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

FILE: B-215763.3 **DATE:** May 28, 1985

MATTER OF: Shelf Stable Foods, Inc.

DIGEST:

Protest contending that failure of agency to prohibit a small business mobilization base contractor from subcontracting with a large business violates the intent of 10 U.S.C. § 2304(a)(16) and the solicitation's 30 percent allocation of the total requirement to small businesses is denied since nothing in the statute, the solicitation or the contract prohibits such subcontracting.

Shelf Stable Foods, Inc. protests the award of a contract to Vantage Foods, Inc. by the Defense Logistics Agency (DLA) under request for proposals (RFP) No. DLA13H-84-R-8258. The solicitation anticipated the negotiation of fixed-priced contracts under 10 U.S.C. § 2304 (a)(16) (1982) for the manufacture of 23,726,625 pouches of meat components for use as combat rations. Shelf Stable contends that the agency improperly permitted Vantage to subcontract a major portion of the work to Southern Packaging & Storage Co., Inc. (SOPAKCO), a large business. The protester argues that the agency's action violated the intent and purpose of 10 U.S.C. § 2304 (a)(16), as well as the small business allocation provision in the RFP.

We deny the protest.

Under 10 U.S.C. § 2304 (a)(16), contracts could be negotiated as an exception to the rules of formal advertising in those instances when the Secretary (or his designee) determined the following:

" [I]t is in the interest of national defense to have a plant, mine, or other facility or a producer, manufacturer, or other supplier, available for furnishing property or services in case of a national emergency; or (B) the

> interest of industrial mobilization in case of such an emergency, or the interest of national defense in maintaining active engineering, research, and development would otherwise be subserved. . . ."

The use of this negotiation authority had to be supported by a Determination and Finding (D&F) signed by the Secretary. Defense Acquisition Regulation (DAR), § 3-216.3 (1976 ed.). In this case, the D&F was dated February 7, 1984, and was supported by a Justification for Authority to Negotiate (JAN) prepared by the Defense Personnel Support Center, which is a field activity of DLA.

The solicitation was issued on February 15, 1984 only to firms that had current Industrial Preparedness Plan (IPP) agreements with DLA. These agreements specified the maximum monthly capacity of the contractors with respect to each meat component (i.e., ham slices, ground beef, etc.), which were to be vacuum packed into gas and moisture impermeable pouches.

The solicitation stated that the procurement was "unrestricted" and neither the total nor the partial small business set-aside box was checked. The solicitation's evaluation provision, however, stated that 30 percent (7,117,987) of the pouches would be "allocated" to small business. It also stated that small business firms with IPP agreements could compete for the unrestricted portion of the procurement but that if they received an award under it, they would be considered for an additional award under the restricted portion only up to the maximum quantity they were eligible to receive under the terms of the solicitation. That quantity was based on the production capacity stated in their IPP agreements.

DLA received 15 proposals in response to the RFP. Vantage, a small business firm, received an award for 7,117,987 pouches. An additional 6 percent of the total requirement was awarded to two other small business firms, one of which was Shelf Stable.

Shelf Stable protested the award to Vantage (B-215763.2), contending that Vantage did not have the necessary facilities to perform the contract itself and was approved for award by a preaward survey team only

because of its plan to subcontract to SOPAKCO. As SOPAKCO had also received an award under the solicitation, Shelf Stable argued that the award to Vantage would be inconsistent with 10 U.S.C. § 2304(a)(16). Shelf Stable also argued that the subcontracting arrangement violated the small business allocation in the RFP. The protest report from DLA, however, stated that the preward survey was based only on Vantage's own capacity, that DLA had refused a request from Vantage to change the place of performance after the award, and that Vantage would not be allowed to subcontract performance of the contract to a large business concern. Based on this assurance, Shelf Stable withdrew its protest and we closed the file.

Subsequently, Shelf Stable reinstated its protest because, contrary to its assurances, DLA permitted Vantage to subcontract with SOPAKCO. In its supplemental report, DLA conceded that Vantage's contract was modified after award to change the place of manufacture for 50 percent of the awarded quantity to SOPAKCO's Bennettsville, South Carolina plant, with the remaining 50 percent to be manufactured at Vantage's own facilities.[1/] The contract amendment specifically required that the portion retained by Vantage include the "filling and sealing of the finished pouches and retorting or thermostabilization."

DLA explained that after its initial denial of Vantage's request to subcontract to SOPAKCO, Vantage questioned that decision on the bases that the solicitation, the contract and Vantage's IPP agreement contained no requirement that Vantage perform the entire contract in its own facilities and that the solicitation was unrestricted, with no portion set aside for small business. Because of this and its concern about program delays which could result from litigation or contract termination for default, DLA explains, it agreed to the subcontract. DLA asserts that the 30 percent small business "allocation" is not violated by the subcontracting arrangement and states that while SOPAKCO now may be producing more of the total requirement than DLA had anticipated, DLA, without a contractual prohibition against subcontracting with another prime contractor,

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[1/] A later contract modification permitted an additional quantity to come from the SOPAKCO plant.

could not have withheld approval of the subcontracting arrangement. DLA also emphasizes that, in any event, it is Vantage that is responsible for the entire contract. DLA states, however, that it intends to include a restriction on subcontracting in future solicitations for similiar contracts.

The agency contends that the issues raised by Shelf Stable are matters of contract administration which our Office generally does not review. While the agency's action challenged here occurred after award and therefore does involve contract administration, the issue arises in the context of contract administration only because the initial timely protest was withdrawn based on agency assurances that it would not permit Vantage to subcontract. Since it is the propriety of such subcontracting under this particular solicitation that is in issue, we are not inclined to dismiss the protest simply because the agency has now done, after award, what it said it would not do. See Intermem Corp., B-212964, July 31, 1984, 84-2 CPD ¶ 133, where we entertained a protest under similar circumstances.

Shelf Stable first complains that the Vantage subcontract to SOPAKCO violates the intent and purpose of 10 U.S.C. § 2304(a)(16). The protester's point is that the use of negotiation procedures was justified in connection with the need to maintain mobilization base producers, but that an award to a firm that subcontracts the work instead of doing it itself, particularly when the subcontractor is already a moblization base company, does nothing to enhance the mobilization base. While there is a certain logic to that position (which, in essence, the agency recognizes), there is nothing in the statute, the solicitation, the D&F or the JAN which specifically prohibits Vantage from subcontracting to another prime contractor under the solicitation. Accordingly, we cannot conclude that the subcontract arrangement was precluded by the statute, and we believe that the agency's decision to permit Vantage to subcontract was reasonable in view of the absence from the solicitation of a provision prohibiting such an arrangement, and the agency's desire to avoid program delays which might result from litigation or contract termination. We note, however, that the agency is including a clause in future solicitations prohibiting subcontracting with other prime contractors.

Shelf Stable also argues that Vantage's subcontract with SOPAKCO violates the small business allocation in the RFP. This argument appears to have two aspects. First, the protester asserts that the subcontract defeats the small business allocation provided for by the RFP and the D&F. Second, the protester asserts that the allocation is a partial small business set-aside and that under such a set-aside Vantage could not subcontract as it did because of the alleged requirement that it furnish end products manufactured by a small business.

On the first point, we are not prepared to conclude that subcontracting to a large business is precluded by the allocation provision. Certainly the provision itself doesn't so state. Moreover, the general rule is that there is no innate prohibition on a small business set-aside contractor's subcontracting with a large business. See, e.g., Engineering Computer Optecnomics, Inc., B-203508, June 22, 1981, 81-1 CPD ¶ 516; Industrial Contractors, Inc., B-197745, June 20, 1980 80-1 CPD ¶ 436. The fact that Vantage will play some role in contract performance and retain responsibility for all aspects of performance, even though it subcontracts a substantial amount, is not, it seems to us, inconsistent with the allocation.

On the second point, the parties do not agree on whether the 30 percent allocation was a set-aside, with DLA pointing out that the solicitation here was unrestricted: neither the total nor the partial set-aside box was checked, and the standard "Notice of Partial Small Business Set-Aside" clause required by DAR, § 7-2003.3 was not included. We need not decide on the appropriate characterization, however, since what is controlling is not whether we call the allocation a set-aside but whether the RFP imposed a restriction on Vantage's subcontracting arrangement.

The protester's argument, that Vantage is required to furnish end products manufactured by a small business, stems from a requirement normally found in small business set-aside solicitations for supply contracts that the contractor agree to furnish such end products. See DAR §§ 7-2003.2, 7-2003.3; see also the Federal Acquisition Regulation, 48 C.F.R. §§ 52.219-6, 52.219-7 (1984). No such requirement, however, was included in this solicitation. In the absence of any provision imposing the requirement, Vantage was not contractually precluded from

furnishing end items manufactured by a large business. Accordingly, the fact that the award to Vantage satisfied the RFP's small business allocation did not, by itself, obligate Vantage not to subcontract with a large business.

It seems clear that the problems in this case essentially were caused by DLA's carelessness in preparing the RFP, and obviously could have been avoided had DLA included appropriate provisions in the solicitation. Again, however, we note that DLA states that it intends to include a restriction in future procurements to preclude the type of subcontracting that occurred here, and we further note that DLA also is now including a standard small business set-aside provision in solicitations similar to this one which requires the furnishing by set-aside awardees of end products produced by small business. We trust that this will preclude the recurrence of the situation that arose in this case.

The protest is denied.

Harry R. Van Cleve
General Counsel