



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

Decision

43376

Matter of: Alamo Aircraft Supply, Inc.
File: B-252117
Date: June 7, 1993

Donald E. Barnhill, Esq., and Joan K. Fiorino, Esq., East & Barnhill, for the protester.
William H. Gammon, Esq., Moore & Van Allen, for Equipment and Supply, Inc., an interested party.
Cynthia Emerson, Esq., Defense Logistics Agency, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The General Accounting Office will not object to Defense Logistics Agency's award of surplus property sales contract to the high bidder that is currently suspended by the Army for procurement contracts, notwithstanding a solicitation provision that declares all suspended firms ineligible for award, where (1) the high bidder has not been suspended from sales contracts; (2) the solicitation provision is defective because its applicability to procurement program suspensions --made by an agency lacking authority to suspend firms from the sales program--conflicts with due process requirements and applicable suspension/debarment regulations that require firms to be specifically suspended for sales contracts; and (3) nothing in the record suggests that the protester was competitively prejudiced.

DECISION

Alamo Aircraft Supply, Inc. protests any award to Equipment and Supply, Inc. (ESI), the high bidder on various line items under invitation for bids (IFB) No. 31-3339 issued by the Defense Logistics Agency (DLA) for the sale of surplus aircraft parts. Alamo contends that despite ESI's high bid, ESI is ineligible for award, and that the award should go to Alamo as the second low bidder.

We deny the protest.

Alamo's contention that ESI is ineligible for award is grounded on paragraph 34 of part 2 of DLA's August 1989 "Sale by Reference" pamphlet incorporated into the IFB,¹ which provides:

"34. DENIAL OF ACCESS TO DRMS [Defense Reutilization and Marketing Service] FACILITIES.

The following individuals and firms are ineligible to do business with the agency and in addition to being ineligible to receive awards, they will not be sent [IFBs] and will not be allowed access to any of the [a]gency's facilities:

"(c) Those who are either suspended, proposed for debarment, or debarred by DRMS, DOD or any other Executive Agency."

Alamo also references paragraph 33 of DLA's "Sale by Reference" pamphlet as supporting its view that paragraph 34 precludes an award to ESI. Paragraph 33 provides:

"33. NOTICE TO DEBARRED OR SUSPENDED CONTRACTORS.

Any contract awarded to an individual or firm who, at the time of award was suspended, debarred, ineligible for receipt of contracts with [g]overnment agencies or in receipt of a notice of proposed debarment from any [g]overnment agency, is voidable at the option of the [g]overnment."

The government has two separate programs and two separate regulatory bases for suspending/debarring firms and individuals from contracting with executive branch agencies. The programs are (1) the procurement program governed by the Federal Acquisition Regulation (FAR) and (2) the sales program governed by the Federal Property Management Regulations (FPMR). Since June 7, 1989, both FAR § 9.407(e)(i) and FPMR § 101-45.601(d) have required executive branch agencies

¹The "Sale by Reference" pamphlet contains instructions, terms, and conditions applicable to Department of Defense (DOD) personal property sales. Typically, DLA incorporates the "Sale by Reference" pamphlet by reference into its sales catalogs (the instant IFB uses the catalog format) and flyers.

having the requisite suspension/debarment authority to notify suspended firms and individuals of the exact nature of their suspensions, whether for procurement contracts, sales contracts, or both.²

On September 3, 1992, the Department of the Army, citing FAR § 9.407, notified ESI that the Army was suspending ESI from procurement contracts.³ The Army's notice neither mentioned sales contracts nor cited applicable FPMR provisions. The Army did not consider suspending ESI from sales contracts because it lacks the authority to institute sales program suspensions. The authority to institute sales program suspensions is vested in the General Services Administration (GSA) and to our knowledge DLA is the only DOD component to which GSA has delegated the required authority to suspend firms from the sales program. Consequently, while DLA has authority to institute dual suspensions--i.e., from both the procurement and the sales programs--of entities, the Army does not.

Alamo's argument that ESI is ineligible for award assumes the primacy of paragraphs 33 and 34 of the "Sale by Reference" pamphlet, which Alamo contends preclude ESI from bidding on sales contracts because of ESI's suspension from procurement programs. The declaration in paragraphs 33 and 34 that "individuals and firms are ineligible to do business with the agency . . . who are either suspended, proposed for debarment, or debarred by DRMS, DOD or any other Executive Agency" is not limited to suspensions/debarments from sales contracts, and literally precludes ESI or any other firm that is suspended or debarred under either the sales or procurement program from submitting a bid on this sales IFB.

The problem with this language is that it purports to exclude a firm which has not been debarred or suspended from the sales program. To give this language effect would circumvent the FAR/FPMR procedural safeguards that condition a

²The FPMR was amended effective October 9, 1985 (50 Fed. Reg. 41145), to require that notices of suspension/debarment include the citation of the regulatory bases of the action. The FAR was similarly amended effective June 7, 1989 (54 Fed. Reg. 19812 and Federal Acquisition Circular No. 84-46).

³ESI's suspension was based, in part, on evidence that its president and its engineering manager "directed ESI employees to substitute nonconforming products received by the [g]overnment, and directed ESI employees to falsify test certificates."

firm's suspension from a specific program (here, the sales program) on the firm's receipt of express notice as to the nature of the suspension/debarment and the suspension/debarment being imposed by an authorized agency. In other words, the effect of Alamo's reasonable reading of the IFB is to effect a no-notice suspension of ESI from the sales program, based on ESI's earlier suspension by the Army from the procurement program.

A party may not be suspended or debarred from receiving government contracts unless minimum requirements of due process are met. Horne Bros., Inc. v. Laird, 463 F.2d 1268 (D.C. Cir. 1972); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). Due process for a suspension requires notice sufficiently specific of what action is proposed and the grounds therefor to allow the party to make a meaningful response to the notice. TS Generalbau GmbH; Thomas Stadlbauer, B-246034 et al., Feb. 14, 1992, 92-1 CPD ¶ 189. While exactly what due process is due a contractor is determined not so much on the general regulations as on the specific facts of the case, id., the regulations are the framework to which agencies must adhere unless it is established that the contractor was not prejudiced by less than exact adherence. S.A.F.E. Export Corp., 65 Comp. Gen. 530 (1986), 86-1 CPD ¶ 413, aff'd, B-222308.2 et al., July 8, 1986, 86-2 CPD ¶ 44. Consequently, although Alamo's reading of the solicitation is a reasonable one, it does not compel exclusion of ESI because to do so would be contrary to regulatory and due process requirements. While offers normally must be evaluated on the basis of the terms and conditions found in the solicitation, see 50 Comp. Gen. 42 (1970); Montgomery Ward and Co., Inc., B-189500, Mar. 21, 1978, 78-1 CPD ¶ 218, the IFB language upon which Alamo relies is ineffective to the extent that it states that firms suspended or debarred from procurements are ineligible to bid on this sale.

Despite this solicitation defect, nothing in the record indicates that paragraphs 33 and 34 deterred potential bidders from competing or that Alamo was prejudiced in any way by the presence of these paragraphs in the solicitation. Alamo does not claim that its competitive position would have changed had it been aware of the agency's interpretation of paragraph 34 as not precluding the participation of firms suspended under the procurement program. Nor does Alamo argue, or even suggest, that it would have modified its offer had it known of the agency's interpretation. In any event, a bidder that offers other than a competitive price in what is on its face a competitive environment, based on an assumption concerning the impact of a solicitation provision on the nature of the

competition that it faces, generally does so at its own risk when the assumption proves to be wrong. See generally PTI Envtl., B-230070, May 27, 1988, 88-1 CPD ¶ 504; DataVault Corp., B-223937; B-223937.2, Nov. 20, 1986, 86-2 CPD ¶ 594. Under the circumstances, we have no basis to object to the acceptance of ESI's bid, inasmuch as Alamo has not established that its competitive position would have changed had it known that DLA would not enforce the IFB provision that on its face precluded ESI from competing. See Tritek Corp., B-247675.2, Aug. 6, 1992, 92-2 CPD ¶ 82; Tektronix, Inc., B-244958; B-244958.2, Dec. 5, 1991, 91-2 CPD ¶ 516.

The protest is denied.


for James F. Hinchman
General Counsel