

DECISION



118477 PL-2 KRATZER
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-205060

DATE: May 25, 1982

MATTER OF: Health Services International, Inc.

DIGEST:

1. GAO review of the Small Business Administration (SBA) actions under the 8(a) program is limited to determining whether the SBA has followed applicable regulations and whether officials have acted fraudulently or in bad faith. Where a contracting agency acts on behalf of the SBA in selecting a contractor for award, the agency's actions will be reviewed under criteria applicable to SBA actions.
2. It is not improper for a procuring agency, prior to the issuance of a solicitation, to supply detailed information concerning a section 8(a) procurement to firms selected to compete for the requirement. The protester's refusal to accept the information does not establish an unfair competitive advantage on the part of other firms.
3. To support an allegation of bad faith on the part of a procuring agency, a protester must present virtually irrefutable proof that the agency has a specific and malicious intent to injure the protester.
4. Within the context of an 8(a) procurement, the failure to hold competitive range discussions with offerors is not legally objectionable since normal competitive procurement practices are not applicable to 8(a) procurements.

Health Services International, Inc. (HSI) protests the selection for award of One America, Inc. under request for proposals (RFP) AFR-00024 issued by the Agency for International Development (AID). The procurement is

for assistance to the Government of Sudan in meeting the basic health needs of its rural population. HSI contends that AID acted improperly by disseminating information to selected offerors, failing to adhere to evaluation criteria and conducting discussions with only certain offerors. HSI also contends that certain AID officials were biased against the firm. We deny the protest.

The requirement was solicited under the authority of section 8(a) of the Small Business Act which authorizes the Small Business Administration (SBA) to enter into contracts with any Government agency having procurement powers, and to arrange for the performance of such contracts by letting subcontracts to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (Supp. III, 1979).

AID selected five 8(a) firms which it believed were capable of performing the contract to compete for the requirement. By letter dated June 17 AID solicited technical proposals for the requirement with the proviso that:

"This Request for Proposals in no way obligates AID to award a contract, nor does it commit AID to pay any cost incurred in the preparation and submission of the proposal. AID reserves the right to make a selection without conducting discussions with all proposers."

A selection committee evaluated the five proposals submitted in response to the RFP. One America received a high score of 70 of a possible 100 points, while HSI was ranked third with a score of 60 points. On this basis, AID requested authorization from SBA to negotiate a subcontract for the requirement with One America.

Because of the broad discretion afforded the SBA and the contracting agencies under the Small Business Act, our review of actions under the 8(a) program is generally limited to determining whether the SBA has followed pertinent regulations and whether Government officials have committed fraud or acts of bad faith. Orincon Corporation, 58 Comp. Gen. 665 (1979), 79-2 CPD 39. Here, AID was acting on behalf of the SBA in selecting a firm for award, and therefore its actions will be reviewed under the criteria applicable to SBA actions. Arawak Consulting Corporation, 59 Comp. Gen. 522 (1980), 80-1 CPD 404.

HSI argues that we should review the procurement because, in HSI's view, several actions taken by AID amount to fraud or to bad faith. In this regard, HSI contends that AID improperly provided detailed information to certain firms concerning the procurement prior to the issuance of the RFP, and that these actions were tantamount to fraud on the part of AID officials. HSI documents that at least one other firm was aware of specifics concerning the procurement prior to April 21, 1981, two months before the issuance of the RFP.

AID's actions clearly did not constitute fraud or bad faith. HSI cites in support of its contention Willamette-Western Corporation; Pacific Towboat & Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 CPD 259, in which we sustained a protest partly on the basis that the agency provided the incumbent contractor, and no other firm, with a draft RFP, giving the incumbent an unfair competitive advantage. The decision is not applicable here. The record indicates that in April 1981 AID offered a copy of the statement of work which was eventually incorporated in the RFP to all five firms being considered for the competition. HSI rejected this offer because it believed that receipt of the statement would be improper. It appears that the other four firms accepted the statement. Since all firms had an opportunity to receive the information, we find nothing improper in AID's action.

HSI next contends that AID did not properly apply the evaluation criteria set forth in the RFP. We have examined the evaluation record and find no indication of impropriety. HSI neither specifies how the evaluation deviated from the evaluation criteria, nor articulates how the evaluation amounts to fraud or bad faith. To support an allegation of bad faith, a protester must present virtually irrefutable proof that the agency had a specific and malicious intent to injure the party alleging bad faith. See Solis Enterprises, B-202759, July 21, 1981, 81-2 CPD 54. HSI has failed to sustain this burden.

HSI contends that contracting officials conducted discussions with certain offerors, but not with HSI. HSI points out that the Federal Procurement Regulations (FPR) require discussions to be conducted with all firms in the competitive range. FPR § 1-3.805-1 (1964 ed.).

The FPR requirement is not applicable to this case. Section 8(a) of the Small Business Act authorizes a contracting approach which in general is not subject to the

competition requirements of the FPR and the statutory provisions they implement, see Ray Baille Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973), cert. denied 415 U.S. 914 (1974); Vector Engineering, Inc., 59 Comp. Gen. 20 (1979), 79-2 CPD 247, and we have recognized that under the 8(a) program there is no requirement to hold competitive range discussions. See Arawak Consulting Corporation, supra, where we upheld the agency's selection of the winner of a technical evaluation for negotiations leading to the award of an 8(a) contract. The record here establishes only that AID did precisely what the agency did in Arawak--it evaluated competing technical proposals, and then sought and received SBA permission to negotiate a contract with the highest evaluated proposer. We find nothing improper with this approach.

HSI also alleges that certain officials at AID discussed the desirability of having the requirement performed by an 8(b) firm which is owned by disadvantaged black individuals and that this discussion reflects bias against HSI (HSI's principals are not black). This allegation is essentially unsupported. Moreover, the record indicates that AID evaluated all proposals in consonance with the evaluation criteria and that One America was selected on the basis of technical merit. We have no basis upon which to make a finding of fraud or bad faith in connection with this allegation.

Last, HSI contends that several of its competitors have had improper contact with the Sudanese Mission accredited to Washington, D.C. There is no indication, however, that Sudanese personnel participated in any capacity in the selection process. Therefore, we fail to see how this assertion, even if proved, would support HSI's allegation that AID officials acted fraudulently or in bad faith.

This protest is denied.

for 
Comptroller General
of the United States