to provide relief. Further, the Navy points out that its failure to exercise the option had nothing to do with it being unpriced; according to the agency, at that time it simply had no use for additional test sets.

We do not believe that the protester's interpretation is supported by the language of the statute, the committee report or logic. There are no references in the statute or the committee report to expired options. Further, we do not agree with the protester that the reference to "any and all unpriced options" was intended to encompass expired options. First, we think that the authors of the cited phrase presumed the existence of a legally viable option; one that has expired is not legally viable. See 51 Comp. Gen. 119 (1971). Second, we think the phrase was simply intended to ensure that all types of unpriced options were covered in view of the disagreement between our Office and the Department of Defense referred to in our report which gave rise to the SBA directive as to whether options which included price ceilings were "unpriced." See The Use of Unpriced Options and Other Practices Needs Revision, NSIAD-86-59, B-217655, Apr. 23, 1986, at pp. 23 and 41.

In short, it seems clear that the legislation simply provides a vehicle to permit the relevant contractors and the government to agree on fair market value option prices where existing options were unpriced. It is not reasonable in our view to conclude that it was also intended to revive an option which had expired, where, as here, the expiration had nothing to do with the fact that the option was unpriced.

The protest is denied.

  
James F. Hinchman  
General Counsel