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DECISION

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

FILE: B-195789 DATE: March 7, 1980

MATTER OF: Kentron International, Inc.

DIGEST:

1. Proper cancellation of solicitation renders academic protest concerning award procedures under solicitation.

2. Protester has not shown arbitrariness of Air Force decision to cancel solicitation for Wake Island services.

Kentron International, Inc. (Kentron), has protested the July 1979 selection of Federal Electric Corporation (FEC) as the proposed awardee under Air Force request for proposals (RFP) F646005-79-R-0011. Kentron also protests the August 1979 cancellation of the RFP. We dismiss in part, and deny in part, the protest for the reasons that follow.

Air Force Selection of Federal Electric

Kentron's main attack here concerns FEC's failure to timely supply an "approved employment agreement" from the Republic of the Philippines (ROP) for ROP nationals whom FEC proposed to employ under the contract which was for services on Wake Island. Kentron insists that in lieu of canceling the RFP the Air Force should have rejected FEC's low proposal for this defect and awarded the contract to Kentron. Related to this main attack, Kentron also urges that the Air Force's failure to reject the FEC proposal in this circumstance demonstrates Air Force bias in favor of FEC.

Proper cancellation of a solicitation renders academic a protest concerning award procedures involved under that solicitation. United Security, Inc., B-194867, June 21, 1979, 79-1 CPD 445. Because of our conclusion, infra, concerning the propriety of the cancellation, this aspect of Kentron's protest is dismissed.

[Protest Involving Contract Award]

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Cancellation of RFP-0011

Under this basic ground of protest, Kentron urges that the Air Force's August 1979 cancellation of the RFP was defective because it was only intended to give FEC an additional opportunity to submit a proposal with an acceptable ROP employment agreement. We reject this ground of protest for the reasons that follow.

The Air Force insists that it properly canceled the RFP because of "totally unacceptable" actions taken by the ROP Ministry of Labor (MOL) in interfering with the competitive process through the rejection of proposed labor agreements submitted by all offerors except Kentron. (The review of the labor agreements was required by the RFP under the terms of the 1968 United States-ROP Offshore Labor Agreement (OLA). Although the RFP did not require the use of ROP workers, the Air Force maintains that an offeror proposing use of ROP workers, particularly use of the ROP labor force now performing the services under Kentron's existing contract, has a "natural competitive advantage" since a contractor using another labor force would have to recruit and transport those workers to Wake Island, which does not have an indigenous work force.)

The Air Force has listed the "unacceptable actions" taken by the MOL in violation of the OLA as follows:

> (1) Improperly selecting the "most advantageous" proposed labor agreement (proposed by Kentron) and not reviewing other labor agreements in good faith let alone within a reasonable time;
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> (2) Improperly insisting--in violation of the OLA--that offerors guarantee not to reduce the number of ROP workers on Wake Island during the term of the contract without a concomitant reduction of Air Force activities on Wake Island--thereby preventing competition between contractors in the areas of innovation and managerial efficiency.

The end result of these "unacceptable actions," in the Air Force's view, was an improper "attempt to usurp the source selection authority of the Air Force for the Wake Island contract" and to interfere in the competitive process which had resulted in the selection of FEC for the contract. Because of this usurpation and interference, the Air Force canceled the RFP to "allow a review of the OLA by both the U.S. State Department and the MOL to redefine the terms and conditions of the agreement [in order to] preclude recurrence of [these 'unacceptable' actions] by assuring that all potential contractors contemplating using ROP workers will be treated equally and without prejudice." Subsequent to the cancellation, a new RFP for the same services was issued in October 1979.

Protest Allegations

Kentron's objections to the cancellation may be summarized as follows:

(1) There was no prejudice resulting to FEC under the MOL actions, even if improper, since the RFP did not require use of ROP workers and FEC ultimately proposed use of other-than-ROP workers at a lower price than the company previously proposed for ROP workers. This lower price was proposed in August 1979 after FEC failed to obtain ROP approval; moreover, evidence of record shows that in June 1979, prior to the date for final offers, the Air Force's contracting officer and the director of the procuring activity rejected the notion that competition would be affected if non-ROP labor were proposed;

(2) The MOL did not usurp the Air Force selection authority since: (a) the OLA does not set specific wages or benefits and the prohibition against reduction of ROP workers only influences contract administration; (b) the MOL gave advance indications to the Air Force and all offerors of the labor agreement review criteria which were applied uniformly to prospective offerors' agreements including FEC's agreement; and (c) the RFP and the OLA contemplated that the MOL would have an indirect effect on source selection through the labor agreement approval procedure;

(3) The Air Force's cancellation had the net effect of prejudicing Kentron since the Air Force could have awarded the contract to Kentron rather than canceling the RFP;

(4) The Air Force has not explained why it did not meet with the MOL earlier to resolve the difficulties (for example, in 1976 a similar situation developed), or explained why its proposed resolicitation of the procurement will cure these difficulties since the OLA is still in effect.

(5) The Air Force may only take action to correct "unfair" advantages created by the United States Government. The Air Force's present position carried to its logical extreme would, for example, require an agency to cancel a solicitation if a bidder were improperly denied a necessary foreign license while the matter could be resolved. This example shows the absurdity of the Air Force position;

(6) The cancellation action was caused by "undue command influence."

Analysis

General Considerations

To cancel a negotiated solicitation, the reason for canceling must not be arbitrary. A.B. Machine Works, Inc., B-187563, September 7, 1977, 77-2 CPD 177. As we said in the cited decision:

> "* * * The contracting officer is correct * * * [in] that the justifications for canceling an RFP are not * * * limited to the circumstances described in ASPR § 2-404.1(b) * * * [for canceling advertised solicitation]. However, we do not agree that an RFP may be arbitrarily canceled."

Further, as the moving party in a protest, the protester has the general burden of proving its position (Arista Devices Corporation, B-194393, September 5, 1979, 79-2 CPD 177); this burden is especially appropriate in a protest challenging a decision to cancel a solicitation since we have traditionally recognized the wide range of discretion vested in the contracting officer in

arriving at a decision to cancel a solicitation. As we stated in Micro Labs Inc.; Bowman Enterprises, Inc., B-193781, June 18, 1979, 79-1 CPD 430:

> "Contracting officers have broad powers of discretion in deciding whether a solicitation should be canceled; consequently, we do not question these decisions so long as they are reasonably founded under existing precedent. * * *"

For the below reasons, we find that the protester has not shown the Air Force decision to be arbitrary.

Reply to Arguments

(Keyed to the above-numbered paragraphs of Kentron's protest)

(1)(2)(3) Under these grounds, Kentron essentially argues that the actions of the MOL did not interfere with the competition to FEC's or any other offeror's disadvantage; hence, the decision to cancel and resolicit must necessarily be viewed as prejudicing Kentron whose offer otherwise was for acceptance in the event the RFP had not been canceled and FEC's labor agreement had been finally disapproved by the MOL.

Kentron disputes the Air Force view (stated also to be shared by the State Department) that the MOL has violated the OLA by selecting the "most advantageous" proposed labor agreement rather than reviewing in good faith all proposed agreements of other offerors, as contemplated by the RFP, and by insisting on a guarantee against employment reduction during the terms of the contract. We are not in a position to question this view, or the anticompetitive effects of the MOL actions, especially since the State Department-Air Force representatives, rather than our Office, are the "Government" for the purpose of resolving disputes under the disputes provision of the OLA. In this perspective, even if the MOL gave some advance indication of its intention to act in a manner contrary to the OLA and, assuming that the Air Force failed to immediately react to the intention, we do not agree that the Air Force was in any way estopped from later attempting to remedy the effects flowing from the MOL's actions.

Further, we do not find FEC's belated submission (August 1979) of non-ROP workers inconsistent, as Kentron suggests, with the Air Force's position that the MOL's actions were anticompetitive. Under the circumstances, it is reasonable to assume that FEC: (1) felt it had to offer ROP workers to submit a competitive final offer; (2) expected to have its labor agreement ultimately accepted by the MOL even after final offers had been submitted; and (3) decided to propose non-ROP workers only when it became clear that the MOL's anticompetitive stance would not readily be changed; by that time the Air Force decided it was too late for FEC to overcome the prejudicial effects of the MOL's actions. The fact that the Air Force's contracting officer was of the opinion, prior to final offers, that competition was possible without use of ROP workers is irrelevant to our assumption concerning FEC's proposal intent. In any event, the June 1979 memo shows the opinion was made in the abstract without any confirmation of the labor forces finally proposed by contending offerors. Indeed, only ROP labor was timely proposed. Under the above view, we reject Kentron's notion that it, rather than FEC, was prejudiced under the procurement.

(4) We have rejected Kentron's suggestion that the Air Force's possible failure to remedy the MOL action in any way estopped the Air Force from later taking corrective action in an attempt to cure the MOL actions. As to Kentron's allegation that the status quo will prevail on the resolicitation since the same MOL attitudes may still prevail, we must accept the Air Force's advice that it has made its objections known to the MOL during the time afforded by the resolicitation. Whether these objections will produce the desired result is obviously open to question, but this uncertainty does not retroactively call into question the validity of the Air Force cancellation. In any event, the cancellation and resulting resolicitation process has allowed offerors to become aware of these difficulties and, perhaps, the competitive possibility of using non-ROP workers. In these circumstances, we cannot question the implicit Air Force view that improper competitive interference has thereby been reduced even if not totally eliminated.

(5) We reject Kentron's argument that the procuring agency may not attempt to remedy foreign governmental acts which improperly interfere, as here, with the conduct of procurements. To the extent the interference conflicts with an agreement between the United States and the foreign Government, and to the extent the executive branch agencies charged with interpreting and administering the agreement decide it would be appropriate to attempt to remedy the interference, as here, we will not object. By contrast, in Pacific Architects & Engineers, Inc., 56 Comp. Gen. 494, 77-1 CPD 244 (1977), cited by Kentron, the procuring agency found that the Japanese licensing requirements involved were not restrictive or prejudicial and were consistent with the Status of Forces agreement between the United States and Japan. We therefore did not object to the exclusion of the bidder who failed to comply with the requirements.

(6) The charge of excessive "command influence" exerted on the contracting officer to compel him to cancel the solicitation is basically founded on the June 1979 Air Force memo of record, discussed above, which shows that the contracting officer believed competition was possible without the use of ROP workers. Since this opinion was advanced before final offers were received--all of which apparently proposed use of ROP workers--the opinion is not necessarily inconsistent with a later independent change in the contracting officer's opinion as is apparently evidenced in his August decision canceling the procurement. Aside from this evidence, there is no evidence that the contracting officer's decision to cancel was the result of "undue command influence."

Protest denied.

Milton J. Socolar

ACTING Comptroller General
of the United States