



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: PI Construction Corporation

File: B-270576.2

Date: December 15, 1995

Paralee White, Esq., and G. Brent Connor, Esq., Cohen & White, for the protester. Gregory Petkoff, Esq., and Richard P. Castiglia, Jr., Esq., Department of the Air Force, for the agency.

Ronald Berger, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer properly may delete small disadvantaged business (SDB) set-aside provisions from request for proposals, after proposals have been received and evaluated, pursuant to a memorandum suspending the SDB set-aside provisions of the applicable regulations which requires such deletion except in cases where that would unduly delay a procurement.

DECISION

PI Construction Corporation protests the Department of the Air Force's elimination, after the receipt of proposals, the small disadvantaged business (SDB) set-aside provisions of solicitation No. F04608-95-R-0001. PI contends that the Air Force could not properly take that action.

We dismiss the protest.

The Department of Defense (DOD) established the SDB preference program primarily under authority of section 1207 of the National Defense Authorization Act of 1987, 10 U.S.C. § 2301 note (1994). The Act left to DOD's discretion the promulgation of regulations and procedures necessary to achieve the Act's stated objectives of awarding 5 percent of the dollar value of DOD's contracts to SDB concerns. G&D Foods, Inc., B-233511 et al., Feb. 7, 1989, 89-1 CPD ¶ 125.

On October 23, 1995, the Under Secretary of Defense issued a directive suspending certain provision of the Defense Federal Acquisition Regulation Supplement in light of the decision in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).¹ The directive provided, in pertinent part, that:

"Until further notice contracting officers shall not set aside acquisitions for [SDBs]. This suspension is effective immediately. Contracting officers should amend solicitations that have been issued to remove a set-aside that was based on the suspended sections where the amendment of the solicitation will not unduly delay a procurement such that deliveries under the resultant contract would not be received when required."

Pursuant to that directive, the contracting officer issued an amendment to the solicitation on November 22, which removed the SDB set-aside provisions. The procurement was also again synopsisized in the Commerce Business Daily; the synopsis announced a new unrestricted procurement for the same requirement.

PI contends that since proposals had already been received (the proposal due date was August 14) when the directive was issued, it does not apply to this procurement. PI asserts that the suspension "applied only to . . . outstanding solicitations for which the due date for proposals had not yet passed." PI further asserts that because the procurement "had proceeded . . . to the evaluation and award stages . . . there existed no outstanding solicitation to amend." We find no merit to these assertions.

First, by its own terms the Under Secretary's memorandum is not limited to solicitations under which proposals had not yet been received. The memorandum requires removal of the SDB set-aside provisions from all solicitations unless that would unduly delay a procurement. Here, the Air Force determined that there would be no such undue delay. Moreover, the fact that proposals had been received and evaluated does not mean that the solicitation could not be amended. It is well-settled that a request for proposals can be amended at any time prior to award. See, e.g., Federal Acquisition Regulation § 15.606.

The protest is dismissed.

Comptroller General
of the United States

¹In Adarand, the Supreme Court held that racial classifications must be subject to strict scrutiny and must serve a compelling government interest and be narrowly tailored to further that interest.