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DECISION

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

FILE: B-218537 **DATE:** June 12, 1985

MATTER OF: Winfield Manufacturing Co., Inc.

DIGEST:

Protest that agency violated regulations by removing work previously reserved under the section 8(a) program (in the form of open 8(a) contract options) from a non-8(a) procurement (in which it had been inadvertently included) because the removal constituted an illegal exercise of the options at an unreasonable price is denied where protester fails to establish that contracting agency either has or will pay a price in excess of fair market price for the reserved 8(a) work.

Winfield Manufacturing Co., Inc. (Winfield), protests the Defense Logistics Agency's (DLA) decision to delete a quantity of fragmentation vests (vests) from invitation for bids (IFB) No. DLA100-85-B-0429, a total small business set-aside, for 270,000 vests.

Prior to the IFB's issuance, DLA had entered into a contract with the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U. S. C. ¶ 637(a) (1982), for identical vests from Amertex Enterprises, Ltd. (Amertex). The Amertex contract contained two options for 150,000 and 52,168 vests respectively at a price of $183.15 per vest. The IFB advised bidders of the existence of the Amertex options and warned bidders of the possibility of an award of less than the total quantity advertised (270,000) should the terms of the Amertex options prove more favorable than those of the bids received in response to the IFB.

Winfield specifically objects to a prebid opening amendment which deleted 170,000 vests from the procurement contending that it constitutes an unlawful exercise of the Amertex options prohibited by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.207 (1984), because in Winfield's opinion, the option prices are unreasonably high.

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DLA's position is that all the vests called for under the Amertex contract (both base period and open options) were reserved for 8(a) procurement. DLA indicates that it determined that the reserved quantities were inappropriately made the subject of the competitive solicitation among non-8(a) eligible firms and simply issued an amendment deleting these reserved quantities from the IFB.

We deny the protest.

Initially, we point out that under section 8(a) SBA is authorized to contract with government agencies for the performance of required work and to subcontract such work to socially and economically disadvantaged small business concerns (8(a) firms) upon terms and conditions mutually agreeable to SBA and the contracting agency. The thrust of the 8(a) program is to insulate participants from open price competition with established firms. For this reason, price is not a factor in the selection of an 8(a) firm for an award through SBA. Vector Engineering, Inc., 59 Comp. Gen. 20, 22-23 (1979), 79-2 C.P.D. ¶ 247 at pp. 4-5. SBA and the contracting agencies enjoy broad discretion in arriving at 8(a) contracting arrangements, and therefore our review of actions under the 8(a) program generally is limited to determining whether the regulations have been followed and whether there has been possible fraud or bad faith on the part of government officials. Forway Industries, B-217046, Nov. 26, 1984, 84-2 C.P.D. ¶ 573.

In Winfield's view, the amendment deleting the vests from the non-8(a) procurement violates the FAR because DLA either knew or should have known that the option prices announced in the IFB were above the fair market value of the vests and therefore unreasonable. The post-protest bid opening disclosed that several bids were, in fact, lower than the announced option prices. Winfield thus argues the bid opening prices confirm that the exercise of the option is not the most advantageous method of fulfilling DLA's needs. Further, Winfield asserts that DLA, even as part of an 8(a) contract, cannot legally award an option at an unreasonable price.

However, with regard to ultimate award of an 8(a) contract, the FAR requires a contracting agency to establish the fair market price of work reserved for the 8(a) program ". . . based on reasonable costs under normal competitive

conditions and not on lowest possible costs." 48 C.F.R. § 19.806-1(a). The FAR also provides, in effect, that the 8(a) contract cannot be awarded unless either: (1) SBA agrees to fund the difference between the contract price and the fair market price as a business development expense (BDE); or (2) the contract award is negotiated down to the fair market price. 48 C.F.R. § 19.806-4(a). Thus, since the quantities deleted from the IFB are reserved for an 8(a) firm, DLA could not award the 8(a) contract for more than the fair market price unless the SBA applies BDE funds to the award of these quantities or the contracting agency negotiates the price at which an 8(a) option is awarded down to a fair market price. Therefore, notwithstanding Winfield's assertion to the contrary, there is no basis on this record for concluding that DLA has, or will, award the 8(a) quantities at a price in violation of the FAR. In this connection, we understand that DLA has negotiated down the price to be paid for the 8(a) option quantities.

Under these circumstances, we deny the protest.

for Seymour Efros
Harry R. Van Cleve
General Counsel