

Matter of: Consolidated Industries, Inc.

File: B-256278; B-256278.2

Date: June 3, 1994

David M. F. Lambert, Esq., and Thomas S. Dann, Esq., Hewes, Morella, Gelband & Lamberton, for the protester. Gregory H. Petkoff, Esq., Department of the Air Force, and John W. Klein, Esq., Small Business Administration, for the agencies. Behn Miller, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

After terminating original awardee's contract, agency properly canceled request for proposals issued under Small Business Administration's section 8(a) program and decided to recompete the requirement instead of making contract award to the second-low offeror--who had been graduated from the 8(a) program for more than a year--where: (1) the agency reasonably concluded that the 8(a) program objectives would be best served by awarding a contract to a current 8(a) program participant; and (2) the agency's technical requirements had so substantially changed that an award under the original solicitation would no longer serve the agency's minimum needs.

DECISION

Consolidated Industries, Inc. protests the actions of the Department of the Air Force in regard to request for proposals (RFP) No. F41608-92-R-20936, issued by the agency under the Small Business Administration's (SBA) section 8(a) program for 80 M-10 missile adapters. The Air Force terminated the original awardee's contract after discovering that the contractor was unable to proceed with contract performance. Instead of awarding a contract under the original RFP to Consolidated--who was the second-low, technically acceptable offeror--the agency canceled the procurement and proceeded with a resolicitation since Consolidated is no longer an 8(a) program participant, and because of significant changes in the agency's technical requirements. Consolidated contends that, notwithstanding its graduation from the 8(a) program, under the applicable

small business statute it is still eligible for award, and consequently, instead of resoliciting this requirement, the Air Force should reinstate the original RFP and award a contract to Consolidated.

We deny the protest.

The solicitation was issued on January 5, 1993, with competition limited to 8(a) firms. The RFP contemplated the award of a 5-year indefinite quantity contract to the lowest-priced, technically acceptable offeror. On June 22, the Air Force made award to Enser Corporation as the lowest-priced, technically acceptable offeror. On September 15, the Air Force learned that Enser was unable to begin contract performance since its manufacturing facilities were closed; apparently, Enser was forced to shut down its operations in July due to the firm's nonreceipt of progress payments under an Army contract.

On November 15, the Air Force issued a no-cost termination for convenience of Enser's contract; on January 5, 1994, after learning of the termination and the agency's decision to resolicit this requirement as a new 8(a) procurement, Consolidated filed this protest with our Office.

PROTESTER'S CONTENTIONS

Consolidated argues that instead of resoliciting its requirement for missile adapters, the Air Force should have awarded a contract to Consolidated as the next low, technically acceptable offeror under the original solicitation. In this regard, the record shows that although Consolidated graduated from the 8(a) program on June 23, under the Small Business Act, see 15 U.S.C. § 637(a)(1)(C) (1988 and Supp. IV 1992), the firm still would be eligible for award under the original solicitation since, on the RFP's closing date--April 22, 1993--Consolidated was an active, eligible participant in the 8(a) program.

Of relevance here, section 207 of the Small Business Administration Reauthorization and Amendments Act of 1990, Pub. L. No. 101-574, 104 Stat. 2814 (1990), amended section

¹Under the section 8(a) program, SBA enters into contracts with government agencies and arranges for performance through subcontracts with socially and economically disadvantaged business concerns. See 15 U.S.C. § 637(a). Under certain circumstances, acquisitions offered to SBA under the 8(a) program must be awarded on the basis of competition limited to eligible 8(a) firms. See Federal Acquisition Regulation (FAR) § 19.805.

8(a)(1) of the Small Business Act, 15 U.S.C. § 637(a)(1), by adding a new subparagraph (C) which authorizes agencies to make competitive 8(a) awards in limited circumstances to firms that have graduated from the 8(a) program. The purpose of this provision is to allow contract awards where an unanticipated lengthy evaluation process--or other unforeseeable delay--prevented an otherwise eligible 8(a) firm from receiving award due to its graduation from the 8(a) program; to avoid unfairly penalizing 8(a) firms who have expended time and effort during their period of 8(a) eligibility to compete, contracting agencies may--in their discretion--proceed with an award even if the firm has graduated from the 8(a) program.

Consolidated also argues that a resolicitation under the 8(a) program is an improper means of filling the Air Force's missile adapter needs since offerors' prices under the original solicitation have been released to all competitors who requested a post-award pricing abstract; consequently, Consolidated argues, a resolicitation will result in an improper auction.

The Air Force maintains that a resolicitation is proper in this case because the Air Force would like to ensure that this requirement is awarded to a currently participating 8(a) business concern. The Air Force also asserts that no improper auction will occur as a result of the current resolicitation since substantial changes have been made in the missile adapter technical specifications which are expected to significantly impact offerors' prices.

DISCUSSION

Where, as here, the agency terminates a contract and resolicits for its requirement, it is in effect canceling the RFP, and we will determine the propriety of the agency action by applying the rules pertaining to the cancellation of a solicitation. See Control Corp.; Control Data Sys., Inc.--Protest and Entitlement to Costs, B-251224.2 et al., May 3, 1993, 93-1 CPD ¶ 353; Information Ventures, Inc., B-241441.4; B-241441.6, Dec. 27, 1991, 91-2 CPD ¶ 583.

Cancellation of an RFP after offerors' prices have been revealed is proper where the record contains plausible evidence or a reasonable possibility that a decision not to cancel would be prejudicial to the government or the integrity of the procurement system. See Budney Indus., B-252361, June 10, 1993, 93-1 CPD ¶ 450. For example, cancellation is appropriate where the needs of the agency have changed in some material respect. Id.

As a preliminary matter, the record shows that the protester graduated from the 8(a) program more than a year ago. Under

these circumstances, we see no basis to conclude that it was unreasonable for the agency to conduct a new procurement rather than make award to Consolidated. As noted above, while the Small Business Act permits contracting agencies to make award to a graduated 8(a) concern in the event the agency deems it appropriate, there is no requirement that the agencies do so in every case. Here, we think the Air Force reasonably concluded that the objectives of the 8(a) program would be better served by conducting a new procurement in order to provide a contracting opportunity for a current 8(a) firm, rather than by making an award to a firm which had been graduated from the 8(a) program for more than a year. See 10 U.S.C. § 2323(a) (Supp. V 1993); Defense FAR Supplement § 219.000 (regarding statutory goal of awarding 5 percent of contract dollars to small disadvantaged firms).

We also find that material changes in the missile adapter's technical specifications justify the cancellation. In the year since the original RFP was issued, the Air Force has made substantial changes in the materials used to make the missile adapters. Because of these required technical changes, any product provided under the original RFP's specifications would no longer serve the Air Force's minimum needs. Further, the Air Force states, these changes will significantly affect offerors' prices. For example, the new RFP will require the use of a cleaning compound that is non-ozone depleting; according to the Air Force, this substance is approximately twice the price of the cleaning compound originally specified. While Consolidated expresses general disagreement with the agency's assessment of the impact of the changes on price, it has offered no specific evidence showing that the changes are not material. In sum, the record shows that any award under the original RFP would be prejudicial to the government's interests, since it would force the Air Force to procure an adapter that will not meet its minimum needs, and because the changes in the adapter specifications will significantly affect offerors' prices.

²We note that SBA has not objected to the Air Force's decision.

³Because the new solicitation has not yet been issued, the Air Force has asked this Office not to identify the specification changes in order to prevent giving the protester and other contractors an unfair competitive advantage in the procurement effort. However, all this information was available to the protester's counsel under a protective order issued by our Office. In addition, certain information regarding the changes--specifically, the change in the required cleaning compound, discussed in the text above--is not subject to the protective order.

Under these circumstances, we find the RFP cancellation to be proper. See Budney Indus., supra. In this regard, where there is no legal basis to object to the cancellation, the agency has not created an impermissible auction--particularly where, as here, the result of the solicitation specification revisions will effectively place all offerors in the same competitive posture they enjoyed under the original solicitation. See Anderson Hickey Co., B-250045.3, July 13, 1993, 93-2 CPD ¶ 15.

The protest is denied.

/s/ Robert H. Hunter
for Robert P. Murphy
Acting General Counsel

⁴Consolidated also argues that proceeding with the resolicitation was improper while its protest challenging the cancellation of the prior RFP was pending. This issue is academic in light of our finding that the agency's cancellation was unobjectionable. See ASR Mgmt. & Technical Servs., B-244862.3; B-247422, Apr. 23, 1992, 92-1 CPD ¶ 383.