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

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FILE: B-213425 **DATE:** March 6, 1984

MATTER OF: Expand Associates, Inc.

DIGEST:

1. GAO review of an 8(a) procurement is limited to determining whether the Small Business Administration (SBA) has followed applicable regulations and whether government 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 action will be reviewed under the same criteria.

2. Within the context of a competitive 8(a) procurement conducted by an executive agency on behalf of the Small Business Administration, the failure to hold competitive range discussions with all acceptable and potentially acceptable offerors is not legally objectionable since normal competitive procurement practices are not applicable to 8(a) procurements and the regulations governing such 8(a) competitions do not require discussions.

Expand Associates, Inc. protests the proposed nomination of Andrulis Research Corporation for award of an 8(a) subcontract under request for proposals (RFP) No. NCI-CO-33853-38 issued by the National Institutes of Health, Department of Health and Human Services (HHS). The procurement is for the establishment and operation of a Current Cancer Research Project/Protocol Analysis Center. Expand complains that the evaluation process was fundamentally unfair because, while HHS did not enter into any competitive range discussions with the firm regarding technical aspects of its proposal, HHS conducted such discussions with the two other technically acceptable offerors. We deny the protest.

Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts

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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)(1982). HHS' regulations for the procurement of technical services under section 8(a) provide that, except where the SBA selects a firm for an 8(a) award, or where one 8(a) firm has exclusive or predominant capability or technical competence to perform the work within the time required, the selection of a contractor should be made through "limited technical competition," in which case written technical proposals may be required from the participating firms. 41 C.F.R. § 3-1.713-50(a)(2) (1983). Where limited technical competition is deemed appropriate, the firms to be included in the competition are identified by HHS in consultation with the SBA. 41 C.F.R. § 3-1.713-50(a)(4). Due to the potential adverse impact on the limited financial resources of these firms, usually no more than three to five firms are selected for the limited technical competition. 41 C.F.R. § 3-1.713-50(a)(6).

HHS selected five 8(a) firms it believed capable of performing the contract to compete for the requirement. The RFP was identified by its cover letter as an 8(a) set-aside, and set forth the specific technical criteria under which all proposals would be evaluated. According to the RFP, the government reserved the right to award a contract without further discussion of the proposals received, so that an offeror's initial proposal should include "the most favorable terms from both the technical and cost standpoints." The cover letter also informed all offerors that cost proposals were not requested at that time.

Three of the five proposals, including Expand's, were determined to be technically acceptable. The remaining two were determined to be marginally acceptable. All five proposals initially were rated as follows:

	CRITERIA			
	Personnel	Organization	Approach	Total
(Weight Factor)	(45)	(30)	(25)	
Andrulis Research Corporation	3037.5	1830	1487.5	6355

	Personnel	Organization	Approach	Total
InterAmerica Research Associates, Inc.	3060	1785	1450	6295
Expand Associates, Inc.	2047.5	1425	1245	4717.5
The Maxima Corporation	2115	1440	1037.5	4592.5
Technical Resources, Inc.	2272.5	1110	1025	4407.5

This initial assessment subsequently was confirmed by the agency's formal evaluation group.

HHS' normal procedure at that point would have been to conduct cost discussions with the highest-ranked firm and, if the discussions warranted, nominate the firm to the SBA for the subcontract award. See 41 C.F.R. § 3-1.713-50(b)(4). Here, however, the evaluation group concluded that the Andrulis and InterAmerica offers were essentially equal, and decided that the best approach to selecting a nominee from the two firms was to establish a competitive range of two and conduct technical discussions. After technical discussions with both firms, InterAmerica was determined to have the best technical offer and therefore was recommended for award.

Expand then protested to the contracting officer that neither Andrulis nor InterAmerica was eligible for award as an 8(a) concern because each firm had entered into a joint venture arrangement with a large business. The SBA concurred that InterAmerica was no longer eligible and so notified the contracting officer, but found Andrulis to be eligible and approved the contracting officer's request to enter into cost negotiations with that firm.

Expand now protests that the evaluation process was fundamentally unfair because HHS did not conduct any technical discussions with Expand regarding its proposal, even though the proposal was judged acceptable, but conducted such discussions with both Andrulis and InterAmerica. Expand urges that this 8(a) procurement is subject to the same standards for competitive range

discussions as are generally applicable to non-8(a) negotiated procurements: technically acceptable offers are included in the competitive range, and if discussions are held with one competitive range offeror they must be held with all such firms. Federal Procurement Regulations § 1-3.805-1(b) (1964 ed.).

We do not agree that the rule governing discussions in a negotiated procurement apply in this type of solicitation. As we stated in Arawak Consulting Corporation, 59 Comp. Gen. 522 (1980), 80-1 CPD 404, we believe section 8(a) of the Small Business Act, to further a socio-economic policy of fostering the economic self-sufficiency of certain small businesses, authorizes a contracting approach which in general is not subject to the competition and procedural requirements that govern non-8(a) procurements. Thus, the obligation to conduct discussions, among other norms of competitive federal procurements, simply does not extend to 8(a) procurements. See Ray Baillie 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.

Moreover, HHS regulations recognize that the ultimate responsibility for nomination of an 8(a) subcontractor rests with the SBA, 41 C.F.R. § 3-1.703-50(a), so that HHS in effect is acting on behalf of the SBA in dealing with the competing 8(a) firms and in evaluating their proposals. As a result, we have decided that our review of HHS actions in an 8(a) limited technical competition context should be the same as our review of SBA 8(a) actions. Arawak Consulting Corporation, supra. Because of the broad discretion afforded the SBA and the contracting agencies under the Small Business Act, we limit our review of 8(a) procurements to determining whether the SBA has followed pertinent regulations and whether there has been fraud or bad faith on the part of government officials, Orincon Corporation, 58 Comp. Gen. 665 (1979), 79-2 CPD 39; we review HHS' actions against the same criteria.

Here, neither the applicable HHS nor SBA regulations require that competitive range discussions be held regarding an 8(a) offeror's technical proposal. See also Health Services International, Inc., B-205060, May 25, 1982, 82-1 CPD 495. Indeed, it is clear that the "competitive range" HHS established never was intended to be the usual group of offers both acceptable and susceptible to being made acceptable, but simply was a vehicle to choose between the two firms initially judged equally entitled to nomination

to the SBA. While we recognize that Expand's offer was judged acceptable, it is clear that the firm's relatively low score did not warrant Expand's inclusion, under HHS regulations, in the group of potential nominees. In this regard, we have held that a proposal which is technically acceptable or capable of being made acceptable need not be considered for negotiation if, relative to all proposals received, it does not stand a real chance for award. Hittman Associates, Inc., 60 Comp. Gen. 120 (1980), 80-2 CPD 437.

Concerning whether Expand's technical proposal was evaluated in bad faith, the record establishes that Expand received the lowest score in the personnel category because the agency's evaluation group felt that the firm's staff lacked sufficient medical and scientific expertise. Expand's proposed organization was rated low because the firm had failed to furnish examples of certain photocomposition work that was to be subcontracted. The firm received the third highest rating for its proposed approach, however, because the evaluators were impressed with Expand's emphasis on quality control and its description of unique types of error recovery. Expand has proffered no evidence or argument to suggest that the evaluators' conclusion was unreasonable, and based upon our review of the numerical ratings given each proposal, and the narrative summaries of the evaluators furnished with the agency's report, we have no reason to conclude that the evaluation of Expand's technical proposal was unfair or otherwise inconsistent with the RFP's specified criteria. Therefore, we find nothing legally objectionable in the agency's limitation of potential nominees for the 8(a) subcontract to the two highest-scored, and arguably technically equal, firms.

To the extent that Expand continues to maintain that Andrulis is ineligible to receive an 8(a) subcontract because of its joint venture arrangement with a large concern, the issue is not for our consideration. The SBA has exclusive authority under the Small Business Act to determine such matters as a firm's eligibility, see Industrial Lease Inc. of Fayetteville, B-204446, August 31, 1981, 81-2 CPD 191, and, as we noted earlier, the SBA has already made such a determination regarding Andrulis' eligibility.

The protest is denied.

Notwithstanding our view that HHS acted properly, we believe the agency should be more precise in setting forth the effect of cost in selecting a firm for an 8(a) subcontract pursuant to its regulations on 8(a) limited technical competitions. The RFP, by stating that initial proposals should include "the most favorable terms from both the technical and cost standpoints," even though also expressly not inviting initial cost proposals, seems to indicate that proposed costs will have a bearing on the relative evaluation of offers in the same way it generally does in a normal negotiated procurement. However, under HHS' regulations, implemented in this procurement, cost is a factor in the selection only in the sense that the firm chosen on the basis of technical merit must enter into successful cost discussions with HHS before it can receive the 8(a) subcontract. Therefore, if HHS does not intend to conduct a relative cost evaluation, we believe it would be more accurate if solicitations in these procurements clearly state that proposals are to be evaluated for technical merit exclusively, and that a cost proposal will only be requested from that firm deemed to be technically superior. By separate letter, we are so recommending to the Secretary of Health and Human Services.

for Milton J. Socolar
Comptroller General
of the United States