B.S. Coles

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Taylor Group, Incorporated

File: B-242134.4

Date: March 20, 1991

Charles G. Taylor for the protester.
Russ Offutt for Southwestern Associates, Inc., J. Paul Junge for All Star Maintenance, Inc., Stewart Taylor for Stay Incorporated, and Rudy C. Grubb for Contractors International, Inc., interested parties.
Captain Thomas H. Eshman II and Millard F. Pippin, Department of the Air Force, for the agency.
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency erroneously relies on past procurement history and issues solicitation on unrestricted basis which results in a protest and subsequent agency determination, shortly before closing date for receipt of proposals, to set procurement aside for small disadvantaged businesses (SDB), claim for proposal preparation costs is denied since there is no evidence of bad faith on the agency's part; mere negligence or lack of due diligence by the agency, standing alone, does not provide a basis for the recovery of proposal preparation costs.

DECISION

The Taylor Group, Incorporated, a small business, protests agency actions under request for proposals (RFP) No. F41636-90-R-0083, issued by the Air Force for military family housing maintenance. In its protest, Taylor initially challenged the agency's decision, made 24 hours before the closing date for receipt of proposals, to amend the unrestricted solicitation and subsequently to set aside the procurement for exclusive small disadvantaged business (SDB) competition. In its supplemental protest documents and its comments on the agency report, which explained the reasons for the set-aside, the protester concedes that the set-aside determination was proper; however, the protester requests reimbursement of its

proposal preparation costs. Taylor argues that the firm is entitled to such costs because the agency negligently issued the solicitation on an unrestricted basis--when it should have known, prior to the issuance, that there was sufficient SDB interest in the procurement and, therefore, in bad faith induced non-SDB offerors to prepare proposals.

We deny the protest and claim for costs.

The RFP was issued on September 17, 1990, on an unrestricted basis. The record indicates that prior to issuing the solicitation the contracting officer consulted the previous solicitation history of the acquisition, conducted in fiscal year 1988, which showed that only one SDB competed for the award, as well as the agency's source list, which did not include any other SDBs. Based on this information, the contracting officer concluded that there was insufficient SDB interest to justify issuing the RFP as a SDB set-aside.

On November 26, 2 days before the closing date for receipt of proposals, the agency received notification that Hernandez Contractors, an SDB concern, had filed a protest with our Office challenging the agency's decision to issue the solicitation on an unrestricted basis. The agency reviewed the protest and concluded that it had based its decision on incorrect data regarding SDB interest and that the current data--the fact that 21 SDBs responded to the Commerce Business Daily (CBD) notice by requesting solicitations--showed that there was sufficient SDB interest to set the procurement aside. Consequently, the Air Force postponed the closing date and amended the RFP to set aside the procurement. Hernandez's protest was dismissed as academic; Taylor's protest to our Office followed.

As stated, the protester now concedes that the set-aside is proper but argues that the Air Force should pay its proposal preparation and protest costs, since the allegedly negligent and/or bad faith issuance of the solicitation on an unrestricted basis induced Taylor to invest time and money for proposal preparation. To support its allegation, the protester contends that the agency's decision not to set aside was based on incomplete and outdated information, and that the agency should have known, prior to issuing the solicitation, that there was sufficient SDB interest in the procurement, based on its receipt of requests for solicitations from 21 SDB contractors. Moreover, the protester states that the timing of the decision to set the procurement aside demonstrates that it was made in bad faith.

While we agree with the protester and the Air Force that it would have been preferable to set aside the procurement early in the procurement process, the issue here is whether the agency should be required to pay the protester's proposal preparation costs because it did not make that decision earlier. Even assuming that the agency acted negligently in basing its decision not to set the procurement aside for SDBs on past acquisition history without considering the responses to the CBD notice, recovery of proposal preparation costs is allowed only where there is a showing of bad faith on the agency's part. Computer Resources Technology Corp., B-218292.2, July 2, 1985, 85-2 CPD ¶ 14. To show bad faith, the agency must have had a malicious and specific intent to injure the protester. See Asbestos Abatement of America, Inc.--Recon., B-221891.2; B-221892.2, Aug. 5, 1986, 86-2 CPD ¶ 146. The record here does not show that the Air Force acted in bad faith when it decided not to restrict the procurement. Rather, the record shows that the agency based its decision on the erroneous assumption that there was insufficient SDB interest and that it issued the RFP with the intent to award a contract. The fact that the agency concedes that it relied on outdated data and failed to react sooner to the SDB responses to the synopsis simply does not rise to the level of bad faith by the agency, i.e., it does not show that the agency's decision to issue the solicitation on an unrestricted basis, even if erroneous, was made with the intent to harm Taylor or any other offeror.

The protester also contends that the manner in which the agency conducted site visits confirms that it was acting in bad faith. In this regard, the protester argues that the first site visit was flawed because the potential offerors were not shown the interior of any housing units and that the second site visit was flawed because the agency only showed a few units which did not constitute a cross section of the units. The Air Force concedes that the first site visit was flawed and argues that even if the second visit was flawed, the government, in good faith, tried to provide an idea as to the breadth of the project by showing vacant quarters and floor map plans.

While Taylor takes issue with the adequacy of the site visits, we fail to see how its contentions demonstrate bad faith by the agency; on the contrary, the agency instituted a second site visit when it discovered that the first visit was flawed. Nor has Taylor explained the nexus between the agency's conduct of the site visits and its initial decision not to set aside the procurement. To the extent the protester is arguing that there was a general air of bad faith on the agency's

part, the facts simply do not establish that this is the case. Rather than bad faith, the record at most shows errors by the agency which it has now rectified.

The protest is denied.

for James F. Hinchman
General Counsel