

Van Schuik
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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Jimenez, Inc.

File: B-242663

Date: May 6, 1991

Pedro I. Jimenez for the protester.
Col. Scott L. Silliman, Esq., Department of the Air Force, for the agency.
Karen Turner and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest of award of contract prior to resolution of Small Disadvantaged Business status protest filed with the Small Business Administration is denied where record shows that the contracting officer's determination that award without delay was necessary to protect the public interest had a reasonable basis.

DECISION

Jimenez, Inc. protests the Air Force's award of contract to A.W. & Associates under invitation for bids (IFB) No. F09607-90-B-0020 for the removal of asbestos siding and replacement of the siding and roof on building 979 at Moody Air Force Base, Georgia.

We deny the protest.

The IFB was issued on August 19, 1990, as a small disadvantaged business (SDB) set-aside. At the September 19 bid opening A.W. & Associates and Jimenez were the two lowest bidders; both firms certified that they were SDB concerns. On that date Jimenez protested the SDB status of A.W. to the contracting officer. The protest was transferred to the Small Business Administration (SBA) in accordance with Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.302(4). Jimenez's protest questioned whether A.W., a concern owned by a white male confined to a wheelchair, qualified as an SDB.

On September 29, the contracting officer executed a written determination in accordance with DFARS § 219.302(4) stating that notwithstanding the pending SDB status protest the award must be made to protect the public interest because the work

to be performed, the removal of asbestos material, is to eliminate a possible health hazard. The award was made to A.W. on that same day. That prompted another protest from Jimenez. The SBA determined on November 7 that A.W. was not an SDB for the purpose of this procurement. The Air Force then informed Jimenez that it intended to allow A.W. to perform the contract and stated that it had appealed the initial status decision to the SBA's Associate Administrator for Minority Small Business and Capital Ownership Development. On February 9, 1991, the Associate Administrator "overturned" the initial status decision because official written notice of the initial protest had not been supplied by SBA to the parties. A new decision was issued on March 7, after the proper notices had been issued, also concluding that A.W. is not an SDB. We understand that A.W. is appealing the new decision to the Associate Administrator.

Jimenez argues that the Air Force's failure to withhold award prejudiced it as next low bidder because A.W. is not eligible for award. Jimenez argues that the Air Force has not presented sufficient grounds for claiming urgency. The protester states that there was no indication that the asbestos was a hazard to public health because the asbestos in the roofing and siding materials had been previously painted and were not deteriorated to the point that it would be considered "friable or dangerous."

The applicable regulation provides that a contract may not be awarded following the referral of a timely protest concerning a bidder's social or economic disadvantaged status to the SBA until the SBA has made a determination on the protest or 15 business days have expired since SBA's receipt of the protest, unless the contracting officer determines in writing that an award must be made to protect the public interest. DFARS §§ 219.302(4) and (6).

Since the regulations permit the agency to make award in the face of a pending SDB status protest if it determines that award is in the "public interest," we will not independently decide whether the facts justify the agency's action but we will review the record to insure that there exists a reasonable basis for the determination. See Howard Johnson Motel, B-234668, June 30, 1989, 89-2 CPD ¶ 16. Here, the contracting officer concluded that the primary reason for this solicitation to replace siding on the building was to remove asbestos materials and thus eliminate a health hazard. While the protester argues that the type of asbestos present in the structure did not, in fact, constitute a real health hazard, we think the contracting officer could reasonably conclude that health-related concerns were involved and necessitated that the project be awarded without delay. We therefore have no legal basis upon which to interfere with the contracting

officer's judgment in deciding to make award notwithstanding the pending protest. That being so, since the SBA decision was not received until after award, it did not apply to the current procurement and the Air Force was not obligated either to suspend performance or terminate the contract because of the initial adverse SBA decision. See DFARS § 219.302(7).

The protester also argues that it was improper for the agency to appeal the initial SBA determination to the SBA's Associate Administrator. Whether or not the appeal was properly taken is a matter for the SBA, which has the responsibility to decide protests concerning a firm's SDB status. See 15 U.S.C.A. § 636(j)(11)(F)(vii) (West Supp. 1990); Washington-Structural Venture, 68 Comp. Gen. 593 (1989), 89-2 CPD ¶ 130.

The protest is denied.


for James F. Hinchman
General Counsel