DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

61245

FILE: B-185261 DATE: July 30, 1976

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MATTER OF: Hoover Reporting Company, Inc.

DIGEST:

1. Protest that contractor is established firm and should not be eligible for award under 8(a) program is denied where SBA determines firm to be in need of further assistance through 8(a) program.

2. Protest that award of 8(a) contract to SBA resulted in agency paying excessive prices for services is denied as contracting agency determined prices to be fair and reasonable. Moreover, SBA has determined that 8(a) contracts may include an amount over and above competitive market prices if such an amount is needed to permit 8(a) contractors to perform profitably.

3. Protest that contract is in violation of Advisory Committee Act requirement that copies of agency transcripts must be available to public at cost because protester considers contract prices for this service excessive is denied as cost of duplication may include reasonable factor for overhead and profit and price to public under subject contract is same as price of copies to Government which agency has determined to be fair and reasonable.

Hoover Reporting Company, Inc. has protested the award of the Maritime Administration's (MarAd) contract No. 6-38005 for stenographic reporting services to the Small Business Administration (SBA) under the authority of section 8(a) of the Small Business Act, 15 U.S.C. 637(a) (1970 ed.) and the subsequent award of SBA contract No. SB 3-20-8(a) 76-C-407 for the reporting requirements to Baker, Hames & Burkes Reporting, Inc. Hoover contends that the procurement should not have been set aside for the 8(a) program because Baker is not eligible for 8(a) assistance. Also, Hoover argues that the award prices are excessive. Hoover also believes that this contract violates the requirement of the Advisory Committee Act (5 U.S.C. App. I), that copies of transcripts of agency proceedings or advisory committee meetings be made available to the public at the actual cost of duplication.

Section 8(a) empowers the SBA to enter into contracts with any Government agency having procurement powers, and the contracting officer of such agency is authorized "in his discretion" to let the contract to SBA "upon such terms and conditions" as may be agreed upon between SBA and the procuring agency. See 53 Comp. Gen. 143 (1973). Under regulations issued pursuant to the above statutory authority, the SBA has determined that firms which are owned or controlled by economically or socially disadvantaged persons should be the beneficiaries of the 8(a) program. Section 124.8-1(b) of title 13 of the Code of Federal Regulations (CFR). It is clear, therefore, that the determination to initiate a set-aside under section 8(a) and to dispense with competition is a matter within the sound discretion of the SBA and the contracting agency. Alpine Aircraft Charters, Inc., B-179669, March 13, 1974, 74-1 CPD 135; see also Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F. 2d 696 (5th Cir. 1973).

SBA states that it reviewed its criteria for determining whether the instant procurement would be suitable for 8(a) contracting. Under these criteria, a specific contracting opportunity will not be accepted for 8(a) contracting if:

> "a. The percentage of procurements for the specific requirement is excessive to the total procurements for like or similar services or products procured by the federal government.
>
> "b. The instant requirement is all ready 'on the street' by means of IFB or RFP.
>
> "c. There is a reasonable probability that a competitive award could be won by the disadvantaged firm.
>
> "d. Another small business firm would suffer a major hardship if the requirement were accepted for 8(a) contracting."

The record shows that Baker has been receiving 8(a) assistance for the past few years (since 1973), and SBA considered that award of this requirement would help Baker reach its business development goals.

Whether a firm's business development goals are reasonable and how much aid a firm needs to become self-sustaining is largely a matter of judgment which is within the discretion of the SBA. Our review of the record, which includes a copy of the SBA's determination (which SBA considers confidential and not subject to disclosure) that Baker is eligible for the 8(a) program and

that its business goals are reasonable, does not suggest that SBA has arbitrarily decided that Baker is not yet a self-sustaining firm or that its business development goals are unreasonable.

Hoover supports its contention that the award to Baker was at excessive rates by comparing Baker's rates with those Hoover charged when it held the previous contract for MarAd's reporting requirements. Also, Hoover points out the lower average per page price at which Baker at one time successfully bid a reporting contract for another agency and the lower rates charged for reporting Congressional hearings.

The SBA, in the administration of the 8(a) program, has determined that while contracts will be awarded at prices which are fair and reasonable both to the Government and the 8(a) contractor (13 CFR 124.8-2(d)), prices may include an amount over and above competitive market prices if such an amount is needed to permit the 8(a) contractor to perform profitably. See Kings Point Manufacturing Company, 54 Comp. Gen. 913 (1975), 75-1 CPD 264. This additional amount is referred to as a business development expense. SBA determines how much, if any, business development expense is necessary to allow a proposed subcontractor to perform at a profitable level. Thus, it is clearly recognized that higher procurement costs may be incurred in order to attain the goal of the 8(a) program "to assist small business concerns * * * to achieve a competitive position in the market place." Moreover, the determination of whether a price is reasonable or whether such price is in excess of the amount for which the Government should be able to obtain the items or services sought is the responsibility of the contracting agency and will not be disturbed unless it is arbitrary or made in bad faith. Eastern Tunneling Corporation, B-183613, October 9. 1975, 75-2 CPD 218; Norris Industries, B-182921, July 11, 1975, 75-2 CPD 31; Southern Space, Inc., B-179962, March 29, 1974, 74-1 CPD 155.

Here MarAd determined that the prices being charged by Baker were fair and reasonable. Under the circumstances, we will not question this determination.

Finally, Section 11 of the Federal Advisory Committee Act, 5 U.S.C. App. I (1972 Supp.) (Act) provides in part:

> "(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings."

In the contract between MarAd and SBA and incorporated by reference in the contract between SBA and Baker is the following clause:

> "ARTICLE V AVAILABILITY OF TRANSCRIPTS/SALES PRIVILEGE
> pursuant to Public Law 92-463, the Government reserves the right to make transcripts available to the public at the actual cost of duplication. Contractors may also sell copies of transcripts to the public, provided that such copies are sold at a price which does not exceed the Government's price cited for 'Additional Copies' (Items 2 of the Schedule-Page 4A of this contract)."

Hoover insists that the prices for copies of hearings held outside of Washington, D. C. but within the continental United States are:

> "* * * far in excess of the actual duplicating costs and far in excess of the rates established as fair and reasonable. For Marad to have negotiated such an excessive rate, it might just as well have exercised what it erroneously believes to be its legal prerogative and not have included any reference whatsoever to Public Law 92-463."

We have held that this Act does not require any particular procedures on the part of agencies contracting for reporting services, so long as the public is adequately protected against paying unreasonably high prices for duplicating services. In this connection, we have recognized, that such cost may include a reasonable factor for overhead and profit. See Securities Exchange Commission, B-184120, July 2, 1975, 75-2 CPD 9; B-179038, October 4, 1973, and February 13, 1974, 74-1 CPD 66. Here the agency has determined that the contractor's prices are fair and reasonable. Moreover, under the contract clause quoted above the agency has reserved the right to supply the public with copies of the transcript. Therefore, if in the future the agency determines that the prices charged by Baker for copies to the public are excessive, the agency may arrange to have the public supplied by another source. Under the circumstances, we find no violation of Public Law 92-463.

Accordingly, the protest is denied.

Deputy Comptroller General
of the United States