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Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Analytica, Inc.

File: B-259110

Date: February 9, 1995

DECISION

Analytica, Inc., a small business, protests the award of a contract to Avalon Integrated Systems under solicitation No. IRS-94-005, issued by the Department of the Treasury, Internal Revenue Service (IRS), for FrameMaker training services. The procurement was set aside under section 8(a) of the Small Business Act. 15 U.S.C. § 637(a) (1988 and Supp. V 1993). Analytica's primary contention is that the award price is excessive.

We dismiss the protest.

This is Analytica's second protest to our Office of this IRS procurement. Originally, Analytica filed an agency-level protest with the IRS challenging the decision to set aside the procurement under section 8(a), in part because Analytica alleged that the procurement had originally been set-aside for small businesses, and because all previous procurements of this requirement had been small business set-asides. The IRS denied this protest, explaining that Analytica's request to bid on the procurement was premature since the solicitation had not then been issued. It also noted that the protester was not a qualified 8(a) firm. The IRS explained that it had not reclassified the procurement as an 8(a) purchase; it had been first designated as an 8(a) purchase in May 1994. The IRS also denied, as unfounded, Analytica's claim that its 8(a) candidate was not authorized to distribute FrameMaker copyrighted training materials.

In its first protest to our Office, Analytica appealed the agency's denial of its protest and observed that the IRS had not addressed Analytica's argument that the previous procurements of this requirement had been small business set-asides. We dismissed Analytica's protest, explaining that our Office generally did not review agency actions taken under section 8(a) because of the broad discretion afforded the Small Business Administration (SBA). In that dismissal, we pointed out that our review is limited to

determining whether government officials engaged in fraud or bad faith. See 4 C.F.R. § 21.3(m)(4) (1994); Lecher Constr. Co.--Recon., B-237964.2, Jan. 29, 1990, 90-1 CPD ¶ 127. We also explained that a prior small business set-aside would not preclude a subsequent 8(a) set-aside of the same requirement. In this regard, we observed that the SBA would not accept a procurement for the 8(a) program if that acceptance would have "an adverse impact on other small business programs or on an individual small business . . . ." 13 C.F.R. § 124.309(c). Analytica did not allege in its protest that the SBA had not complied with this regulation. Analytica did not request reconsideration of our dismissal.

On October 11, 1994, Analytica learned of the award to Avalon and filed its second protest with our Office alleging: that an 8(a) set-aside was improper because this procurement had originally been classified as a small business set-aside before being set aside under section 8(a); that the SBA did not evaluate the procurement for small business adverse impact; and that the award price of $52,134 was excessive. The first two issues are untimely and Analytica is not an interested party to raise the third issue.

Our Bid Protest Regulations contain strict rules requiring timely submission of protests. These rules specifically require that protests based upon alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of proposals must be filed prior to the closing time. 4 C.F.R. § 21.2(a)(1); Engelhard Corp., B-237824, Mar. 23, 1990, 90-1 CPD ¶ 324. Protests not based upon alleged improprieties in a solicitation must be filed no later than 10 working days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. §§ 21.2(a)(2), 21.12(b).

With regard to its first issue, Analytica is essentially requesting reconsideration of our September 2 decision. A request for reconsideration must be filed within 10 working days after the requesting party knows, or should know the basis for reconsideration. 4 C.F.R. § 21.12(b); MRL, Inc.--Recon., B-235673.4, Aug. 29, 1989, 89-2 CPD ¶ 188. Where, as here, a party fails to meet our time requirements, we will not consider a request for reconsideration. For the purposes of computing timeliness, Analytica was assumed to have received a copy of our dismissal by September 13, within 1 calendar week after it was mailed. Analytica's second protest was not filed until October 25, more than 10 working days later. Id. While Analytica argues that it could not protest the procurement until it was set aside, the fact remains that such a solicitation impropriety must be raised prior to the closing time for receipt of

proposals. 4 C.F.R. § 21.2(a)(1). Here, since Analytica did not file its protest until after it learned of the award, its protest is untimely.

Analytica's protest concerning the SBA's alleged failure to consider the adverse impact of the procurement also is untimely.[1] To the extent it was appropriate to raise the issue prior to the issuance of the 8(a) solicitation, Analytica should have done so when it filed its protest with the agency, or at the latest, when it filed its first protest here. 4 C.F.R. § 21.2(a)(2). Further, after we observed that Analytica had not raised the issue in these protests, it failed to timely challenge our decision in a request for reconsideration. 4 C.F.R. § 21.12(b). To the extent it was appropriate to wait until the solicitation was issued, its failure to raise this alleged solicitation impropriety until after the award makes its protest untimely. 4 C.F.R. § 21.2(a)(1).

Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Air Inc.--Request for Recon., B-238220.2, Jan. 29, 1990, 90-1 CPD ¶ 129. In order to prevent those rules from becoming meaningless, exceptions are strictly construed and rarely used. Id.

With regard to the reasonableness of the amount of the award, Analytica is not an interested party to raise the issue. Under our Bid Protest Regulations, a protester must have a direct economic interest which is affected by the award of a contract in order to be considered an interested party. 4 C.F.R. § 21.0(a). In general, a non-8(a) firm is

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[1]Further, the requirement to consider any adverse impact of an 8(a) set-aside does not apply where, as here, the requirement represents a "new requirement." 13 C.F.R. § 309(c). A "new requirement" is one which has not been previously procured by the agency, or represents the expansion or alteration of an existing requirement. Analytica argues that the IRS requirement is not "new" because Analytica instructed six IRS employees in a FrameMaker course in early 1994. The IRS explains that the course in question was offered by Universal Systems Inc., which hired Analytica, or its employee, to instruct the course. The IRS employees were sent on an individual basis and attended the course with employees of other agencies. In contrast, the current IRS requirement is for a training course in FrameMaker 4.0, tailored to IRS needs, for 72 IRS employees, over a 6-month period. Under these circumstances, we agree with IRS' position that the current requirement is "new."

not an interested party to protest the qualifications of a particular 8(a)-eligible firm, since even if the protest were sustained, a non-8(a) firm would not be eligible for award. AVW Elec. Sys., Inc., B-252399, May 17, 1993, 93-1 CPD ¶ 386. The same is true with regard to challenges to the reasonableness of an award price to an eligible 8(a) firm under an 8(a) set-aside. San Antonio Gen. Maintenance, Inc., B-230152, Mar. 14, 1988, 88-1 CPD ¶ 263.[2]

The protest is dismissed.

Paul Lieberman
Assistant General Counsel

[2]In any event, the agency conducted a market survey of the costs of existing courses in FrameMaker 4.0 training and comparable courses. The agency found that the Avalon proposal was less expensive than the government estimate and prices obtained in the survey. In view of the fact that the services were to be performed on-site at the IRS and tailored for IRS employees, the agency concluded that the Avalon proposal, as further reduced in negotiations, was reasonable. The protester has submitted the results of its own market survey which includes prices apparently lower than those proposed by Avalon. However, it is not clear that these market prices are based on the identical IRS requirement, thus Avalon's survey does not call into question the reasonableness of the agency's determination. See U.S. Elevator Corp., B-224237, Feb. 4, 1987, 87-1 CPD ¶ 110.