W0065

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gino Morena Enterprises

File: B-224235

Date: February 5, 1987

DIGEST

1. Protest jurisdiction of the General Accounting Office extends to protests filed by interested parties challenging procurements conducted by federal agencies and does not turn on whether appropriated funds are involved.

2. Where the provisions of the Armed Services Procurement Act do not apply to a procurement by a defense agency because payment would not be made from appropriated funds, the General Accounting Office will review the actions of the agency to determine whether it acted reasonably.

3. Where the agency discovered just prior to award of a contract under a competitive small business set-aside solicitation that appropriated funds would not be available to fund the contract, and the agency determined that its need for the required services was urgent, the agency acted reasonably in awarding a concession contract that would not require appropriated funds to the offeror who had been low under the solicitation.

4. Where an award is justified on basis of urgency, the inclusion in the contract of options to extend the contract is not justified.

DECISION

Gino Morena Enterprises (GME) protests the award by the Basic Military Training School (BMTS), Lackland Air Force Base, Texas, of concession agreement No. F41800-86-S-0008 to Manuel J. Rodriguez. We deny the protest because, as discussed below, we conclude that GME was not improperly excluded from competing for award of the concession. We also conclude, however, that since the agency justified the award at least in part on urgent circumstances, the inclusion of options to extend the agreement was not justified. The options therefore should not be exercised.

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BACKGROUND

The agreement requires the concessionaire to provide initial haircuts for BMTS basic trainees and incarcerated personnel at a designated location at Lackland. The concessionaire is to furnish all equipment and supplies and reimburse the BMTS for utilities used. The agreement contemplates that the concessionaire will charge those receiving the haircuts for these services at rates contained in the agreement. The agreement is for a 1-year base period and contains two 1-year options.

The concession agreement was awarded following the cancellation of request for proposals (RFP) No. F41800-86-R-7014, a total small business set-aside solicitation issued by the San Antonio Contracting Center for the initial haircut services at the BMTS. The solicitation envisioned that the Air Force would pay for these services. The Center canceled the solicitation on September 25, 1986, after the BMTS informed it that, contrary to earlier assumptions, no appropriated funds would be available to fund a contract for these services. However, since the BMTS needed to have someone ready to provide the services by October 1, BMTS signed the concession agreement with Mr. Rodriguez, the low offeror under the canceled RFP. Under the concession agreement the trainees must pay for the haircuts.

Prior to October 1, initial haircuts for the BMTS recruits were provided by the Army and Air Force Exchange Service (AAFES), a nonappropriated fund instrumentality, under a 1983 contract between the Air Force and the AAFES.[1/] This contract, as extended by the exercise of option provisions, expired on September 30. The AAFES had arranged for the performance of the haircut services by subcontracting with the protester. The contract between the AAFES and the protester is not scheduled to expire until November 15, 1987. GME also operates several other barbershops at Lackland and elsewhere under contract with the AAFES.

When the Center issued the small business set-aside RFP, GME filed a protest with the contracting officer complaining that an award under that solicitation would result either in duplication of the initial haircut services or in a breach

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1/ This contract also provided for the AAFES to provide "follow-on" (i.e. second and third) haircuts for male recruits, and estimated that the number of follow-on haircuts would be five percent of the estimate for the initial haircuts.

of the subcontract between the AAFES and GME.2/ The protester also complained that there was no authority for providing for these services other than through the AAFES; that the set-aside was improper; and that the solicitation did not contain required minimum wage provisions, and was otherwise defective. The contracting officer informed GME that its protest was considered moot after the solicitation had been canceled. GME then filed a protest with this Office, contending that the concession agreement with Mr. Rodriguez constituted an improper sole-source contract and reiterating many of the issues raised earlier with the agency. GME's basic complaint is that it was improperly denied an opportunity to compete for the initial haircut concession contract.

The Air Force argues that this Office is without jurisdiction to decide this protest because the concession agreement executed by the BMTS is not a procurement contract. The agency also questions our authority to review this matter on the basis that the government will derive no benefit or income from the agreement.

On the merits, the Air Force's position is that it violated no statute or regulation and that it acted reasonably under the circumstances in awarding the concession agreement. The agency points out that it first attempted to procure the initial haircut services through a small business set-aside, appropriated funds contract. Nine solicitation packages were distributed to prospective offerors, including the AAFES, which did not submit an offer. The agency received three proposals, with prices for the base year ranging from $.95 to $1.20 per haircut. The agency says that it decided to compete its requirement for initial haircuts rather than simply award a noncompetitive contract to the AAFES based on the requirement of the Competition in Contracting Act of 1984 (CICA), title VII, Division B, Pub. L. 98-369, 98 Stat. 1175 et seq., that agencies obtain full and open competition when contracting for goods and services. In this regard, the agency cites our decisions holding that a contract with an AAFES is similar to a contract with a nongovernmental entity, Obtaining Goods and Services from Nonappropriated Fund Activities Through Intra-Departmental Procedures, 58 Comp. Gen. 94 (1978), 78-2 CPD ¶ 353, and therefore requires adequate

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2/ The RFP provided, as does the concession agreement, for the initial haircut services to be performed at the same location at Lackland where GME had been operating a barbershop.

justification if made on a sole-source basis. Army Request for Advance Decision, B-148581 et al., Sept. 2, 1980, 80-2 CPD ¶ 162.

The agency justifies the award of the concession without conducting an unrestricted competition basically on two grounds: first, by the time the set-aside RFP had been canceled, the need to arrange for initial haircut services had become urgent; second, the BMTS Commander decided to base the award of the concession contract on the results of the set-aside competition in furtherance of the congressional policy that a fair proportion of contracts be awarded to small business concerns. The agency recognizes that Department of Defense (DOD) Instruction 1330.18, Aug. 28, 1974, establishes a policy that military exchanges are to be the primary sources of services on defense installations, but notes that the policy does not state that exchanges are to be exclusive sources. In this connection, the agency points out that other barbershops at Lackland are operated by nonappropriated fund activities other than the AAFES.

ANALYSIS

Jurisdiction

The authority of this Office to decide protests is based on CICA, 31 U.S.C. § 3551 et seq. (Supp. III 1985). Our jurisdiction extends to a protest filed by an interested party challenging a solicitation issued by a federal agency for a proposed contract for property or services or the award or proposed award of such a contract, Artisan Builders, 65 Comp. Gen. 240 (1986), 86-1 CPD ¶ 85, and does not turn on whether appropriated funds are involved. T.V. Travel, Inc., et al.--Request for Reconsideration, 65 Comp. Gen. 109 (1985), 85-2 CPD ¶ 640; Spectrum Analysis & Frequency Engineering, B-222635, Oct. 8, 1986, 86-2 CPD ¶ 406.

In this case, the concession agreement to which the protester objects was awarded by the BMTS Commander. No one contends that BMTS is not a federal agency. Further, regardless of how the arrangement is styled, the concession agreement is a contract for services under which the BMTS will satisfy its need to obtain initial haircuts for its recruits--which the agency insists is an important aspect of the training experience--and therefore constitutes a procurement contract. See T.V. Travel, Inc., et al., 65 Comp. Gen., supra. Also, GME is an interested party because GME asserts that it would have submitted an offer had the agency provided it the

opportunity to do so and that it will compete for an award if we should recommend that the agency resolicit. See Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1986). Thus, all the requisite circumstances for the exercise of our protest jurisdiction exist.

Applicable law and standard of review

The protester bases much of its complaint on alleged violations of sections of the Armed Services Procurement Act codified in chapter 137 of title 10 of the United States Code. As amended by CICA, these provisions require, among other things, that defense agencies use advance procurement planning, 10 U.S.C. § 2305(a)(1)(A)(ii) (Supp. III 1985), and obtain full and open competition through the use of competitive procedures, 10 U.S.C. § 2304(a)(1)(A), when contracting for goods or services. The protester also cites 41 U.S.C. § 253(f)(5)(A) (Supp. III 1985), which provides that in no case may an executive agency contract for property or services using other than competitive procedures because of a lack of advance planning.

The provisions cited by the protester are not directly applicable, however, to the agency's award of the concession agreement in this case. The provisions of chapter 137 of title 10 apply only to those procurements by defense agencies for which payment is to be made from appropriated funds. 10 U.S.C. § 2303(a). Where appropriated funds are not directly involved, the Armed Services Procurement Act does not apply. 58 Comp. Gen., supra, at 98. Further, 41 U.S.C. § 253, which is section 303 of the Federal Property and Administrative Services Act of 1949 (FPASA), also is inapplicable based on section 302 of the FPASA which excludes defense agencies from the provisions of title III of that Act. 41 U.S.C. § 252(a) (1982).

Where the basic procurement statutes are not applicable to a procurement that is within our protest jurisdiction, we review the actions taken by the agency to determine whether they were reasonable. See Flexsteel Industries, Inc., et al., B-221192 et al., Apr. 7, 1986, 86-1 CPD ¶ 337 (protest of a Department of State procurement not subject to the FPASA denied where the agency's actions were not shown to lack a reasonable basis). We shall apply that standard here.

Merits

In our view, the award by BMTS of the concession agreement to Mr. Rodriguez was reasonably based. Because its contract

with the AAFES for initial haircuts for its recruits was expiring, BMTS initially requested the Center to procure these services, with the expectation that appropriated funds would be available. The Center issued a competitive solicitation, restricting participation to small businesses. The agency was permitted under 10 U.S.C. § 2304(b)(2) to conduct a competitive procurement limited to small business concerns in furtherance of section 15 of the Small Business Act, 15 U.S.C. § 644(a) (1982). The Center reports that it distributed solicitations to nine potential offerors, including AAFES, which apparently qualifies as a small business concern, but not including GME, which apparently does not. The agency received offers from three firms, AAFES not among them. Following a preaward survey of the low offeror's ability to perform the contract, BMTS learned that no appropriated funds would be available to pay for the recruits' initial haircuts and so informed the Center, which canceled the solicitation on September 25.

BMTS still had a need for the services, however, and its existing contract with AAFES was due to expire on September 30. What the protester contends the BMTS was required to do at this point is not entirely clear. On the one hand, the protester complains that it was not solicited, and says that it would have submitted an offer had it been invited to do so. On the other hand, the protester cites Air Force Regulation (AFR) 147-7, March 15, 1984, which contains some of the same provisions as the DOD instruction cited by the agency, as requiring that the AAFES provide all barber services at Lackland, thus suggesting that BMTS should have awarded a sole-source contract to the AAFES. We find no merit in either contention.

The appropriated fund problem came to light only after the Center, at the request of BMTS, had conducted a competitive procurement and was ready to award a contract. While the protester apparently believes that cancellation by the Center of the set-aside solicitation required that the results obtained under that competitive solicitation be ignored and that new competition be sought, we do not agree. As we stated above, the competition statutes did not apply once it was determined that appropriated funds would not be used, and we think that under what BMTS considered as urgent circumstances,[3/] it acted reasonably in basing the award of the concession agreement on the results of the competition obtained under the recently canceled RFP.

[3/] Shortly after GME filed its protest with this Office, the agency determined under 31 U.S.C. § 3553(c)(2)(A) (Supp. III 1985) that its requirement for initial haircuts for the recruits was an urgent and compelling circumstance that would not permit waiting for the decision of this Office on the protest.

The protester contends that the concession contract itself was not awarded as a small business set-aside and that therefore it was improper not to solicit GME. In this connection, the protester points out that paragraph 1-6c(2) of Air Force Regulation 176-9, August 17, 1984, provides that the Small Business Act does not apply to contracts not involving appropriated funds. It is clear from the record, however, that the agency decided to maintain this procurement action as a set-aside even after changing the manner in which the contractor would be paid. Although the Small Business Act may not have applied, we cannot say that the agency acted unreasonably in choosing nevertheless, as a matter of policy, to continue with the set-aside.

With respect to the protester's contention that the regulations required BMTS to contract for initial recruit haircuts through the AAFES, the regulation states that "AAFES will be the primary source of nonsubsistence resale merchandise and services on Army and Air Force installations." The same statement appears in the DOD instruction cited by the agency. The regulations seem to set forth a general policy rather than a specific prohibition against obtaining services in any instance from a source other than the AAFES. In both regulations, the statements are made in the context of imposing limitations on sales activities by other nonappropriated fund instrumentalities, and are not directed at how an agency is to conduct its procurements.

Finally, the protester contends that if the award of the concession agreement without soliciting GME was justified on the basis of urgency, the agreement should have a limited duration and the options to extend the agreement should not be exercised. We agree. In IMR Systems Corp., B-222465, July 7, 1986, 86-2 CPD ¶ 36, the agency did not comply with the CICA requirement to solicit as many sources as practicable when using other than competitive procedures on the basis of urgency. We said that while the urgent circumstances of that case justified the award of a contract without soliciting other sources, the inclusion of options to extend the contract was not justified. While CICA does not apply here, we think the rationale expressed in IMR Services Corp. does. The exercise of the options to extend should not be considered and, by letter of today, we are so advising the Secretary of the Air Force.

Because we conclude that the agency acted reasonably in awarding the concession agreement without soliciting the protester, we deny the protest.

Harry R. Van Cleve
General Counsel