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DECISION

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

FILE: B-207681.2 DATE: December 6, 1982

MATTER OF: John F. Small & Co., Inc.

DIGEST:

1. Federal Procurement Regulations do not apply per se to a cost-type construction management prime contractor of the Department of Energy; rather, prime contractor must conduct procure-ments according to terms of contract with agency and its own procedures, approved by the agency, and conform to fundamental principles known as Federal norm.

2. Determination of nonresponsibility, based essentially on offeror's lack of integrity and poor performance, and Government approval of that determination, was arbitrary where breach of a prime contractor's conflict of interest policy was technical in nature, occurred almost a year ago, there is no recent evidence bidder lacks integrity, and allegations of poor performance under one contract used to support prime contractor's determination are not supported by the record.

3. Where prime contractor acting for the Govern-ment made a nonresponsibility determination that was arbitrary and Government approval was given, and offeror had a substantial chance for award, offeror is entitled to proposal preparation costs.

John F. Small & Co., Inc. (Small), protests the rejection of its proposal under request for proposals (RFP) No. 295-P-0084, for a seal, flush system at West Hackberry, Louisiana, by Parsons-Gilbane, a joint venture of The Ralph M. Parsons Company (Parsons) and Gilbane Building Corporation (Gilbane) (P-G), a Department of Energy (DOE) prime contractor. P-G is the construction manager for the DOE's Strategic Petroleum Reserve (SPR) Project Management Office. We find the protest to be meritorious.

It is Small's position that P-G's determination that Small was nonresponsible, based on an alleged breach of a P-G conflict of interest agreement and unfounded allegations, and DOE's acceptance of P-G's finding and approval of award to Vincent Construction Company were improper. Furthermore, Small submits that it was informed by P-G that P-G would continue to consider Small nonresponsible on all future procurements. Consequently, Small filed protests under two other RFP's essentially arguing de facto debarment. However, Small states that it withdrew the protests, not the allegation, so as to not harm the project. In this regard, Small contends that the nonresponsibility determination and DOE's approval of it constitute a de facto debarment by P-G and DOE. Small argues that it was entitled to notice of the de facto debarment and an opportunity to be heard. Small requests proposal preparation costs in the amount of $10,489.50.

Initially, we note that since this involves a subcontract award by a DOE cost-type construction management prime contractor, it is an award "for" the Government under the standards set forth in Optimum Systems, Inc., 54 Comp. Gen. 767 (1975), 75-1 CPD 166, and appropriate for our review. C-E Air Preheater Co., Inc., B-194119, September 14, 1979, 79-2 CPD 197, and Motley Construction Company, Inc., B-204037, December 14, 1981, 81-2 CPD 465. In addition, since DOE approved the subcontract award, we will review DOE's examination of the facts of this case to determine if DOE was reasonable in approving P-G's determination that Small was nonresponsible, i.e., lacked the ability and integrity to perform the contract.

A review of the creation of Small is essential to understanding the protest. On March 23, 1981, Small was incorporated in Texas and John F. Small was appointed president. The initial directors were all employees of P-G. Jackie Cox, who left P-G on October 1, 1981, was the vice president. The only activity of the corporation from its incorporation to August 1981 was the preparation of preliminary promotional literature, which listed names of P-G personnel. Small advises that the use of those names was "to only reveal that adequate resources were available for qualified personnel should the need arise." Furthermore, it was assumed that P-G's work at the West Hackberry site would be completed by November 1981.

On August 6, 1981, Small submitted a bid to Tri-Coast, Inc., a prime contractor for Conoco, for the construction of the mechanical and concrete portion of a Conoco project. Small's bid was $5,500 lower than that of the next low bidder. Tri-Coast was also a P-G subcontractor at the West Hackberry site. On August 14, John F. Small received a memo from P-G advising of an August 25 release date from the SPR project. Subsequently, Small, on August 18, signed a subcontract with Tri-Coast. On September 7, Small commenced work on its subcontract with Tri-Coast.

In regard to the protested RFP, on April 22, 1982, a preaward survey was performed by P-G on Small, who submitted the lowest priced proposal. It was the opinion of P-G's senior subcontract administrator that Small had "sufficient facilities to support the subcontract requirements" and "adequate financing" and, therefore, was qualified for award. We note that P-G had previously issued two purchase orders to Small in 1982.

However, on April 23, a letter of complaint was submitted by Mar-Len of La., Inc. (Mar-Len), a P-G subcontractor at the West Hackberry site, to DOE. In the letter, Mar-Len alleged, among other things, that Small "took a subcontract away from Mar-Len by threatening the prime contractor (Tri-Coast) that it would never work on the SPR Program again because John Small and Jackie Cox still had 'connections' with [P-G] and [DOE]."

P-G commenced an investigation of this allegation which resulted in P-G determining Small to be nonresponsible. The investigation disclosed that John Small and Jackie Cox executed the P-G conflict of interest statement which provides, in essence, that a P-G employee shall not perform work or render services for an organization with which P-G does business except in the normal course of doing business with P-G. Moreover, during the investigation, Tri-Coast's president and vice president signed a summary statement of a meeting they had with personnel from Parsons and Gilbane. The statement supported the Mar-Len allegation, above. Specifically, it showed that Jackie Cox threatened Tri-Coast concerning future work at the West Hackberry site and that it would have problems with Conoco. In addition, Tri-Coast's officers advised P-G of Small's poor performance on the job. However, we note that neither officer would

sign an affidavit in this regard. P-G argues that the seeking and obtaining of work from Tri-Coast, a P-G subcontractor, by Small, at a time when John Small and Jackie Cox were employed by P-G, violates the Conflict of Interest statement executed by both men. P-G submits that this violation, along with the use of threats and the poor performance on the Conoco job, as noted above, was the basis for the P-G determination that Small was nonresponsible.

Jackie Cox and John F. Small, by affidavits, state that no pressure was ever applied to Tri-Coast. They also submit that Small's performance on the Conoco job was excellent. However, they raise the point that Tri-Coast was not timely in its payments to Small, which resulted in Small, after repeated attempts to obtain payment, requesting assistance from Conoco. Small believes that the Tri-Coast statement was given to P-G to get even with Small.

With respect to the conflict of interest issue, Small argues that there was no violation. As noted above, there was no activity, other than administrative, until the submission of a bid to Tri-Coast. Small states that it was approached by Tri-Coast and was dubious about submitting a bid to Tri-Coast. However, since the project was nearing completion (the P-G staff was to be terminated by November 1981) Small decided to submit a proposal. Small eventually entered into a contract with Tri-Coast, because of the receipt of the August 14 termination memo, mentioned above, and some other factors. Small did not start performing any work for Tri-Coast until September 7, 1981. Therefore, it is Small's position that there was no violation of the P-G conflict of interest policy.

At the outset, we note that the Federal Procurement Regulations (FPR) do not apply per se to this procurement. Rather, P-G, acting "for" the Government, is required to conduct its procurement according to the terms of its contract with DOE and its own procedures, approved by the agency, and to conform to certain fundamental principles of Federal procurement known as the Federal norm. See C-E Air Preheater Co., Inc., supra; Central Computer Products, Inc., B-200605, June 24, 1981, 81-1 CPD 526; and Morley Construction Company, Inc., supra.

The Federal norm requires not only that the competition for a contract be conducted in accordance with the broad general principles of Federal procurement, but also that the prospective awardee be responsible, that is, that the prospective contractor can comply with the requirements of the contract and has the integrity, perseverance and tenacity to perform the contract. See Motley Construction Company, Inc., supra; 39 Comp. Gen. 468 (1959). Because these determinations involve the exercise of considerable discretion and judgment, we will not disturb a contractor's finding that a prospective subcontractor is nonresponsible unless there is no reasonable basis for the determination. See Arrowhead Lines Service, B-194496, January 17, 1980, 80-1 CPD 54.

It is our view that P-G's action in determining Small to be nonresponsible was not reasonably based and, therefore, DOE's approval of P-G's action also was not reasonably based. P-G's conflict of interest statement provides, as noted above, that a conflict of interest arises when a P-G employee performs work or services for a company that does or seeks to do business with P-G. While it is true that Small did submit a proposal to a P-G subcontractor during the time when John F. Small and Jackie Cox were P-G's Project Manager and Resident Construction Manager, respectively, no work or services were performed until after John F. Small was terminated by P-G. In addition, Jackie Cox was not actively involved with Small until October 1, 1981, well after the submission of the proposal to Tri-Coast. Even if we assume that there was a technical breach of the conflict of interest policy (that submitting a proposal reasonably might affect John F. Small's judgment concerning P-G's business), the close proximity of John F. Small's termination mitigated any possible harm that could result from such breach. Moreover, Small has been in business for almost 1 year and there is no evidence that it has engaged in conduct that would reflect poorly on its integrity. In this connection, we note that FPR § 1-1.1205-2 cautions that information bearing on responsibility shall be obtained on as current a basis as feasible with relation to the date of contract award. In the almost year's time since Small was organized and competed for the subject procurement Small has, as mentioned above, worked for P-G and was specifically requested by P-G to respond to this RFP.

We are well aware that allegations of a breach or an actual breach of a conflict of interest policy is a serious matter. However, based on the record before us, we do not find that the actions of John F. Small or Jackie Cox, as they relate to the conflict of interest issue, even assuming a technical breach of P-G's conflict of interest policy, is enough by itself to support a nonresponsibility determination.

With respect to the allegations of the use of threats and poor performance, all we have before us are unsubstantiated allegations. Neither P-G nor DOE has submitted any documentary evidence from Tri-Coast, Mar-Len or any other source to support their position. While on the other hand we have two affidavits (John F. Small and Jackie Cox) denying the allegations. Furthermore, as noted above, Small's bid to Tri-Coast was low by $5,500 and, despite allegations of poor performance, Small was paid for its work under the contract. Therefore, neither the conflict of interest matter nor the alleged poor performance reasonably support a nonresponsibility determination. Therefore, Small's protest is sustained. However, since the contract awarded pursuant to the RFP has been completed, no corrective action can be recommended.

In regard to Small's claim for proposal preparation costs, because P-G was acting "for" the Government and in light of DOE's approval of P-G's actions, Small is entitled to these costs if it meets certain standards. These standards were set forth in our decision in Decision Sciences Corporation--Claim for Proposal Preparation Costs, 60 Comp. Gen. 36 (1980), 80-2 CPD 298, where we held that in order to be eligible for proposal preparation costs there must have been arbitrary or capricious agency action and the claimant must have had a substantial chance of award.

In this case, there was arbitrary agency action and, had it not been for that action, Small would have received the award. Therefore, Small is entitled to reimbursement of its proposal preparation costs with respect to RFP No. 295-P-0084. Since Small never submitted proposals on the two RFPs referred to on page 2, above, it cannot satisfy the standards necessary for entitlement to proposal preparation costs under those procurements. Small should submit

substantiating documentation to DOE to permit DOE to determine the amount to which Small is entitled. See DeRalco, Inc., B-205120, May 6, 1982, 82-1 CPD 430.

The protest and the claim are sustained.

for Milton J. Socolar
Comptroller General
of the United States

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