The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Seyforth Roofing Co., Inc.

File: B-235703

Date: June 19, 1989

DIGEST

Absent clear judicial precedent, General Accounting Office will not consider protester's challenge to the constitutionality of agency's use of a small disadvantaged business set-aside since issues involved are more appropriate for resolution by the courts.

DECISION

Seyforth Roofing Co., Inc., protests the rejection of its bid under invitation for bids (IFB) No. F29650-89-BA013 issued by the Air Force for roofing maintenance at Kirtland Air Force Base. The Air Force rejected Seyforth's bid because the company did not qualify as a small disadvantaged business (SDB).

The solicitation was issued as a total SDB set-aside in accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.502-72 (1988 ed.). Under such set-asides only socially and economically disadvantaged small businesses1/ are eligible for award. Seyforth acknowledged in its bid that it was not an SDB and its bid was rejected for that reason.

Seyforth argues that its bid should be considered because the SDB set-aside provision in the solicitation is unconstitutional. According to the protester, in order for the Air Force to constitutionally provide preferential treatment to SDBs under the solicitation, it must first have established--which it did not--that discrimination against SDBs occurred within the Kirtland Air Force Base jurisdiction. The protester also contends that even if prior

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1/ Generally, individuals who are members of specified groups, such as Black Americans, Hispanic Americans, and Native Americans, are regarded as socially and economically disadvantaged. DFARS § 219.301-70(b)(2).

discrimination had, in fact, been established, the Air Force was required to consider alternative, race-neutral affirmative action techniques prior to resorting to preferential treatment. Seyforth argues that the Air Force has failed to investigate other less drastic remedies which could have been used to correct any past discrimination. Seyforth further argues that even if the SDB set-aside program is justified, it is not narrowly tailored to ensure that its duration is limited, that it extends no further than necessary to redress the injury to the victims of the identified discrimination, and that the minimum number of innocent third parties such as Seyforth are disadvantaged by the program.

We decline to consider the matter. First of all, Seyforth's protest essentially is untimely. Although Seyforth complains about the rejection of its bid, the IFB by its own terms limited the competition to SDBs. Consequently, rejection of Seyforth's bid was not only proper, but mandatory under the terms announced for the competition. Seyforth's real complaint is about the IFB provision restricting the competition to SDBs. Under our Bid Protest Regulations, however, Seyforth should have protested the terms of the IFB prior to bid opening. See 4 C.F.R. § 21.2(a)(1) (1988). Regardless of the timeliness of the protest, however, we think it is inappropriate for us to consider Seyforth's arguments. We note that Seyforth, in support of its position, cites no authority but appears to rely on the Supreme Court's recent pronouncement in City of Richmond v. Croson Company, 109 S. Ct. 706 (1989). We do not believe, however, that the Court's decision in Croson, which dealt with a municipality's minority set-aside program, is dispositive in determining the constitutionality of set-aside programs on the federal level. See Fullilove v. Klutznick, 448 U.S. 448 (1980), in which the Court, in reviewing a federal set-aside requirement, applied a standard that it expressly rejected in Croson. In the absence of clear judicial precedent, we decline to consider Seyforth's challenge to the IFB on constitutional grounds; the issue is a matter for the courts, not our Office, to decide. See Techplan Corp.; American Maintenance Co., 67 Comp. Gen. 357 (1988), 88-1 CPD ¶ 312; DePaul Hospital and the Catholic Health Association of the United States, B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173.

The protest is dismissed.

Ronald Berger
Associate General Counsel