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

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Protest Alleging That Solicitation Was Defective

FILE: B-199441 DATE: November 19, 1980

MATTER OF: D&S Universal Mining, Inc.

DIGEST:

1. On reprocurement due to contract default, contracting officer's decision to use unrestricted method rather than negotiate contract under section 8(a) of Small Business Act is not reviewed in absence of evidence or even allegation of fraud or bad faith.

2. Since issue was not raised until after bid opening, protester's argument that changes in specifications caused solicitation to be defective is untimely and will not be considered on merits.

3. Protester which did not submit bid and has no direct or substantial economic interest in procurement is not interested party within meaning of GAO's Bid Protest Procedures to challenge responsiveness of awardee's bid where other bidders were in line for award.

4. GAO will not question agency decision to make award prior to resolution of protest where decision to do so was made in accordance with applicable regulations.

D&S Universal Mining, Inc. (D&S), protests the contracts awarded to Island Creek Coal Sales Company and National Engergy Resources (NER) under invitation for bids (IFB) No. DLA600-80-B-0196, issued by the Defense Fuel Supply Center, Defense Logistics Agency (DLA), Alexandria, Virginia.

The IFB solicited bids on an unrestricted basis for an estimated 50,000 tons of bituminous coal. D&S argues that the solcitation was defective and that DLA's best course of action would have been to award

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the full requirement to D&S under its present section 8(a) contract with the Small Business Administration (SBA) and the General Services Administration (GSA). However, we do not believe that D&S has shown any basis to disturb the awards.

On February 27, 1979, DLA, on GSA's behalf, issued IFB No. DLA600-79-B-0144, requesting bids for bituminous coal. This solicitation represented 50 percent of GSA's requirements for the 5.2 Program (coal for the heating and air conditioning of Government buildings in the District of Columbia metropolitan area). The other 50 percent was reserved for SBA's 8(a) program. DLA, however, was unable to agree on a price for the 8(a) portion. Thus, GSA negotiated the 8(a) portion itself with SBA, and D&S became SBA's subcontractor under GSA contract No. GS-03S-51472. The Mitchell Energy Corporation (Mitchell) was the successful bidder on six of the eight items under solicitation -0144, and on July 19, 1979, was awarded contract No. DLA600-79-D-1683 for the delivery of 77,000 tons of coal.

However, on June 2, 1980, DLA terminated Mitchell's contract for default on all but one of the items due to Mitchell's failure to deliver the coal. On June 10, 1980, the present IFB was issued as a reprocurement on an unrestricted basis for 50,000 tons of coal to be used to replenish stockpiles depleted as a result of Mitchell's nondelivery. The specifications were changed in some respects.

Upon receipt of the IFB, D&S did not submit a bid, but instead filed a protest with the contracting officer objecting to the method of procurement and requesting that the IFB be canceled. The contracting officer, however, denied the protest, and bids were opened on the date scheduled. D&S then filed a protest with our Office. Despite the protest, DLA awarded contracts to NER (40,000 tons) and Island Creek Coal Sales Company (10,000 tons) under Defense Acquisition Regulation (DAR) § 2-407.8(b)(3) (1976 ed.) and due to the urgent need to replace the emergency stockpiles that had been depleted due to Mitchell's failure to perform.

D&S argues that this repurchase should have been negotiated with D&S under SBA's 8(a) program. It believes that, in view of its existing 8(a) contract with GSA, D&S

offered DLA the most economic and efficient way of repurchasing the defaulted tonnage since by negotiating with D&S under the 8(a) program there would be no need to advertise, no need to inspect mines, and D&S was already supplying coal to the locations in question.

Regarding the award of 8(a) contracts, we note that section 8(a) of the Small Business Act authorizes SBA to enter into contracts with any Government agency with procuring authority and to arrange the performance of such contracts by letting subcontracts to small business or other concerns. The contracting officer of the procuring agency is authorized "in his discretion" to let the contract to SBA. In light of that discretionary authority, we do not review agency determinations to set aside or not to set aside contracts for section 8(a) awards, unless there is a showing of fraud or bad faith on the part of Government officials. Therefore, as a general rule, our Office will not review an agency's decision not to enter into an 8(a) contract. Jazco Corporation, B-197550, February 13, 1980, 80-1 CPD 132.

Here, DLA chose to advertise on an unrestricted basis because this was considered to be the best method for fulfilling its responsibility of mitigating the defaulted contractor's damages. Under the circumstances, absent evidence or even an allegation of fraud or bad faith, we have no basis to review DLA's decision.

D&S also protests the changes made in the IFB's specifications. D&S believes that the solicitation is defective because the specifications are so different from those used under the defaulted contract that the IFB constitutes a new buy rather than a repurchase. DLA, on the other hand, argues that the changes were minor and that the coal called for under this procurement is similar to that required under the defaulted contract.

Our Bid Protest Procedures, 4 C.F.R. § 20.2(b)(1) (1980), require that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be "filed" prior to bid opening. The term "filed" as used in this instance means receipt at the contracting agency or the General Accounting Office, as the case may be.

In its initial protest to the agency, D&S did not raise the issue that the changed specifications caused the solicitation to be defective. D&S raised this issue for the first time in its protest to our Office which was filed after bid opening. Thus, under the above-mentioned rule, this ground of protest was not timely filed and will not be considered on the merits.

D&S further argues that NER's bid should have been rejected as nonresponsive because the offered coal did not meet an IFB specification requirement.

Under section 20.1(a) of our Bid Protest Procedures, a party must be "interested" in order to have its protest considered by our Office. Whether a party is sufficiently interested depends on its status in relation to the procurement, the nature of the issues raised, and how these circumstances show the existence of a direct and/or substantial economic interest on the part of the protester. See Die Mesh Corporation, 58 Comp. Gen. 111 (1978), 78-2 CPD 374.

In light of this, we do not believe that D&S is an interested party within the meaning of our Bid Protest Procedures to challenge the responsiveness of NER's bid. In order for a nonbidding protester such as D&S to be an interested party, it cannot merely dispute which of several bidders should properly receive the award. Rather, the protest must, if found to be valid, entitle the protester to relief which will impact on its economic interest--for example, the cancellation of the solicitation so as to allow the protester another opportunity to compete. Cf. Roy's Rabbitry, B-196452.2, May 9, 1980, 80-1 CPD 334. Here, because our discussion above maintained the efficacy of the IFB, D&S has no direct or substantial economic interest which would be affected if NER's bid is determined to be nonresponsive since seven bids were received in response to the IFB and the items awarded to NER would have been awarded to the next low, responsive, responsible bidder if NER's bid had been rejected.

D&S finally contends that DLA did not properly justify the decision to award the contracts prior to a GAO decision on its protest. DLA, however, has presented evidence to show that, prior to making the awards, the contracting officer requested authority to make awards

notwithstanding the protest. This request was made to an appropriate level above that of the contracting officer as required by DAR § 2-407.8(b)(2) and was based on urgency--that is, the need to replenish diminished stockpiles--as required by DAR § 2-407.8(b)(3).

We have held that where a contracting agency has taken the steps outlined above, the determination to proceed with an award prior to the resolution of the protest is not subject to question by our Office. See The Entwistle Company, B-192990, February 15, 1979, 79-1 CPD 112.

Protest dismissed in part and denied in part.

Harry R. Van Cleve

For the Comptroller General
of the United States