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DECISION

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

FILE: B-200815 DATE: August 31, 1981

MATTER OF: D&S Universal Mining, Inc.

DIGEST:

1. Where General Services Administration (GSA) procurement of coal was set aside for Small Business Administration (SBA) section 8(a) program and no award documents were executed by GSA or SBA, protester's signature alone on solicitation documents did not bind Government.

2. Government is not estopped to deny existence of contract since: (1) record does not show that Government officials intended their conduct to be acted upon by protester or that Government officials acted in manner which reasonably led protester to believe that their conduct was so intended, and (2) solicitation documents were expressly conditioned upon "official written notice" of award and such notice was never given to protester.

D&S Universal Mining, Inc. (D&S), protests against the General Services Administration's (GSA) cancellation of solicitation No. 8FCB-D7-42537 for the purchase of 5,000 tons of coal and the procurement of any portion of the requirement for coal from any source other than D&S subsequent to the cancellation. D&S argues, alternatively, that GSA's attempted cancellation was improper because: (1) the contracting officer had executed a formal contract with D&S before attempting to cancel the solicitation; (2) GSA is estopped to deny the existence of a contract because of the course of dealings between D&S and GSA.

The protest is denied.

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BACKGROUND

In early June 1980, a GSA procurement officer was contacted by representatives from both D&S and the Small Business Administration (SBA) regarding the possibility of procuring coal for the Denver Federal Center pursuant to a section 8(a) (15 U.S.C. § 637(a) (1976)) contract. On June 18, 1980, the contracting officer received a request from the GSA Public Buildings Manager to establish a requirements contract for an estimated quantity of 18,000 tons of coal with delivery beginning about October 1, 1980, and an additional definite quantity requirement for 5,000 tons of coal for use at the Denver Federal Center. By two separate letters, both dated June 30, 1980, the SBA requested that both coal requirements be fulfilled by contract between the SBA and GSA pursuant to section 8(a) of the Small Business Act and section 1-1.713 of the Federal Procurement Regulations (FPR) (1964 ed. amend. 100) and indicated that it had received a business proposal therefor from D&S, a small business contractor. The Federal Supply Service Contracts Division Director (the contracting officer's supervisor) responded to the SBA by accepting the proposal for an 8(a) contract for the 5,000-ton requirement only. The contracting officer's supervisor stated that GSA would retain the 5,000-ton requirement, but that the estimated 18,000-ton requirement would be submitted to the Defense Fuel Supply Center for handling.

Several weeks later, negotiations began between GSA, SBA, and D&S for the 5,000-ton requirement. On July 23, 1980, GSA issued a pricing request to SBA to be used in formulation of an 8(a) contract for D&S. Additional negotiations took place during the month of August. On August 11, the D&S proposal, offering a price of $42 per ton, was allegedly hand-carried to GSA. A cover letter accompanying the proposal requested that several changes be made in the solicitation concerning visual inspection, sampling procedures and screening. On August 14, D&S also provided GSA a current coal analysis performed by an independent testing laboratory as required under

the solicitation. On August 21, the Assistant Building Manager Engineer of the Denver Federal Center reviewed the coal analysis and indicated that it was acceptable to GSA. Also, on August 21, the contracting officer called an SBA representative to request a copy of the D&S proposal since she could not locate the copy which had allegedly been hand-delivered on August 11. The changes requested by D&S in its August 11 letter were the subject of negotiations conducted on September 3, at which time D&S offered a price reduction to $38 per ton. The GSA Assistant Building Manager Engineer approved the changes on September 4, but, due to the number of changes and because the original D&S proposal had not been signed by the president of D&S, the solicitation as changed was reissued on September 9. On September 4, GSA conducted a plant facility evaluation on both D&S and its proposed subcontractor. On September 10, they were approved as capable of performing the 5,000-ton contract.

On September 15, a meeting took place between the president of D&S and the contracting officer at the latter's request. The specification changes which had been made at D&S's request were pointed out to the president of D&S, and the contracting officer told him that they were acceptable to GSA. The contracting officer told the D&S representative to sign the solicitation if the terms were acceptable to D&S. Although the D&S president signed the document, it must be noted that it had not been signed by a representative of either the SBA or GSA. At this point, the recollections of the GSA contracting officer and the president of D&S differ. The president of D&S states that he understood that his signature was the final step in executing a binding contract prepared by and acceptable to GSA. He then inquired as to the date delivery would start. The contracting officer, however, recalls that she told him that "subject to approval of an award," delivery would probably begin around October 1. The contracting officer told the president of D&S to check with the Assistant Building Manager Engineer to find out how much coal was on hand and when delivery would be required. The contracting officer again requested

a guaranteed coal analysis which D&S immediately supplied. According to D&S, the contracting officer also informed the president of D&S that GSA had purchased screens to perform inspection and screening as requested by D&S during negotiations.

As directed by the contracting officer, D&S discussed delivery with the Assistant Building Manager Engineer on September 15. D&S alleges it was told that delivery could be required upon very short notice because only three more cars of coal remained to be used and even that coal might not be usable alone since it was very poor quality coal. D&S also believed that delivery might be required on an urgency basis since the Denver facility has a very limited amount of onsite storage capacity. D&S argues that it was led to believe that it had a contract with GSA because of this conversation with the Assistant Building Manager Engineer. This GSA official, however, states that he was led by D&S to believe that D&S already had a contract.

D&S alleges that, based upon its belief that the contract had been executed on September 15 and that GSA would be placing "an immediate and extreme demand for coal," it changed its position in several ways: (1) a D&S supervisor was moved from Tennessee to Colorado for the purpose of overseeing the contract; (2) discussions were begun with the subcontractor and banking representatives to secure adequate financing to perform the contract; (3) D&S directed its subcontractor to contact trucking firms to provide necessary hauling services; and (4) D&S temporarily suspended its marketing efforts with other companies until after initial deliveries were made to GSA. D&S alleges that it informed the contracting officer of these activities (with the possible exception of the suspension of D&S marketing efforts).

On September 16, the contracting officer completed a price analysis recommending award to D&S and stating, "[c]onsidering all factors, proposed award price is considered fair and reasonable." The contracting officer's supervisor endorsed this recommendation on September 16.

According to the contracting officer, upon rechecking pertinent regulations, she discovered that under FPR § 1-1.713-3(b) necessary cost and pricing data should have been furnished by the SBA to support the award to D&S. She also determined that an audit of D&S's proposal should have been performed in accord with FPR § 1-3.809 (1964 ed. amend. 190). Accordingly, she met with the president of D&S and a representative of its subcontractor on September 24. At that meeting, D&S delivered to the contracting officer information (regarding its pricing proposal) which the contracting officer did not think was adequate. The president of D&S alleges that the contracting officer reiterated the statements made by the Assistant Building Manager Engineer to the effect that, because there was very little coal remaining at the Denver Federal Center, delivery by D&S was expected by October 1. D&S argues that this was a confirmation of the fact that a contract existed and that performance would be required immediately.

The contracting officer also contacted GSA's Director of Audits on September 24 and learned that an audit would take about 30 days. According to the contracting officer, she determined on September 26 to proceed with award without an audit "in view of the urgency." This determination was premised on the belief that a fair and reasonable price had been agreed upon and because the audit could not be accomplished before the Public Buildings Service fiscal year funds used for the procurement would expire on September 30. Moreover, the contracting officer expected to substantiate that D&S's price was reasonable from the results of the competitive bids received on the 18,000-ton requirement. However, on September 30, the Assistant Administrator for Acquisition Policy informed contracting activity officials that the Administrator of GSA had made a final decision that award should not be made to D&S without an audit. Since an audit would take about 30 days and the fiscal year funds used for the procurement were to expire on September 30, the contracting officer's supervisor allegedly informed both D&S and SBA on September 30 that award could not be made to D&S without an audit. Here, again, the president of D&S has a different recollection of the facts. According to him, he was not informed until October 6 that GSA "had canceled the contract."

On October 7, 1980, the contracting officer informed the president of D&S that GSA was about to make an emergency purchase of 2,500 tons of coal and solicited a quotation from him. D&S offered to supply the coal for this requirement at the same price it had offered for the 5,000-ton requirement ($38 per ton). Since D&S's price was not the lowest offered, award was made to another firm at a price of $30.61 per ton.

WAS A FORMAL CONTRACT AWARDED?

D&S argues that GSA, in effect, awarded D&S a formal contract when the contracting officer presented the solicitation to the president of D&S on September 15 and asked him to sign it if the terms were agreeable. Since the solicitation had been modified and reissued in accordance with the negotiations conducted between the parties and because the contracting officer stated that the terms were agreeable to GSA, D&S contends that a contract was formally executed upon the signature by the president of D&S. Even though the contracting officer never signed this document, D&S argues that the contracting officer's statement that the terms were acceptable to GSA amounted to an oral acceptance of D&S's offer and, therefore, a binding contract resulted. D&S also argues that, when the contracting officer's supervisor accepted the SBA's proposal for an 8(a) contract, GSA committed itself to award an 8(a) contract in accord with FPR § 1-1.713-3(c). (D&S claims that it is a third-party beneficiary to this commitment.) This commitment was fulfilled, according to D&S, when the contracting officer accepted D&S's offer at the September 15 meeting.

GSA argues that no binding contract was ever awarded to D&S pursuant to negotiations for the 5,000-ton coal requirement. According to GSA, the discussion which took place on September 15 between the contracting officer and president of D&S was expressly conditioned as "subject to approval of award." Moreover, GSA contends that the discussion which the president of D&S had with the GSA Assistant Building Manager Engineer regarding urgency of delivery took place only after the GSA official was led by the president of D&S to believe that D&S already had a contract for the coal requirement. GSA also

points out that the solicitation documents which the president of D&S signed on September 15 were expressly conditioned upon "official written notice" of award by GSA. Additionally, GSA points out that the solicitation documents incorporated by reference GSA Form 1424 which states in clause 35 that: "Until a formal notice of award is issued, no communication by the Government, whether written or oral, shall be interpreted as a promise that an award will be made." Finally, GSA argues that the commitment it made to the SBA under FPR § 1-1.713-3(c) was conditioned upon availability of funds. Since its fiscal year funds expired before the contract could be awarded, GSA argues that it could not be bound by its commitment to the SBA.

Contrary to D&S's assertion, the record does not support its argument that any formal contract arose out of the negotiations between GSA and D&S. First, we must point out that D&S and GSA have offered differing versions of what was said at and after the September 15 meeting at which the contract allegedly was executed. In order for a binding contract to result, the contracting officer must unequivocally express an intent to accept an offer. Also, the acceptance of a contractor's offer by the Government must be clear and unconditional; it must appear that both parties intended to make a binding agreement at the time of the acceptance of the contractor's offer. See Donald Clark Associates, B-184629, March 24, 1978, 78-1 CPD 230, and cases cited therein. In view of the factual conflict between the versions presented by the protester and the agency regarding what transpired at the September 15 meeting, the fact that the solicitation documents expressly conditioned the Government's acceptance upon formal written notification, and the solicitation's caution that the Government would not be bound by any communication other than formal notice of award, we cannot find that the contracting officer's statements resulted in a clear and unconditional acceptance of D&S's offer.

More importantly, even though GSA and D&S had negotiated the terms of the alleged contract over a period of many months, it is the SBA itself which enters into a formal contract with other Government

agencies under the section 8(a) program. FPR § 1-1.713-3(d)(1) provides that the procuring agency shall prepare for execution by the SBA Standard Form 26 (Award/Contract) and Standard Form 36 (Continuation Sheet). Here, no award documents were sent to or executed by the SBA. Since no award was made to the SBA, no formal contract came into existence. See Donald Clark Associates, supra. Moreover, the D&S signature alone, without execution by the SBA or GSA, was not sufficient to bind the Government.

Accordingly, this portion of the protest is denied.

ESTOPPEL

In the alternative, D&S argues that GSA should be estopped to deny the existence of a contract because of the manner in which it conducted the negotiations with D&S. In response, GSA argues that the actions of the contracting officer and the Assistant Building Manager Engineer did not manifest an intention to contract with D&S. Furthermore, GSA contends that, even if its officials' actions are construed as manifesting an intention to contract, the Government cannot be bound by their actions because these officials had no authority to award such a contract because GSA has delegated its authority to purchase coal to the Defense Fuel Supply Center in accord with subpart 101-26.6 of the Federal Property Management Regulations (FPMR) (41 C.F.R. § 101-26.6 (1980)). GSA argues that the United States is not bound by the acts of its agents acting beyond the scope of their authority and cites our decision in Charlie Driesbock Machine Tools, 58 Comp. Gen. 240 (1979), 79-1 CPD 56, as standing for the proposition that the Government cannot be estopped to deny the existence of a contract awarded by a Government official where that official has no actual authority to award such a contract.

The Government may be estopped from denying any contract exists if the following elements are present:

(1) The Government knows the facts;

(2) The Government intends that its conduct shall be acted on or the Government so acts that the offeror has a right to believe that the Government's conduct is so intended;

(3) The offeror is ignorant of the true facts; and

(4) The offeror relies on the Government's conduct to his injury.

See United States v. Georgia Pacific Company, 421 F.2d 92 (9th Cir. 1970); Fink Sanitary Service, Inc., 53 Comp. Gen 502, 506 (1974), 74-1 CPD 36.

We do not believe that all of the elements necessary for estoppel were present during the negotiations between GSA & D&S. The record does not demonstrate that Government officials either intended their conduct to be acted upon by D&S without a written contract or that Government officials acted in a manner which led D&S to reasonably believe that their conduct was so intended. Instead, the record shows that all parties were merely negotiating in good faith in anticipation of reaching an agreement and making an award to D&S.

Even though the parties came very close to reaching such an agreement, Government approval of the intended contract was the final step which had to be taken before the agreement could be consummated. This step was never taken and we cannot find that GSA personnel misled D&S into believing that the contract had been so approved. When the president of D&S met with the contracting officer on September 15 and signed the solicitation documents, he should have been aware that his signature alone without the signature of a GSA official did not make a binding contract, especially since D&S had previously contracted with GSA. In addition, the contracting officer states that she specifically told him that the award was "subject to approval" by GSA. D&S contends that the contracting officer never stated that award was contingent upon approval. However, since this fact is clearly disputed

by the parties and there is no documentary evidence to show who is correct, we think that D&S has not carried its burden of affirmatively proving its case. Macro Systems, Inc., B-196274, April 25, 1980, 80-1 CPD 299. Moreover, the solicitation document which the president of D&S signed specifically states "Award will be made on this form or on Standard Form 26, or by other official written notice" and incorporates GSA Form 1424 which states in clause 35, "Until a formal notice of award is issued, no communication by the Government, whether written or oral, shall be interpreted as a promise that an award will be made." Thus, D&S was put on notice that the contract would not be awarded until GSA provided D&S with written notification of award, and such notification was never provided. Finally, D&S's consultations with the Assistant Building Manager Engineer at the using facility did not bind the Government since D&S should have been aware from the course of its dealings with GSA that this Government official, though knowledgeable about the facility's needs, was not in a position to consummate a binding contract.

In these circumstances, we do not find that GSA intentionally misled D&S, and, therefore, GSA is not estopped to deny the existence of a contract with D&S. Accordingly, in view of the urgent need for coal at the Denver Federal Center and the length of time required to audit D&S's 8(a) proposal, we cannot find that GSA's emergency purchase from another supplier, after soliciting a quotation from D&S, was unreasonable. Therefore, this portion of the protest is denied.

Milton J. Socolar

Acting Comptroller General
of the United States