15367 Kratzer Proc II

DECISION

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

FILE: B-199578.2 DATE: November 7, 1980

MATTER OF: C. Engel's Sons, Inc.--Reconsideration [Request For]

DIGEST:

1. Untimely allegation that certain District of Columbia regulations governing minority business procurements were not authorized by law under which they were promulgated does not raise significant issue since recent change in law clearly authorizes contested regulations so that issue should not arise in future procurement and thus it does not involve principle of widespread interest.

2. Allegations that firm does not have adequate facilities to perform contract concern affirmative responsibility determination and are not for GAO review absent showing of fraud on part of procuring officials.

3. Protester's contention that it was approached by minority firm, the eventual awardee, under procurement reserved for such firms to engage in "front" scheme and that it was informed by minority firm that contracting officials assured that firm it would get award does not establish prima facie case of fraud on part of contracting officials because protester seems mainly concerned with fraud on part of contractor, allegations concerning contracting official are heresay and award was to be made on competitive basis to certified minority firm submitting lowest bid.

4. Allegation, first raised in request for reconsideration, that definitive responsibility criteria were not followed, will not be considered since under circumstances, including fact that original term of contract has expired, no useful purpose would be served thereby.

~~012754~~ 113706

C. Engel's Sons, Inc. (Engel's) requests reconsideration of our decision, C. Engel's Sons, Inc., B-199578, September 2, 1980, 80-2 CPD 167, in which we dismissed in part and summarily denied in part its protest of the award of a contract to Hood's General Contracting Service (Hood's) by the District of Columbia Department of General Services (DGS).

DGS designated this contract as a "sheltered market" procurement pursuant to the Minority Contracting Act of 1976, D.C. Code 1973, § 1-851 et seq. The solicitation, pursuant to regulation, precluded consideration of non-minority bids for the procurement. See 26 D.C.R. § § 203.2, 203.6 (December 21, 1979). Notwithstanding this limitation in the solicitation, Engel's, which is not a minority firm, submitted a bid to supply the required fresh foods. The Engel's bid was lower than the Hood's bid, which was the lowest submitted by a certified minority business. The Engel's bid was not accepted.

Engel's argued that its bid should have been considered and that the regulations precluding consideration of non-minority firms for sheltered market procurements were not authorized by the Minority Contracting Act. Alternatively, Engel's argued that the Act itself was unconstitutional. We dismissed these arguments as untimely since the exclusion of non-minority firms was evident on the face of the solicitation and Engel's failed to protest prior to bid opening as required by our Bid Protest Procedures. 4 C.F.R. § 20.2 (b)(1) (1980). We also noted that we do not generally consider constitutional attacks on statutes, but view them as matters to be dealt with by the courts.

Engel's now contends we shouldn't have dismissed the protest as untimely. First, it argues that it was unreasonable to expect it to be able to protest before bid opening because the actions complained of took place close to bid opening. Second, it contends that the protest raises significant issues and thereby qualifies for consideration under section 20.2(c) of our Procedures.

We do not agree with these contentions. First, the portion of the protest dismissed as untimely dealt with the solicitation restriction and had nothing to do with any "actions" immediately preceding bid opening. Second, the significant issue exception to the timeliness requirement is invoked sparingly and only where an issue is of widespread interest or affects a broad class of procurements, Arlandria Construction Co., Inc., B-195044, B-195510, April 21, 1980, 80-1 CPD 276. The only issue raised by the protest which could conceivably meet that requirement is whether the regulations excluding non-minority firms were authorized by the Minority Contracting Act. However, any question regarding the authority of the District of Columbia Minority Business Opportunity Commission to promulgate regulations precluding consideration of non-minority bids under the sheltered market program has been eliminated by D.C. Law 3-91, the Minority Contracting Act Amendments of 1980, which became effective on September 13, 1980. Section 5 of that law specifically limits eligibility for participation in the sheltered market program to "certified minority business enterprises." Thus, the issue does not appear to be one that will arise in the future procurements, and we therefore do not perceive it to be a significant issue within the meaning of our Procedures.

In its initial protest, Engel's also alleged that Hood's, for a number of reasons, was not a responsible bidder. We declined to review the DGS affirmative determination of Hood's responsibility since those determinations are basically subjective business judgments. Engel's now contends that there has been no

such judgment here and that we otherwise should have considered the issues because the protest contained both an allegation of fraud on the part of contracting officials and an allegation of noncompliance with specific solicitation provisions bearing on bidder responsibility, thereby invoking exceptions to our rule of not reviewing a contracting agency's affirmative determination of responsibility.

We do not agree. Engel's did not allege in its protest that the contracting officer acted fraudulently or in bad faith in regarding Hood's as a responsible bidder or that the affirmative determination was violative of a specific solicitation criterion. It merely pointed out, "[u]pon information and belief * * * that Hood's is deficient" because it couldn't meet Department of Agriculture standards, and had neither "adequate plant facilities" nor "the refrigerated warehouses which are essential for the safe storage of the foodstuffs." These are precisely the types of concerns which are within the discretionary judgment of contracting officials and not subject to our review unless the solicitation contains a specific requirement that, as a condition of being found responsible, a bidder demonstrate it has such facilities or be able to meet such standards. Engel's did not allege the existence of any such definitive responsibility criterion.

Engel's did refer to an alleged minority "front" scheme, stating that it was approached by a representative of Hood's and asked to participate in a scheme whereby Hood's would do the bidding and Engel's would supply the produce. Although Engel's also stated that Hood's said it had been assured by a DGS purchasing agent that Hood's was virtually assured of getting the contract, Engel's concern appeared to be not with fraud on the part of contracting officials, but on the part of Hood's, as indicated by its statement that Hood's "may have violated both the spirit and letter of the law" through the minority front scheme.

Moreover, we fail to see how this indicates fraud on the part of contracting officials. We note that the IFB required bidders to be certified both as a minority enterprise and for the "commodity" involved in the procurement. Hood's admittedly has the certification. In addition, we see nothing in the solicitation and are aware of nothing in the applicable regulations which prohibited subcontracting, including subcontracting with non-minority firms. Thus, it appears that the contracting officer properly could view Hood's as both eligible to perform this contract and able, through the use of subcontracting, to meet contract requirements. (We note that the 1980 amendments do prohibit subcontracting more than 50 percent of the contracting effort and require that 50 percent of what is subcontracted be performed by minority enterprises. That law, however, was not applicable to this procurement.)

With respect to what the purchasing agent allegedly said, Engel's' recitation of what Hood's said the agent said is obviously heresay and of dubious evidentiary value. Moreover, even if such a statement was made, we would not consider it prima facie evidence of fraud since 1) in a sheltered market procurement the competition would be limited to the few eligible concerns such as Hood's, so that one could have reasonably viewed the firm as having an excellent chance of success, and 2) despite the statement, the procurement was advertised, bids were publicly opened, and the award was to go to the low eligible bidder, which was Hood's. In short, we do not believe Engel's either in its original protest or in its reconsideration request has satisfied its burden of establishing a prima facie case of fraud. See Courier-Citizen Company, B-192899, May 9, 1979, 79-1 CPD 323.

Consequently, we believe our original decision declining to consider the issue of Hood's responsibility was the appropriate response to the Engel's protest. For the first time, however, Engel's now identifies specific solicitation provisions which it believes are definitive responsibility criteria. One of them,

a requirement that the bidder "have warehousing, distributing facilities within the Metropolitan Area of the District of Columbia," appears to be such a criterion. See, e.g., Courier-Citizen Company, supra. Had Engel's specifically asserted non-compliance with this provision in its initial protest, we would have considered the matter. At this point, however, we are not disposed to develop the case on this issue alone since 1) it is not clear that this provision was meant to preclude use of a subcontractor's facility if indeed Hood's does not have its own; 2) there is apparently a facility being used to satisfy contract requirements; and 3) the term of the contract was for 3 months ending in September 1980. Consequently, we doubt that any useful purpose would be served by our examining that issue now.

For the foregoing reasons, our original decision is affirmed. In light of Engel's allegations concerning the operation of the sheltered market program and our current audit review of that program, we are referring Engel's correspondence to the audit staff for possible consideration in its ongoing activities.

For The Comptroller General
of the United States