Richard

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Freddie Oliver Contractor

File: B-235255.2

Date: September 28, 1989

DIGEST

Protest that agency improperly found firm's surety unacceptable will not be considered where agency, pursuant to statute, properly does not apply small disadvantaged business (SDB) evaluation preference in evaluating bids, and firm is not the low bidder without the SDB preference.

DECISION

Freddie Oliver Contractor (FOC) protests the rejection of its bid under invitation for bids (IFB) No. N62470-87-B-7361, issued by the Department of the Navy for house repair and improvement services at the Marine Corps Air Station, Cherry Point, North Carolina. FOC argues that its bid was improperly rejected on grounds that its individual surety was unacceptable.

We dismiss the protest.

The Navy states that the IFB was originally incorrectly issued on February 17, 1989, as a 100 percent small business set-aside with a 10 percent evaluation preference for small disadvantaged businesses (SDBs). Subsequent to its initial issuance, the IFB, by amendment No. 0001, was changed to an unrestricted acquisition. In amending the IFB, the Navy deleted the clause in the solicitation which notified bidders that the IFB was set aside. However, it inadvertently failed to remove the clause calling for the application of a 10 percent SDB evaluation preference. The Navy's amendment of the IFB was effected pursuant to title VII of Pub. L. No. 100-656, 102 Stat. 3853, 3889 (1988), which established a Small Business Competitiveness Demonstration Program. This statute essentially precludes the setting aside of solicitations for small business in various industry groups where an agency has achieved a goal of expending 40 percent of its procurement funds for that industry group on contracts awarded to small businesses.

The implementing regulations preclude altogether (for a 4-year period) the setting aside of acquisitions after January 1, 1989, in the specified industry groups unless the contracting agency is otherwise directed. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.1070-1 (DAC 88-10).

Bids were opened on April 11, 1989. The contracting officer initially applied the SDB 10 percent preference and announced that FOC was the apparent low bidder. After reviewing FOC's bid bond, the agency determined that FOC was nonresponsible due to the unacceptability of its sureties. After rejecting FOC's bid, award was made to the second low bidder, Texas Capital Contractors. This protest followed.

The Navy argues that the rejection of FOC as nonresponsible need not be resolved because FOC is not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1989). The Navy reports that without the application of the 10 percent SDB evaluation preference, FOC is not the low bidder. In this connection, the Navy, while admitting that it erred in failing to delete the evaluation preference clause, argues that it cannot apply the evaluation preference in any event because of a prohibition contained in the regulation implementing the statute. See DFARS § 219.1071(c). According to the Navy, FOC was on notice of this prohibition, regardless of the IFB's terms, because the regulation in question was published in the Federal Register.

FOC responds that it is entitled to the evaluation preference for three reasons. First, FOC argues that the statute's requirements are only applicable to procurement actions which are "considered" after January 1, 1989. In this regard, FOC argues that, while the IFB was issued after January 1, the Navy was "considering" the procurement action before that date. Second, FOC argues that, notwithstanding the terms of the DFARS, the Navy must use the SDB evaluation preference program since it is still required to award at least 5 percent of the total dollar value of all construction contracts in fiscal year 1989 to SDBs pursuant to section 1207 of the Department of Defense Authorization Act, 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986). Finally, FOC argues that the Navy is precluded from evaluating offers without application of the evaluation preference since the pertinent clause was not deleted from the solicitation.

We conclude that the Navy properly did not apply the evaluation preference in determining which firm was the low bidder under the IFB. As to the protester's first argument, the statute applies to "contract solicitations" for the

designated industry groups during the period of the demonstration program which began January 1, 1989. Pub. L. No. 100-656, § 711. Nothing in the statute indicates that it is inapplicable to contract actions "considered" prior to January 1, and FOC has provided us with no legal authority in support of its position.

With regard to the application of the evaluation preference in satisfaction of the Navy's goal of awarding 5 percent of its contracts to SDBs, as required by section 1207 of the Department of Defense Authorization Act, 1987, supra, we point out that nothing in that act directs the Department of Defense to use a particular type of program to meet the 5 percent SDB goal. See Techplan Corp.; American Maintenance Co., 67 Comp. Gen. 357 (1988), 88-1 CPD ¶ 312. Thus, the existence of the 5 percent goal does not mandate the use of the evaluation preference in this procurement.

Concerning the Navy's failure to delete the SDB evaluation preference clause from the IFB, we initially note that award of a contract must ordinarily be made consistent with the terms of the solicitation. See Western Publishing Co., Inc., B-224376, Sept. 2, 1986, 86-2 CPD ¶ 249. Here, however, the initial application of the SDB preference to FOC's bid by the contracting officer was erroneous and not required by the solicitation as reasonably read in its entirety. Notwithstanding the inadvertent failure to omit the SDB preference, amendment No. 0001 to the IFB, in addition to withdrawing the small business set-aside status of the procurement, required bidders to execute a representation concerning the status of their firms as either a "small business" or an "emerging small business," pursuant to the demonstration program statute, which reasonably should have alerted FOC to the fact that this program applied to this solicitation. As implemented by the DFARS, this program precludes the setting aside of the services solicited here and the use of the SDB preference. Moreover, the applicable DFARS provisions were published in the Federal Register, and thus FOC was on constructive notice of these provisions which made it clear that an SDB preference was not authorized in these circumstances. See PF Construction Corp., B-232141, Oct. 14, 1988, 88-2 CPD ¶ 355. Therefore, in our view, the Navy is correct in its assertion that the SDB preference was not applicable to bids under this solicitation.

Since FOC is not the low bidder without the application of the SDB preference, we need not resolve its protest of the rejection of its surety.

The protest is dismissed.

James F. Hinchman
General Counsel