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DECISION

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

FILE: B-206490 DATE: May 7, 1982

MATTER OF: Frederick A. Potts & Co., Inc.

DIGEST:

GAO disagrees with the Small Business Administration's (SBA) and the protester's conclusion that, under the circumstances of this procurement, a contract award to the low priced offeror would have made that offeror the Government's agent so that the offeror's proposed supplier would have essentially been the prime contractor and, thus, entitled to consideration under SBA's certificate of competency (COC) procedure. Rather, GAO agrees with contracting agency that the COC procedure was not applicable because no contract relationship would have existed between the supplier and the agency in the event of award.

Frederick A. Potts & Co., Inc. (Potts), protests the award of four contracts to firms other than the low offeror, Handelsgesellschaft "Braunkohle" GmbH (Braunkohle), under the anthracite coal portion of request for proposals (RFP) No. DLA600-81-R-0430, issued by the Defense Logistics Agency (DLA) for United States military installations in the Federal Republic of Germany.

Potts contends that Braunkohle, a foreign corporation with a huge amount of business and vast resources, was determined to be nonresponsible because the contracting officer concluded that Braunkohle's coal supplier, Potts--a domestic small business--was not capable of performing based on Potts' delinquent deliveries under a DLA contract, which ended on March 31, 1982. Potts argues, with support from the Small Business Administration (SBA), that the negative determination of Potts' capability should be referred to the SBA under SBA's certificate of competency (COC) procedure. DLA argues that the law does not require referral of the matter to SBA. We deny the protest.

Braunkohle's offer listed Potts as its supplier for anthracite coal. The contracting officer was concerned about Braunkohle's capability to supply the coal because Braunkohle was the awardee under the prior year's solicitation and, using Potts as its supplier, Braunkohle was not able to deliver half of the required coal. The contracting officer requested a preaward survey on Potts. The results contained unsatisfactory ratings of Potts' financial capability, performance record, and capability to meet the RFP's required delivery schedule. Thus, the contracting officer determined that Braunkohle was nonresponsible because of Potts.

Potts presented the situation informally to SBA, and the SBA Associate Administrator for Procurement and Technology Assistance advised Potts by letter that, in his view, the matter of Potts' responsibility should be referred to SBA under the COC procedure. The Associate Administrator noted that the language of the Small Business Act, as amended, would seem to limit SBA's COC procedure to cases where the injured firm would be the prime contractor. Here, he concluded that Braunkohle would have been acting as the Government's agent; thus, in effect, Potts would have been the prime contractor. The Associate Administrator concluded that the Congress did not intend that the provisions of the Small Business Act be circumvented by the use of a prime contractor, like Braunkohle, as a means to insulate from the requirements of the act, firm like Potts, actually performing work that would normally be done by the prime contractor.

SBA's conclusion that Braunkohle is the Government's agent flows from the work to be performed by Braunkohle and by Potts. Potts, as the broker for several mines, would have obtained the coal and transported it to the Port of Philadelphia where a Government vessel would have carried it to Europe. Upon arrival, Braunkohle would have examined the coal to make certain that the coal met the RFP's specifications, stored the coal, if necessary, and delivered it to 50 to 60 locations.

Potts contends that while the law obviously contemplates that the subject of the COC procedure normally will be a prospective prime contractor, nothing in the statute or legislative history specifically limits the procedure to prospective prime contractors. In support,

Potts cites Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). There, the SBA "8(a)" program--for socially and economically disadvantaged firms, subsequently enacted into law--was challenged on the basis that there was no specific authorization for it in the statute. The court found that, in view of the clear congressional purpose of the Small Business Act and the general terms in the language of the statute, SBA had the authority to award subcontracts to socially and economically disadvantaged firms on a noncompetitive basis. Potts argues that the Baillie situation and the instant matter are similar in that in both cases the SBA action is not mentioned in the statute but the action is consistent with the purpose of the act. Potts concludes that the SBA's view is reasonable and should be sustained.

Alternatively, Potts states that these coal contracts are unique in terms of the usual lines of distinction between prime contractor and subcontractor. In support, Potts cites our decision at 47 Comp. Gen. 223 (1967), where we stated that:

> "* * * the control exercised by the [Government] over every aspect of the procurement, from the mine to ultimate destination, points up the overriding importance to the Government of the 'subcontract' cost of coal to such an extent that the usual lines of distinction between prime and subcontract tiers become relatively unimportant. * * *
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> "* * * In view of the special nature of this procurement, it is our opinion that the strict application of the general rule that the provisions of [the Defense Acquisition Regulation (DAR)] and the procurement statute do not apply to subcontract matters would be inappropriate in this situation."

Potts concludes that, here, the real party in interest is Potts, as the prospective subcontractor, and that these coal procurements involve only nominal prime

contractors; therefore, the matter of Potts' responsibility should have been referred to SBA for consideration under the COC program.

DLA argues that the protest should be dismissed (1) as untimely under our Bid Protest Procedures or (2) because the matter is not the type of subcontractor protest considered by our Office. We will not dismiss the protent on timeliness grounds because it presents a significant issue within the meaning of our Bid Protest Procedures (4 C.F.R. § 20.2(c) (1981)), because of the conflict between the SBA Associate Administrator and the contracting agency. We will also not dismiss the protest as that of a subcontractor because SBA essentially contends that Potts should be treated as the prime contractor.

Regarding the merits of Potts' protest, DLA points out that the SBA Associate Administrator's letter does not assert that SBA has authority to certify the competency of subcontractors; SBA's position is that if Braunkohle would have been the Government's agent, then Potts would be eligible for consideration under the COC program. DLA contends that Braunkohle would not have been the Government's agent, DLA did not intend to create an agency relationship with the awardee under this RFP, DLA did not intend to establish privity of contract between a potential awardee's coal supplier and the Government, and DLA did not intend to make a potential awardee's coal supplier the real party in interest. In this regard, DLA notes that title to the coal would not have passed from Potts directly to the Government, payment for the coal would not have been made by the Government directly to Potts, and transactions between Braunkohle and Potts would have bound only Braunkohle, not DLA.

Next, DLA points out that, if award was made to Braunkohle, Braunkohle's responsibilities would have been greater than Potts' responsibilities; Potts responsibilities would have ended at the Port of Philadelphia; whereas, Braunkohle's overall responsibility continued through inspection, storage, delivery, and acceptance by the Government. DLA explains that DLA would have looked to Braunkohle to solve problems at any stage of the contract, and Braunkohle, not Potts, would have been directly accountable to DLA. From this, DLA concludes that Braunkohle would have been the real party in interest.

Finally, DLA notes that the DAR does not require DLA to submit the question of a small business subcontractor's responsibility to SBA for a COC determination. The DAR provision only addresses the situation where the small business is the bidder or offeror, that is, the prospective prime contractor.

The issue presented for our consideration is whether, under the terms of a contract resulting from award to Braunkohle under the RFP, the SBA Associate Administrator's conclusion--that Braunkohle would have been an agent of DLA--is reasonably based.

In our view, the record contains no support for SBA's conclusion that Braunkohle was to be DLA's agent. We find no language in the RFP to establish an agency relationship and there does not appear to be any agreement between Braunkohle and DLA outside the RFP, which could have established an agency relationship. Further, DLA did not intend to establish an agency relationship and we have no indication from Braunkohle in the record that, in its opinion, it would have been DLA's agent.

From our review of the record, Braunkohle would have been an independent contractor of DLA rather than DLA's agent. See 49 Comp. Gen. 668 (1970). While Braunkohle would have been permitted to divide the contract work among its subcontractors, as Braunkohle saw fit, Braunkohle would have had overall responsibility for contract performance. There is no indication that DLA contemplated dealing directly with Potts, that DLA would pay Potts directly, or that DLA could terminate Potts for failure to perform as required.

In addition, Potts' argument--that the SBA Associate Administrator's opinion is entitled to great deference because SBA is responsible for administering the Small Business Act--is not persuasive because, here, the potential contract between DLA and Braunkohle is being interpreted, and not the Act. Thus, if any agency's opinion is entitled to deference, it is DLA's opinion, as the agency responsible for administering the contract.

Further, Potts' analogy to the Baillie case is not appropriate. Here, SBA is not suggesting that the COC procedure be extended to potential subcontractors,

which are nonbidders or nonofferors. The SBA Associate Administrator's view is that Braunkohle would have been DLA's agent, entitling Potts to be considered as the prime contractor. Thus, this aspect of Potts' protest is without merit.

In addition, in our view, Potts' reliance on 47 Comp. Gen. 223--to support its position that there is no important distinction between prime contractor and subcontractor in these coal procurements--is misplaced. In that decision, we considered a protest by Independent Miners & Associates against the coal procurement for fiscal year 1968 on the grounds that the price-fixing and coal allocation practices of the Anthracite Export Association (AEA) violated applicable regulations requiring maximum practicable competition. There, the Government procured only American-exported coal from European prime contractors and AEA--composed of the Big 6 American mines and their common export company, the only suppliers capable of furnishing the quantity of coal required--fixed prices and allocated shares of coal to be supplied. We found that AEA's activities materially restricted competition and were prejudical to the interests of the Government because amount 73 percent of the contract price resulted from the cost of the coal subcontract. We held that, in view of the special nature of the procurement, regulations requiring maximum practical competition were applicable to the award of subcontracts for coal.

In our decision at 47 Comp. Gen. 562 (1968), we reconsidered and affirmed our holding in 47 Comp. Gen. 223, supra, and explained that:

> "* * * the statutory and regulatory requirement for competition extended to the first and second tier subcontractor level because the special nature of the procurement precluded effective competition at the prime contract level * * *." 47 Comp. Gen. at 567.

Thus, actual prejudice to the Government caused by price fixing by subcontractors, which were the sole-source of supply, required us to deal with the lack of real competition from prime contractors and required the elimination of anticompetitive practices by subcontractors.

We note that the special circumstances of the 47 Comp. Gen. 223 decision are not present here: the instant RFP did not require that the prime contractor be a European firm, the RFP did not require the use of subcontractors, the RFP did not require that the coal be an American export and, since 1970, the AEA has been enjoined from price-fixing and quantity allocations related to coal procurements (see B-159868, October 18, 1971).

Moreover, there is no showing that DLA, in any way, directed Braunkohle to select Potts as its proposed supplier, or that DLA prohibited Braunkohle from substituting another coal supplier after bid opening. Potts was not the only supplier. We assume that Braunkohle had sound business reasons for selecting Potts in the first place and then not offering a substitute for Potts when Potts' delivery capability was questioned by DLA. However, in the circumstances, we find that Braunkohle was properly determined to be nonresponsible, that Braunkohle was not the Government's agent, and that Potts is not eligible for the SBA COC procedure.

Protest denied.

Milton J. Socolar

Acting Comptroller General
of the United States