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

FILE: B-190030

DATE: March 16, 1978

MATTER OF: Poli-Com, Inc.

DIGEST:

1. GAO recommended that Navy resolicit for requirements in five improperly canceled RFP's. Protester, allegedly low under three of RFP's, contends that Navy has in bad faith contracted with SBA under section 8(a) of Small Business Act for same items to avoid possible contract with protester. However, Navy has issued solicitation for similar items in similar quantities to those in canceled RFP's, and contends that "C(a)" contract represents additional parts. Protest is denied, since we cannot, therefore, conclude that Navy has acted in bad faith.
2. Protest that there was not sufficient data for SBA to subcontract for certain communications parts pursuant to contract with Navy under section 8(a) of Small Business Act is denied, since GAO previously determined that Navy possessed adequate data to competitively procure such parts.
3. Navy set both price ceiling and ceiling on maximum Navy liability under section 8(a) contract with SBA. SBA determined that subcontract award at price within ceiling would be reasonable. Protest that subcontract price would be too high is denied, since determination whether price is reasonable is responsibility of contracting agency and will not be disturbed in absence of showing of fraud or bad faith.

In our decision in Poli-Com, Inc., B-187086, March 10, 1977, 77-1 CPD 179, we sustained a protest by Poli-Com, Inc. (Poli-Com), against the cancellation of five requests for proposals (RFP's) issued by the Navy Ships Parts Control Center (SPCC), Mechanicsburg, Pennsylvania. The RFP's were for spare parts to support the AN/SCR 20 radio set used in ship-to-ship and aircraft control communications, to be manufactured in accordance with drawings specified. All five RFP's were canceled after SPCC determined that updated and revised technical data was needed to permit competitive procurement and to reduce the number of claims for equitable

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adjustments because of inadequate specifications. That determination was based upon preaward survey reports by the Defense Contract Administration Service recommending against any awards without a complete and accurate data package. In its protest Poli-Com contended that it was the low responsible offeror under at least three of the RFP's and contended that the necessary data was in fact readily available.

In sustaining Poli-Com's protest, we stated:

"It is clear that at the time of the cancellations adequate specifications did exist within the Navy. We have no indication that prior to the RFP cancellation SPCC made any effort to determine if a data package was available within the Navy. Based on that record we cannot say that the cancellations were justified."

Notwithstanding our finding, we did not recommend that the canceled RFP's be reinstated. We stated:

"* * * Poli-Com has stated that it would not accept award on any of the RFPs unless its prices could be negotiated upwards to reflect the inflation occurring since the submissions of its offers. Under 10 U.S.C. § 2304(g), however, such negotiations may not be permitted without conducting oral or written discussions with all offerors within the competitive range. The competitive range apparently was not established prior to the cancellations and we do not believe that establishing the competitive range now on the basis of obsolete offers would be in the best interest of the Government. * * *"

Therefore, we did not object to SPCC's intention to buy the requirements solicited in the canceled RFP's by a procurement restricted to small business. However, we did recommend:

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"* * * that procedures be established within the Navy to require that reasonable attempts be made in the future to locate specifications at other Navy facilities before cancelling solicitations after the submission of proposals."

In May, SPCC issued letter contract No. N00104-77-C-3774 to the Small Business Administration (SBA) under the section 8(a) program of the Small Business Act (15 U.S.C. § 637(a)(1) (1970)) for the same types of items solicited in the canceled RFP's. The SBA has awarded a subcontract thereunder to Oklahoma Aerotronics, Inc.

Poli-Com protests the issuance of the letter contract to the SBA and of the subcontract with Oklahoma Aerotronics, Inc. Poli-Com argues that the items included in the letter contract should have been awarded to Poli-Com under the five canceled RFP's, under which Poli-Com's prices were lower. In addition, Poli-Com questions how the specifications, testing requirements and technical drawings involved in the letter contract can in good faith be considered by SPCC as adequate for such contract, when SPCC's basis for canceling the five solicitations protested earlier by Poli-Com was the inadequacy of those same elements--Poli-Com suggests that if they were insufficient for the earlier RFP's they must be insufficient for the letter contract.

Much of Poli-Com's current protest is in the nature of a request that we reconsider our March 10, 1977, decision and recommend that the five canceled RFP's be reinstated with awards to Poli-Com. To that extent, it is untimely under section 20.9(b) of our Bid Protest Procedures, 4 C.F.R. part 20 (1977), which requires that a request for reconsideration be filed not later than 10 working days after the basis therefor is known or should have been known, whichever is earlier.

Concerning SPCC's decision to contract with SBA under section 8(a) of the Small Business Act, the act authorizes the SBA to enter into contracts with any Government procuring agency, and the contracting officer of such agency is authorized "in his discretion" to

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let the contract to the SBA under such terms and conditions as may be agreed upon by the SBA and the procurement activity. In view of the broad discretion afforded under the act, a determination to set aside a procurement and to award a contract under section 8(a) is for the contracting agency and the SBA. It will not be reviewed by our Office unless the protester shows fraud on the part of Government officials or such willful disregard of the facts as to necessarily imply bad faith. A.R.&S. Enterprises, Inc., B-189832, September 12, 1977, 77-2 CPD 186.

Poli-Com contends that the section 8(a) contract was entered into in bad faith on the part of SPCC. Poli-Com in effect argues that the contract represents another attempt, other than the earlier cancellation of RFP's under which Poli-Com was the apparent successful offeror, to avoid a contract with Poli-Com.

However, the record discloses that SPCC has issued, allegedly in accordance with our March 10, 1977, decision, a new solicitation, restricted to small business, for the same type of items in quantities at least equal to those in the canceled RFP's. Poli-Com was given the opportunity to, and in fact did, submit an offer under that solicitation. In view thereof, and although we do not know what motivated the 8(a) contract, there is not a sufficient basis to conclude that SPCC has acted in bad faith.

Further, we must consider the subcontract issued by SBA to Oklahoma Aerotronics, Inc., as adequate in regard to its drawings and specifications, since in our March 10, 1977, decision we agreed with Poli-Com that SPCC in fact possessed sufficient data and could prepare adequate specifications and requirements to procure the subject items competitively. In this connection, we note that the SBA decision to accept the 8(a) contract and award a subcontract to Oklahoma Aerotronics, Inc., included a determination that those actions would not result in "major hardship" to any other small business firm, including Poli-Com.

In regard to the fact that the prices under the 8(a) subcontract may be higher than those involved in the canceled RFP's, 13 C.F.R. § 124.8-2(d) (1977), provides that "Section 8(a) subcontracts shall be awarded at prices

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which are fair and reasonable to the Government and to the subcontractor." The determination whether a price is reasonable is the responsibility of the contracting agency and will not be disturbed absent bad faith or fraud. Hoover Reporting Company, Inc., B-185261, July 30, 1976, 76-2 CPD 102. Here, SPCC set both a ceiling price and a maximum cost liability to the Navy, which reflect SPCC's belief that a subcontract finalized at a price within those limits would be reasonable. In addition, in the above-referenced SBA decision SBA determined that the estimated value of a section 8(a) subcontract with Oklahoma Aerotronics, Inc., "was not an excessive amount, whether considered individually or collectively, in relation to the total purchase of like or similar products or services provided by the Federal Government." We also note that the basis for our March 10, 1977, recommendation to resolicit rather than make awards under the improperly canceled RFP's was our agreement with Poli-Com's contention that the prices offered were by then obsolete.

Accordingly, and in view of the discussion above, we cannot say that a subcontract within the stated price limits would be unreasonable.

The protest is denied.

R. Z. Kistner
Deputy Comptroller General
of the United States

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

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March 15, 1978

The Honorable Charles W. Whalen, Jr.
House of Representatives

Dear Mr. Whalen:

We refer to your letter dated September 13, 1977, concerning a bid protest filed by Mr. P. J. Kanistros of Poli-Com, Inc., against the Navy's decision to contract for certain communications parts with the Small Business Administration (SBA) under section 8(a) of the Small Business Act, and the SBA's issuance of a subcontract for the parts.

Enclosed is a copy of our decision of today denying the protest.

Sincerely yours,

Deputy

P. J. Kanistros
Comptroller General
of the United States

Enclosure



Peter Iannocelli

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

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March 16, 1978

The Honorable William H. Harsha
House of Representatives

Dear Mr. Harsha:

Enclosed is a copy of our decision of today denying a protest filed in our Office by Mr. P. J. Kanistros of Poli-Com, Inc., against the Navy's decision to contract for certain communications parts with the Small Business Administration (SBA) under section 8(a) of the Small Business Act, and the SBA's issuance to Oklahoma Aerotronics, Inc., of a subcontract for the parts.

Sincerely yours,

Deputy

P. J. Kanistros
Comptroller General
of the United States

Enclosure