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

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FILE: B-211877 **DATE:** December 5, 1983

MATTER OF: FACE Associates, Inc.

DIGEST:

1. A protest that an agency's preference for awarding a single contract for agency-wide architect-engineer (A-E) services and that its use of evaluation criteria related to the size, current workload and location of competing firms discriminates against small, minority-owned firms is untimely where this information appeared in a Commerce Business Daily announcement of the proposed procurement, yet the protest was not filed until after the closing date specified in the announcement for receipt of qualifications statements (Standard Forms 254 and 255) from interested A-E firms.

2. GAO will not review the merits of a protest which, in effect, claims that the procuring agency's misrepresentation of its requirements to the Small Business Administration caused a procurement not to be set aside for small businesses. A decision as to whether a particular procurement should be set aside for small businesses essentially is within the discretion of the contracting officer, since, with certain exceptions not relevant here, nothing in the Small Business Act or the procurement regulations makes it mandatory to set aside any particular procurement.

3. It is not improper for an architect-engineer (A-E) evaluation board to rely solely upon the information in the qualifications statements and performance data (Standard Forms 254 and 255) required to be submitted by A-E firms in determining with which firms discussions will be held.

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4. In view of the language of relevant regulations and the nature of the work to be performed under the contract, procuring agency did not abuse its discretion by convening an architect-engineer evaluation board none of whose members was an architect or an engineer. In any event, the protester had no substantial chance for award in view of serious deficiencies in regards to its staff.

FACE Associates, Inc. protests the Department of Labor's award of a contract to Leo A. Daly Co. for architect-engineer (A-E), project management, and facilities engineering management services at Job Corps centers. FACE contends that the Department of Labor failed to fulfill its obligation under the Small Business Act, as amended, 15 U.S.C. §§ 631-649 (1982), to encourage small business. The protester also contends that the evaluation of interested A-E firms was not in accord with applicable regulations. We dismiss the protest in part and deny the remainder.

The Brooks Act, 40 U.S.C. §§ 541-544 (1976), governs the procurement of A-E services. Generally, the selection procedures require a contracting agency to publicly announce requirements for A-E services. An A-E evaluation board, established by the agency head, then evaluates A-E statements of qualifications and performance data (Standard Forms (SFs) 254 and 255) already on file and statements submitted in response to the public announcement. Thereafter, the board must select no less than three of the most highly qualified firms (i.e., the "short list") with which to hold discussions regarding anticipated concepts and the relative utility of alternative methods of approach for providing the services requested. Federal Procurement Regulations (FPR) §§ 1-4.1004-1 and 1-4.1004-2 (amend. 150, June 1975). After holding these discussions, the board, based on established and published criteria which are not to relate directly or indirectly to the fees to be paid, recommends to the selection official (the agency head or the official to whom the authority has been delegated) in order of preference no less than three firms deemed most highly qualified. FPR § 1-4.1004-2(c). The selecting official must then review the recommendation and make the final selection in order of preference of the firms best qualified to perform the work. If the final selection of the best qualified firms is other than that recommended by the board, then the selecting official must provide complete written documentation of his decision. FPR § 1-4.1004-4. Negotiations are held with the A-E firm ranked first. Only if the agency is unable to agree with that firm as to a fair and reasonable price are negotiations terminated and the second-ranked firm invited to submit its proposed fee.

The Job Corps, part of the Department of Labor's Employment and Training Administration, announced its intention to contract for the A-E services in the Commerce Business Daily (CBD) of January 19, 1983 and invited interested firms to submit SFs 254 and 255 by March 1. The announcement described the work to be performed as of a continuous nature for the period July 1983 to September 1984 and estimated that approximately 50 man-years of effort would be required. The announcement further informed interested firms that:

> " . . . It is the intention of the Employment and Training Administration/Job Corps to select one contractor. However, after evaluation of proposals, it may be necessary to select a second qualified firm to accomplish the total work effort. It is contemplated that the successful firm[s] will be: a single firm capable of providing all services in house, a full service joint venture of not more than two firms or two independent firms utilizing subcontractors to provide full service. . . ."

The evaluation criteria set forth in the notice included size of organization and current workload and location of staff and branch offices.

Based upon an evaluation of the SFs 254 and 255 submitted by 40 interested A-E firms, the A-E evaluation board selected the seven firms receiving the most evaluation points for discussions. By letters of April 1 and 4, FACE protested to the agency its exclusion from this "short list."

The evaluation board held discussions with the seven firms and subsequently recommended that fee negotiations be conducted with Leo A. Daly Co., the firm which had received the most evaluation points in the initial evaluation and which the board had determined to be the best qualified. After learning on May 6 that the Department of Labor had denied its earlier protest to the agency, FACE filed a protest with our Office on May 20. At the beginning of July, while this latter protest was still pending, the agency made award to Daly.

FACE alleged in its protest filed with the Department of Labor and in its initial submission to our Office that the preference for a single contractor and the evaluation criteria concerning contractor size and location set forth in the CBD notice created a strong bias favoring selection of a large enterprise and accordingly breached the agency's obligations under the Small Business Act to provide the maximum practicable opportunity for small businesses to participate in federal procurement. FACE also objects to the agency's failure to set aside this procurement for small business concerns.

The Job Corps contends that these aspects of FACE's protest are untimely. FACE contends that its protest is timely because it was filed within 10 days of when FACE first became aware of an alleged circumvention of procedures mandated by the Small Business Act to ensure that small businesses receive a fair share of federal procurements. In particular, FACE alleges that at an April 1, 1983 meeting attended by representatives of FACE, the Department of Labor and SBA's Office of Small and Disadvantaged Business Utilization, the SBA representative indicated that SBA had questioned the preference for a single contractor but had been convinced by the Department of Labor that a change in the agency's needs had resulted in the change from the previous contract under which the agency had selected multiple firms, including FACE, to perform the work in question. FACE alleges that the Department of Labor misrepresented its needs to SBA, arguing that a comparison of the statement of work from FACE's then current contract with the statement of work for the proposed contract reveals that they are nearly identical. FACE also cites the statement in the agency's administrative report that "Our requirement . . . for architectural, engineering (A/E) and construction management services for the Job Corps program have not substantially changed."

We understand FACE to be contending that this alleged misrepresentation violated the Department of Labor's obligations under the FPR to provide SBA representatives, upon request, an opportunity to review the proposed procurement and access to available information as may be required for SBA's review. FPR §§ 1-1.705-3 and 1-1.705-4. However, FACE has failed to prove that the Department of Labor misrepresented its needs to SBA. While the nature of the work to be performed by the contractor may not have substantially changed under the proposed contract, the record before us taken as a whole indicates that the procuring officials believed that the needs of the government in regards to agency supervision had changed. As FACE itself indicates, the representative of the Department of Labor at the meeting in question indicated that increased management was necessary for the proposed contract. The contracting officer in the administrative report on this protest states that the agency made a careful decision to reduce the number of A-E contractors in order to improve management control, simplify oversight, and adjust to retrenchment within the agency.

Moreover, our Bid Protest Procedures, 4 C.F.R. § 21.2 (b)(1) (1983), require that protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening or the closing date for receipt of proposals must be filed prior to the bid opening or the closing date. The preference for a single contractor, the evaluation criteria, and the fact that the procurement was not set aside all were apparent from the CBD announcement. FACE participated in the procurement knowing of these "ground rules" but did not object to them until it learned that it had not been selected for the "short list." This is too late. If FACE thought any of the terms under which the procurement was being conducted was improper it was incumbent upon FACE to protest prior to the March 1 closing date for receipt of qualifications statements. Since FACE did not, these grounds of protest are untimely. See R.E. Skinner & Associates, B-196084, et al., February 20, 1980, 80-1 CPD 145. Further, even if the protest was timely as to this ground, we note that a decision as to whether a particular procurement should be set aside for small businesses essentially is one within the discretion of the contracting agency, since, with certain exceptions not relevant here, nothing in the Small Business Act or the procurement regulations makes it mandatory to set aside any particular procurement. See W.B. Jolley, B-209933, June 6, 1983, 83-1 CPD 609.

FACE next alleges that in its initial evaluation, the evaluation board arbitrarily and capriciously failed to consult those familiar with FACE's performance under prior contracts with the Department of Labor for information on the quality of that performance and relied instead upon SFs 254 and 255, thereby depriving the board of the ability to fully and fairly apply the mandatory evaluation criteria. The agency denies that it was improper to rely upon SFs 254 and 255 and contends that it gave due consideration to the experience of A-E firms, including FACE, interested in the procurement.

FACE's argument is without merit. 40 U.S.C. § 542 provides that contracts for A-E services will be negotiated upon the basis of demonstrated competence and qualification for the type of professional services required. The implementing regulations generally provide that in evaluating A-E firms, the evaluation board will consider the specialized experience of the firm and the past record of performance on contracts with government agencies and private industry, as well as any criteria set forth in the public notice on a particular contract. FPR § 1-4.1004-3. The CBD notice here informed the interested firms that the factors for evaluation included the experience of the firms.

As for the specific sources of information to be utilized, 40 U.S.C. § 543 provides that the agency shall encourage firms to submit annually a statement of qualifications and performance data and that, for each proposed project, the agency shall evaluate the current statements on file with the agency together with those submitted by other firms regarding the proposed project. The implementing regulations provide that SFs 254 and 255 already on file and those submitted in response to the public announcement shall be used to collect data on A-E firms, including information on their past experience, but adds that "Information from other sources (such as other clients . . . and assessments by the procuring agency itself on prior projects awarded to a firm) may also be included in the files" which the evaluation board must review. FPR § 1-4.1004-2.

The statutory provisions encouraging the submission of annual statements of qualifications and performance data reflect a legislative intent to avoid requiring a burdensome, particularized, ad hoc investigation into qualifications and experience for each individual procurement. See S. Rep. No. 1219, 92d Cong., 2d Sess. 8 (1982); H.R. Rep. No. 1188, 92d Cong., 2d Sess. 9-10 (1972). Accordingly, the FPR permits but does not ordinarily require an evaluation board to seek out information beyond that in the qualifications statements. The regulation provides only that information from other sources "may," as opposed to "shall," be included in the files, even though the drafters of that provision must surely have foreseen that incumbent contractors with relevant experience would compete for subsequent contracts.

While there may be circumstances where it would be an abuse of discretion for an evaluation board to rely solely upon SFs 254 and 255, we do not believe that such circumstances are present here. The record does not support FACE's complaint that the board was deprived of the ability to properly evaluate FACE's experience. The SF 254 is the questionnaire concerning a firm's qualifications and experience which those interested in competing for this work are instructed to submit annually and which is kept on file at using agencies. The SF 255 is a supplement to the SF 254 and whose "purpose is to provide additional information regarding the qualifications of interested firms to undertake a specific Federal A-E project." Both forms require interested firms to describe their prior experience and special qualifications.

In particular, section 10 of SF 255 requests interested firms to show why they are especially qualified to undertake the work in question; provides for the submission of supporting information including "any awards or recognition received . . . for similar work"; and permits respondents to say anything they wish in support of their qualifications. This would appear to have afforded FACE the opportunity to cite favorable evaluations of FACE's prior work for the Department of Labor. We note that FACE in fact took advantage of the opportunity offered by section 10 of SF 255 to submit a 23 page statement documenting its special qualifications. Reliance upon SFs 254 and 255 in these circumstances is consistent with our prior decisions in which we have held that evaluators are not required to refer to information or materials outside a proposal in a negotiated procurement which should have been described or included in the proposal. See Advanced ElectroMagnetics, Inc., B-208271, April 5, 1983, 83-1 CPD 360.

The protester next contends that its exclusion from the "short list" was improper because the evaluation board which failed to select it was improperly constituted.

FPR § 1-4.1004-1(a) provides, in pertinent part, that:

> "(a) Each agency head shall establish one or more permanent or ad hoc architect-engineer evaluation boards to be composed of an appropriate number of members who, collectively, have experience in architecture, engineering, construction, and related procurement matters. Members shall be appointed from among highly qualified professional employees (intra-agency and interagency) and private practitioners (if provided for by agency procedure) engaged in the practice of architecture, engineering or related professions . . . ."

The evaluation board consisted of a chairman and three other members, although apparently only the latter three made actual numerical evaluations of the A-E firms. All four of the board members were long-term government employees. From the biographies provided by the agency, it would appear that none of the members was an architect or an engineer and that only one of the members, the chairman, was a contract specialist experienced in the procurement of architect, engineer, or construction services. Of the remaining members, one was a regional Job Corps director described as knowledgeable as to the needs of the Job Corps and with experience in contract administration, another as a manpower analyst with knowledge of procurement policies and procedures, and the third as a program analyst and auditor familiar with ETA and Job Corps contract compliance and contractor responsibility issues and problems.

FACE alleges that only architects and engineers can properly evaluate the qualifications of A-E firms and that the "plain language" of section 1-4.1004-1(a)

> "requires that all the members of the architect-engineer evaluation board be architects, engineers, or members of related professions [which] is a profession related to the design or construction supervision function of architects or engineers . . . ."

In response, the agency denies that the composition of the board was inconsistent with the requirements imposed by regulation and maintains that the board was composed of highly qualified professional employees selected on the basis of their knowledge of and experience with the Job Corps, the A-E requirements of the Job Corps, A-E procurement regulations, and demonstrated ability to perform evaluations objectively. In addition, the agency indicates that the procurement was for A-E management services only, as opposed to A-E design services, and argues that accordingly, the board was not required to review technical drawings or make judgments requiring an architect or engineer. The agency also notes that, in any case, the selecting official was a registered professional engineer.

We do not read section 1-4.1004-1(a) as mandating that all members of the evaluation board must be architects or engineers. Rather, the regulation instructs agencies to establish evaluation boards that are composed of an appropriate mix of relevant disciplines. In this case, given the nature of the work to be performed, i.e., primarily management services rather than design services, we do not believe that the Department of Labor abused its discretion in constituting the board. Moreover, it is clear to us from our review of the entire record that the protester did not have a substantial chance for award regardless of the composition of the evaluation panel. The agency announced its intention in the CBD notice to award the contract, if possible, to a single contractor capable of providing in-house, over a period of 15 months,the 50 man-years of effort estimated to be necessary for performance. FACE indicated in its SFs 254 and 255 that it had an in-house staff of 25, of which only 17 were designated architects or engineers.

An analysis of the evaluation board's initial technical evaluation of FACE suggests that FACE's chance for award was seriously and adversely affected by perceived problems with its staff. A-E firms were assigned evaluation points in six categories, one of which was "Staff." In each category, the firms were assigned separate point scores by each member of the board, other than the chairman. These raw scores in all the categories were totaled and divided by 3 to yield an overall average total, with a maximum of 100 points possible. FACE received a lower raw staff score than any of the seven firms selected for the short list. Its raw staff score was approximately 6.4 raw points, or more than 2 overall points lower than the average raw staff score of the firms on the short list. This overall point difference is especially significant since FACE scored only 1 overall point below the bottom firms on the short list. At least one of the evaluators specifically attributed the low raw staff score given FACE to the inadequate number of its staff.

Although FACE now contends that, had discussions been held with it, it could have proposed an increase in staff or taken other measures to satisfy the agency's needs, the CBD announcement gave FACE clear notice of the government's needs. FACE, having failed to take advantage of the opportunity to propose such measures when it submitted its SF 255 in response to the announcement, will not now be heard to complain that it was denied an opportunity to propose measures satisfying the government's needs. In any case, FACE's overall point score was 8 points below that of Daly, thus suggesting the relative unlikelihood of any award to FACE.

The protest is denied.

Milton J. Socolar

for Comptroller General
of the United States