



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

Glass 145273

Decision

Matter of: Electronic Systems and Associates, Inc.
File: B-244878
Date: November 13, 1991

Lemuel Kinney for the protester,
T.A. Grimshaw for Rockwell International Corporation, Joseph
W. Young, Esq., for E-Systems, Inc. and J.H. Hartwell for
Raytheon Company, interested party,
Millard F. Pippin, Department of the Air Force, for the
agency.
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. Protest alleging that specifications are unduly restrictive and favor a particular contractor is denied where protester fails to provide specifics to support its allegation and solicitation is based on functional specifications and is the result of extensive discussions with industry.
2. In light of agency's broad discretion to decide to contract or not contract under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), there is no legal basis to object to agency's decision not to award to the protester under the section 8(a) program absent a showing of fraud or bad faith or that laws or regulations were violated.
3. Agency's decision not to set aside a procurement for small disadvantaged business (SDB) concerns was proper where the contracting officer determined on the basis of information concerning interested SDB concerns that a reasonable expectation did not exist that offers would be received from at least two responsible SDB concerns and the agency's Small and Disadvantaged Business Utilization Specialist concurred in this decision.

DECISION

Electronic Systems and Associates, Inc. (ESA) protests the terms of request for proposals (RFP) No. F19628-91-R-0018, issued on an unrestricted basis by the U.S. Air Force

Electronic Systems Division, Hanscom, Air Force Base, Massachusetts for the design and development of a Low Cost Terminal (LCT) for the MILSTAR Program, a critical world wide, survivable anti-jam communications service for commanders-in-chiefs to command and control their military forces.

We deny the protest.

The LCT program is divided into two phases, a demonstration phase and an engineering and manufacturing development phase. This RFP is for the award of a contract for the demonstration phase and will be for a 24 month development (including design) and demonstration effort. The LCT provides a satellite communications system to support the MILSTAR program. Sources sought synopses were published in the Commerce Business Daily (CBD) on December 26, 1990 and March 7, 1991. Ten small businesses and four small disadvantaged businesses (SDB) responded to the synopses. The Air Force evaluated all qualification packages submitted in response to the sources sought synopses and determined that there were no small business sources capable of meeting the government's requirement. Consequently, a small business set-aside was considered inappropriate.

A draft RFP was issued to all firms responding to the sources sought synopses on April 19, 1991 and a bidders conference was held on April 29. Meetings with potential bidders were also held during the week of May 6 to discuss the draft RFP and to resolve questions concerning the solicitation.

By letter dated April 24, the Small Business Administration (SBA) requested that a section 8(a) set-aside of the LCT be considered for ESA.¹ ESA provided the Air Force material to demonstrate its capability and presented a qualification briefing to the Air Force on April 30. In addition, in its briefing with the Air Force on May 10 to provide comments to the draft RFP, ESA addressed its technical and management solutions to the requirements of the draft RFP. By letter dated May 21, the Air Force denied the SBA request and concluded that ESA did not have the technical and management skills necessary to act as a prime contractor for the LCT program. The SBA decided not to appeal the Air Force determination.

¹Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988), authorizes the SBA to enter into contracts with government agencies and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns.

The RFP was issued on June 26 with a closing date for receipt of proposals of July 26. The RFP contains functional specifications and provides for multiple awards for the demonstration phase of the LCT program. During this phase, contractors are to design and, where appropriate, demonstrate various functional requirements of their design, including limited fabrication of hardware and software brassboards. Prior to completion of the demonstration contract, the Air Force will issue an RFP to demonstration phase contractors and conduct a down-select source selection for the engineering and manufacturing development phase contract award. The winner of this contract will also be the production contractor.

Prior to the date for receipt of proposals, by letter dated July 9, ESA protested to the contracting officer. In that protest, ESA alleged that the specifications contained in the solicitation were unduly restrictive, solicitation requirements were in excess of the government's minimum requirements, and the government improperly disclosed proprietary information of one prospective offeror to another prospective offeror concerning the procurement of the LCT demonstration requirements. ESA also made several allegations relating to racial bias. That protest was denied by letter dated July 18. ESA then filed a protest with our Office on July 22, raising the same issues.²

With respect to ESA's allegation that the specifications are unduly restrictive and improperly favor a single contractor, neither in its agency-level protest nor in the one filed with our Office did ESA assert that any specific requirement was restrictive. ESA simply stated that a particular contractor, by virtue of its participation in government funded prior procurements, possessed unique knowledge, experience and information for the supplies and services being procured under this solicitation. In this regard, the record shows that any advantage the contractor may have had resulted from its prior experience under related contracts. It is not unusual for a contractor to enjoy an advantage in competing for a government contract by reason of incumbency,

²ESA, in its initial protest filed with our Office, argued that the solicitation requirements were in excess of the government's minimum needs and that the Air Force did not allow enough time to properly submit responses to the solicitation. The agency in its report responded to these issues, and ESA in its comments did not rebut the agency's response. We consider these issues to be abandoned by the protester and will not consider them. See TM Sys., Inc., B-228220, Dec. 10, 1987, 87-2 CPD ¶ 573.

and such an advantage, so long as it is not the result of preferential treatment or other unfair action by the government need not be discounted or equalized. Nationwide Health Search, Inc., B-237029, Feb. 1, 1990, 90-1 CPD ¶ 134. Here, although the contractor in question has been involved in terminal developments for MILSTAR in the past, as ESA appears to acknowledge, the current solicitation contains functional specifications and is not design specific. All potential offerors were given the opportunity to comment on the draft RFP and comments were received from several firms including ESA. Portions of previous government sponsored study and development work relevant to this solicitation was disclosed in the RFP for all potential offerors. Further, although this new terminal must be interoperable with the existing satellite and multi-service terminals, there is no requirement for this terminal to be architecturally similar to the core terminal. We therefore deny ESA's challenge to the specifications.

ESA also alleges that the agency improperly disclosed to a prospective offeror information it submitted to the Air Force to establish its qualifications for award under the 8(a) program. The agency denies that it disclosed any information ESA submitted. In any event, generally, in considering protests involving allegations of wrongful disclosure of proprietary data, the protester must show that the material submitted was marked proprietary or that the material was disclosed in confidence, that the preparation of the material involved significant time and expense, and that the material contained data or concepts that could not be independently obtained from publicly available literature or from common knowledge. See Kitco, Inc., B-241133; B-241133, Jan. 25, 1991, 91-1 CPD ¶ 73. Here, ESA has failed to state what allegedly proprietary material was actually disclosed to a competitor.

ESA maintains that the Air Force improperly determined that ESA was not qualified for award under the 8(a) program. Under section 8(a) of the Small Business Act, a government contracting officer is authorized "in his discretion" to let the contract to SBA upon terms and conditions to which the agency and SBA agree. 15 U.S.C. § 637(a)(1). Therefore, no firm has a right to have the government satisfy a specific procurement need through the 8(a) program or award a contract to that firm. Lee Assocs., B-232411, Dec. 22, 1988, 88-2 CPD ¶ 618. Consequently, we will object to an agency's actions under the section 8(a) program only where it is shown that agency officials engaged in bad faith or fraud or violated regulations. Kinross Mfg. Corp., B-234465, June 15, 1989, 89-1 CPD ¶ 564.

Although ESA alleges that the agency's decision not to make this procurement an 8(a) set-aside was racially motivated, ESA has provided no evidence of fraud or bad faith on the part of agency official. To the contrary, the record shows the agency's decision not to place this contract under the 8(a) program was reasonable. The record shows that the agency evaluated the qualification package from ESA describing its capabilities, the composition of its proposed team, and its approach to managing the effort and concluded that ESA did not possess the technical and management skills necessary to perform the demonstration program which requires experienced system concept design, terminal concept design, rapid prototyping and demonstration, and mature state-of-the-art, very high speed integrated circuit chip development and technology. ESA simply failed to persuade the Air Force that it could manage and perform a contract of this complexity and importance. The Air Force's determination was concurred in by the local SDB representative and the SBA representative, who are charged with representing SDB and small business interests. Moreover, the SBA accepted the Air Force's determination and did not appeal the decision. Given the agency's broad discretion in determining whether to place a contract under the a section 8(a) program and the nature and complexity of the requirement, we do not find the agency's decision objectionable.

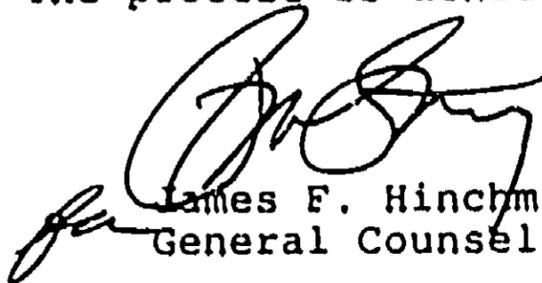
ESA also protests the Air Force's determination not to issue this solicitation as a set-aside for SDBs. The decision whether to set aside a procurement for SDB concerns is governed by Department of Defense Federal Acquisition Regulation Supplements (DFARS) § 219.502-72 (DAC 88-13), which provides that a procurement shall be set aside for exclusive SDB participation if the contracting officer determines that there is a reasonable expectation that: (1) offers will be obtained from at least two responsible SDB concerns, and (2) award will be made at a price not exceeding the fair market price by more than 10 percent. Since the decision to set aside a procurement is a matter of business judgment within the contracting officer's broad discretion, we will not disturb his determination absent a showing that it was unreasonable. Transtar Aerospace, Inc., B-239467, Aug. 16, 1990, 90-2 CPD ¶ 134.

Here, as previously stated, the contracting officer synopsized this requirement several times to solicit responses from industry on its ability to meet the Air Force's specifications, and the results showed that there was no reasonable basis to conclude that offers would be forthcoming from at least two responsible small businesses or SDB concerns. None of the SDB's, including ESA, met the minimum screening criteria published in the CBD. ESA has not shown why the agency's screening determination was unreasonable. The Electronic Systems Division Small

Business Office, the SBA's representative at Hanscom Air Force Base concurred in this judgment.³ MVM, Inc. et al., B-237620, Mar. 13, 1990, 90-1 CPD ¶ 270. In light of these circumstances, we find that the contracting officer had a reasonable basis for not setting aside the procurement.

Finally, ESA argues that procurement decisions at the Electronic Systems Division are racially biased. We cannot in the abstract consider ESA's objection to the Electronic Systems Division's general practices concerning section 8(a) set-asides and SDB set-asides, since our bid protest function encompasses only objections which relate to particular procurements. 31 U.S.C. § 3551(1) (1988); see Cajar Defense Support Co., B-237426, Feb. 16, 1990, 90-1 CPD ¶ 286.

The protest is denied.



James F. Hinchman
General Counsel

³ESA questions when the Small and Disadvantaged Utilization Office concurred with the decision not to restrict this procurement because of its receipt of an unexecuted record of coordination form. However, notwithstanding any procedural defect concerning the execution of the coordination form, the record is clear that the local SBA representative agreed with the decision not to set aside the procurement.