



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Logistical Support, Inc.

File: B-230190.2

Date: October 19, 1988

DIGEST

Protest that agency acted in bad faith in issuing a solicitation by a certain date in order to set it aside for small disadvantaged businesses and to avoid a new regulatory prohibition against such set-asides in certain circumstances, which apparently were present, is without merit where record supports the reasonableness of the agency's actions and reveals no evidence of bad faith.

DECISION

Logistical Support, Inc. protests request for proposals (RFP) No. F05640-88-R-0027, issued by the Department of Air Force for mess attendant services at Peterson Air Force Base, Colorado. Logistical, a small nondisadvantaged business, complains that the solicitation was issued hastily, and apparently in bad faith, as a total set-aside for small disadvantaged businesses (SDBs) in order to circumvent a new regulatory prohibition against such set-asides when the product or service has been previously acquired successfully through a small business set-aside.

We deny the protest.

The acquisition process was not initiated until December 1987 even though the previous contract for the required services had ended September 30. According to the Air Force, immediate action was not taken to obtain the follow-on service starting October 1 because the dining hall was to undergo a complete renovation that was not scheduled to be completed until May 30, 1988. Based on the assumption that service would be required after the May 30 completion date, the Air Force states, it sent a synopsis for the new solicitation to the Commerce Business Daily (CBD), which was published on December 28. The synopsis stated that the

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solicitation was for a basic contract period of June 1 through September 30, 1988 and listed the proposed issuance date for the solicitation as on or about January 26.

Out of 25 prospective offerors responding to the synopsis, the Air Force received a response from 10 SDBs. Two of the SDBs provided references to support their previous experience on government contracts. The Air Force conducted an analysis of the technical and financial capabilities of the two firms and determined that they were both technically and financially responsible. The Air Force also conducted an historical search of the acquisition and found that on the most recent acquisition two SDBs had submitted bids which were within 10 percent of the award price. Under the Department of Defense's (DOD) first set of interim regulations implementing this new category of small business set-asides provided for section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661 the Air Force was required to set-aside the procurement exclusively for SDBs since there was a reasonable expectation that offers would be received from at least two responsible SDB concerns and award would be made at a price not more than 10 percent above the fair market price. See 52 Fed. Reg. 16266 (1987). As a result, a new synopsis was published in the CBD on January 20 announcing that the solicitation was set-aside exclusively for SDBs, and listing a proposed issuance date of on or about February 2.

After issuing its first set of interim regulations implementing the new SDB set-aside program, DOD reviewed public comments and published a second set of interim regulations revising the first set of rules. The second set of regulations were effective only for solicitations issued on or after March 21, 1988, and provided, among other things, that total SDB set-asides would not be conducted when a product or service has been previously acquired successfully on the basis of a small business set-aside. See 53 Fed. Reg. 5114, (1988). The second set of rules were made final on July 15. See 53 Fed. Reg. 20626 (1988).

The RFP was ultimately issued on March 10 while a protest, filed by Logistical on February 9, was pending in our Office. That protest was denied in our decision in Logistical Support, Inc., B-230190, B-230192, Apr. 19, 1988, 67 Comp. Gen. _____, 88-1 CPD ¶ 385. In that decision, we ruled that DOD, given the discretion granted the Secretary of Defense under the statute establishing the SDB program, could under its first set of rules, set-aside procurements exclusively for SDBs even in procurements which had previously been acquired successfully based on a set-aside

for small businesses in general. We also ruled that the second set of rules prohibiting such set-asides applied only to solicitations issued on or after March 21.

Meanwhile, during renovation of the dining hall a significant amount of unforeseen asbestos was discovered under the floor requiring decontamination and removal of the asbestos and repair to the underlying floor, thus delaying the scheduled completion date for the renovation of May 30. The renovation delay caused by discovery of the asbestos made the site visit of March 29 so uninformative that on March 31, the Air Force issued amendment No. 0001 which stated that a second site visit would be scheduled when the renovation was more complete. The amendment also postponed indefinitely the closing date for receipt of proposals. When the Air Force contracting officer was notified that the renovation work would be approximately 75 percent complete by June 25, he issued amendment No. 0002 on June 8, scheduling a site visit for June 28 and establishing a new closing date for receipt of proposals of July 22. Amendment No. 0002 also made changes in the RFP's performance work statement revising the period of performance to reflect the renovation delays, as well as making certain minor performance related changes and revising the payment computation method under the contract to reflect current regulations.

Logistical then filed this protest in our Office on June 27, complaining that the Air Force contracting officer's actions were a "blatant attempt to circumvent the provisions of the law" prohibiting total SDB set-asides for procurements which have been previously acquired successfully through a small business set-aside. Logistical argues that the solicitation, issued on March 10, was "hastily thrown together in order to beat a deadline" of March 21, the effective date of the new regulatory prohibition. Logistical points to the two amendments to the RFP as support for its allegations. Logistical argues that the amendments completely rewrote the original solicitation while retaining the original issuance date of March 10. Logistical concludes that these circumstances indicate bad faith on the part of the contracting officer in attempting to avoid the prohibition, effective March 21, against total SDB set-asides in the circumstances present here.

After the filing of Logistical's June 27 protest, the Air Force issued amendment No. 0003, effective July 12, which again postponed the procurement indefinitely. We were also informally advised by the Air Force that it issued Amendment No. 0004, effective September 14, which rescheduled the site visit for October 4, established a new closing date for

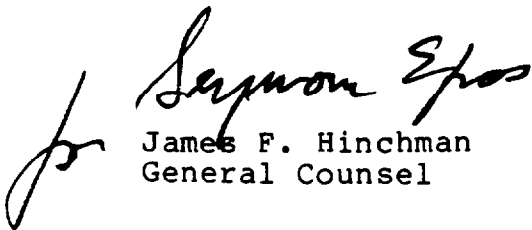
receipt of proposals of October 14, and provided for a basic period of performance of from November 1988 to September 1989.

We find Logistical's allegations to be without merit. Where agency bad faith is alleged, the protester must present supporting factual evidence; contracting officials are presumed to act in good faith and, in order to establish otherwise, there must be virtually irrefutable proof that the agency acted with malicious and specific intent to injure the protester. Dayton T. Brown, Inc., B-223774.3, Dec. 4, 1986, 86-2 CPD ¶ 642. Logistical fails to meet this burden of proof.

The Air Force has fully explained the circumstances leading up to the March 10 issuance date for the solicitation and the subsequent amendments. Nothing in the record indicates that the acquisition process was "hastily thrown together in order to beat a deadline", as the protester contends. The delays in the procurement were the result of the Air Force's application of the requirements for SDB set-asides under the rules in place at the time and the discovery of asbestos during renovation of the dining hall. Nor do we find that the amendments to the solicitation were so substantial that they impermissibly rewrote it, as Logistical contends. In addition, the services involved here are a continuing need and, despite the delays, the Air Force has proceeded with reasonable promptness to meet that need.

Logistical has, thus, not shown that the Air Force acted in bad faith in issuing the solicitation on March 10 as an SDB set-aside or that it abused its discretion in amending the solicitation. Further, as we stated in Techplan Corp.; American Maintenance Co., B-228396.3, B-229608, March 28, 1988, 88-1 CPD ¶ 312, there is nothing in the statutory scheme establishing the SDB program that requires DOD to maintain particular requirements as set-asides for nondisadvantaged small businesses.

The protest is denied.


James F. Hinchman
General Counsel