149944
Arsenoff

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

Decision

Matter of: Acker Electric Company, Inc.--Reconsideration

File: B-250673.2

Date: August 30, 1993

D. Lee Roberts, Jr., Esq., Smith, Currie & Hancock, for the protester.
Robert C. Arsenoff, Esq., and Daniel I. Gordon, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where protester has not shown that the decision contained errors of fact or law warranting its reversal or modification.

DECISION

Acker Electric Company, Inc. requests reconsideration of our decision dismissing in part and denying in part its protest against the award of an 8(a) contract[1] to Thomas Electric Company, Inc., under request for proposals (RFP) No. DAAC01-92-R-0020, issued by the Department of the Army for the removal and replacement of lighting fixtures at the Army Depot in Anniston, Alabama. Acker Elec. Co., Inc., B-250673, Feb. 12, 1993, 93-1 CPD ¶ 130.

We deny the request for reconsideration.

In its request for reconsideration, Acker argues that we erred in dismissing what it describes as the "central" allegation in its protest: that the Army failed to perform the "fair market cost" analysis allegedly required by

---

[1]The 8(a) program is administered by the Small Business Administration (SBA) pursuant to section 8(a) of the Small Business Act, as amended, 15 U.S.C. § 637(a) (1988 and Supp. IV 1992), and implementing regulations contained in 13 C.F.R. Part 124 (1993) and Federal Acquisition Regulation (FAR) Subpart 19.8. The contract price for an 8(a) award may not exceed the fair market price for the items or services in question. 15 U.S.C. § 637(a)(1)(A); FAR § 19.806(b). Here, the Army established a fair market price of $167,737.60 and negotiated a price with Thomas of $167,000.

section 1207 of the Defense Authorization Act of 1987[2] in order to ensure that Thomas's price of $167,000 did not exceed the "fair market cost" plus 10-percent ceiling contained in section 1207. Acker reasons that "fair market cost" has a meaning different from fair market price and argues that "fair market cost" means "the cost which would be achieved to the government using full and open competitive procedures." Acker concludes that the agency made an award in contravention of the 10-percent ceiling contained in section 1207, since the Army in its analysis of Thomas's price refused to consider Acker's courtesy bid of $132,813, which Acker contends is the best measure to gauge a price obtainable through full and open competition. In so concluding, Acker presumes that the fair market cost plus 10-percent language is uniquely applicable to Department of Defense (DOD) 8(a) procurements, in contrast to the general "fair market price" ceiling for 8(a) contracts. See 15 U.S.C. § 637(a)(1)(A); FAR § 19.806(b).

We dismissed this allegation as untimely because we found that it was raised for the first time in Acker's comments on the agency report and that Acker knew the basis for the allegation more than 10 working days prior to the time the comments were filed. 4 C.F.R. § 21.1(a)(2) (1993). In its request for reconsideration, Acker points out that its initial protest contained the following statement, which it views as a sufficient statement of this ground of protest:

---

[2]"Section 1207," as it is still popularly known, formerly appeared at 10 U.S.C. § 2301 note (1988), and is now codified at 10 U.S.C. § 2323 (Supp. IV 1992). The particular section at issue, 10 U.S.C. § 2323(e)(3), provides as follows:

> "To the extent practicable and when necessary to facilitate achievement of the 5 percent goal [of contracting and subcontracting with designated entities] described in subsection [2323](a), the Secretary of Defense may enter into contracts using less than full and open competitive procedures (including awards under section 8(a) of the Small Business Act and partial set asides for entities described in subsection (a)(1)) [i.e., small disadvantaged businesses (SDBs), historically black colleges and universities, and minority institutions], but shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors described in subsection (a)."

> "We protest this solicitation's award due to it exceeding the fair market value by more than 10%. This is a clear violation of [section 1207]."

We disagree that this statement or similar language contained in the protest exhibits indicated that Acker believed that a special "fair market cost" analysis, more stringent than a fair market price analysis, was required for DOD 8(a) procurements and that the best indicator of "fair market cost" was its courtesy bid price submitted for comparison purposes during the protested procurement. "Fair market cost" and its alleged special applicability to DOD 8(a) procurements are not discussed in Acker's initial protest and Acker's unique statutory interpretation was not coherently presented with any detail until its comments were filed. Our Regulations require a protest to include a detailed statement of the legal and factual grounds for the protest, 4 C.F.R. § 21.1(c)(4), and where a protest contains general allegations of improprieties which are only supported with detailed reasons in subsequent comments on an agency report, we will dismiss a protest ground as untimely because our Regulations do not permit the unwarranted piecemeal development of protest issues, as occurred in this case. Conversational Voice Technologies Corp., B-224255, Feb. 17, 1987, 87-1 CPD ¶ 169.

In any event, and quite apart from the distinction the protester belatedly attempted to draw in its comments between "fair market cost" and fair market price, we note that the ceiling of 10 percent plus "fair market cost" contained in 10 U.S.C. § 2323(e)(3) has not been construed as applying to DOD's 8(a) contracts. DOD, which is charged with the implementation of the section 1207 program, see 10 U.S.C. § 2323(e)(5), has consistently, and without objection, applied the "plus 10 percent" ceiling to awards under its SDB set-aside and evaluation preference program, but not to 8(a) awards. See Defense Federal Acquisition Regulation Supplement Subparts 219.5, 219.70, and 219.8. DOD's approach is consistent with 10 U.S.C. § 2323(e)(5)(F), which prohibits DOD from altering "the procurement process" established under the 8(a) program. Also, SBA's own regulations governing the 8(a) program recognize no exception for DOD to the "fair market price" requirement of the Small Business Act. See 13 C.F.R. § 124.315. Thus, the

protester's presumption is not borne out by the regulatory implementation of the two agencies with primary responsibility in this area.[3]

The request for reconsideration is denied.

James F. Hinchman
General Counsel

---

[3]In light of this, we do not find that Acker's unsupported contrary interpretation presents an issue of widespread significance to the procurement community, and we therefore reject Acker's request that we consider and decide the untimely protest issue. See 4 C.F.R. § 21.2(c). We also reject Acker's request that we consider the issue under the "good cause" exception to our timeliness requirements. Acker argues that the agency's deliberate delay in notifying it of the contract award deprived the protester of an opportunity to consult with counsel prior to filing its initial protest and that this, in turn, led to omissions in the protest allegations concerning the precise wording of section 1207. Acker fails to understand, however, that our dismissal was based, not on mere semantic vagueness, but on the fact that the initial protest simply did not raise Acker's statutory interpretation theory. The agency's delay, if any, in providing notice of award cannot justify the protester's failure to timely state this basis of protest.