



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Executive Resource Associates, Inc.
File: B-228092
Date: November 10, 1987

DIGEST

1. Protest that procuring agency was conducting a competitive procurement at the same time it was considering placing one item of that procurement with the Small Business Administration under the section 8(a) program is dismissed as untimely because it was filed more than 10 working days after the basis of the protest was known.
2. General Accounting Office will not object to an agency's decision to withdraw a procurement from the Small Business Act's section 8(a) program absent a showing of fraud or bad faith by government officials.
3. Since the Small Business Act mandates that disagreements between the Small Business Administration and the contracting officer with regard to the terms and conditions of a proposed contract under section 8(a) of the Small Business Act be submitted for determination to the head of the procuring agency, the General Accounting Office will not review disagreements about the fair market price of a contemplated 8(a) contract.

DECISION

Executive Resource Associates, Inc. (ERA), protests the award of a contract for bid lot 5 under request for proposals (RFP) No. DLAH00-87-R-0001, issued by the Defense Logistics Agency (DLA) for the procurement, in 14 bid lots, of automated data processing equipment maintenance at sites throughout the continental United States. Amendment No. 3 to the IFB had advised potential offerors that bid lot 5--the Four Phase Motorola equipment portion of the solicitation--was a candidate for potential award to the Small Business Administration (SBA) under the authority of section 8(a) of the Small Business Act; DLA, however, ultimately decided that an 8(a) contract would be too costly based on its calculation of the fair market price of the services. ERA, which would have been the 8(a)

subcontractor, contends that DLA officials, never really intending to use the 8(a) program, in bad faith conducted simultaneous negotiations for bid lot 5 with ERA and with offerors submitting competitive proposals; opened competitive best and final offers (BAFOs) prior to the completion of negotiations with ERA; and failed to calculate the estimated fair market price properly.

We dismiss the protest in part and deny it in part.

The RFP, issued in January of 1987, invited offers for any or all combinations of the 14 bid lots. Amendment No. 3, issued on February 26, advised potential offerors that bid lot 5 was a candidate for negotiation and potential award to SBA under section 8(a) of the Small Business Act. In this respect, section 8(a) authorizes the SBA to enter into contracts with government agencies 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). The amendment further provided:

" . . . In order for an award to result to SBA, the 8(a) vendor selected . . . must among other conditions, provide a technically acceptable offer and a price which meets the fair market criteria established by [applicable] regulations. In the event that negotiations with SBA are not successful, i.e. if the 8(a) contractor cannot meet the prescribed criteria, 'Bid Lot' 5 will be negotiated with offerors that submitted proposals in response to this solicitation for 'Bid Lot' 5."

On March 16, DLA requested that ERA submit an initial technical and cost proposal by May 18. Initial competitive proposals under the RFP, including offers on bid lot 5, were received by DLA on March 17. Two large businesses, Motorola Computer System, Inc., and Systems Support Inc., and an 8(a) small business, General Analytics Corp., submitted price proposals ranging from \$11,069,760 to \$15,439,644. ERA's subsequently submitted proposal, which named Motorola as subcontractor to ERA, was evaluated at \$22,060,776, more than twice the government's estimated current fair market price of \$10,969,405.

During negotiations with ERA on the proposed 8(a) contract, DLA informed the firm that its proposed price was substantially higher than the government's estimate of the fair market price. After ERA submitted a BAFO on June 10, with an evaluated price of \$19,448,993, DLA notified SBA that it had decided to withdraw the requirement for bid lot 5 from consideration under the section 8(a) program. On August 7,

well after the expiration of the 15-day period during which SBA was entitled to appeal DLA's determination, see 48 C.F.R. § 19.801(b)(2) (1986), and after obtaining the concurrence of DLA's Office of Small and Disadvantaged Business Utilization, DLA withdrew bid lot 5 from section 8(a) consideration.

Under section 8(a) of the Small Business Act, a government contracting officer is authorized "in his discretion" to let the contract to SBA upon terms and conditions to which the agency and SBA agree. 15 U.S.C. § 637(a)(1). Therefore, contracting agencies and SBA have broad discretionary authority in this area, including the discretion to withdraw a procurement from the section 8(a) program, and we will not review such a decision absent a showing of the possibility of fraud or bad faith on the part of government officials or that regulations may have been violated. Bid Protest Regulations, 4 C.F.R. § 21.3(f)(4) (1987); Sam Gonzales, Inc.--Reconsideration, B-225542.2, Mar. 18, 1987, 87-1 C.P.D. ¶ 306. Such evidence must include proof that the officials involved had the malicious and specific intent to injure the protester. Ernie Green Industries, Inc., B-224347, Aug. 11, 1986, 86-2 C.P.D. ¶ 178.

ERA contends that the fact that DLA conducted a simultaneous competitive procurement for bid lot 5 is evidence of a bad faith predetermination not to award the 8(a) contract.

This basis for protest, filed in our Office on August 21, is untimely. The record establishes that ERA knew the simultaneous competitive procurement was in progress, and of the provision in amendment No. 3, well before it submitted its initial proposal on May 18. The protest clearly was not filed within 10 working days after the basis for protest was known, as required by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2). In this respect, ERA notes that it protested shortly after it learned that SBA had not appealed DLA's withdrawal of the bid lot 5 requirement from section 8(a) consideration. This aspect of ERA's complaint that DLA acted in bad faith, however, focuses on the fact that a parallel procurement was conducted at all, not on the basis for the ultimate decision to withdraw the requirement or SBA's failure to appeal.

In any case, there is nothing inherently wrong in the conduct of dual procurements such as those involved here. See Ernie Green Industries, Inc., B-222517, July 10, 1986, 86-2 C.P.D. ¶ 54. DLA explains that the reason for proceeding with both procurements was the agency's critical need for the bid lot 5 work (maintenance on more than 10,000 pieces of equipment at over 180 DLA locations). According to DLA, it could not risk the delay in placing a contract if

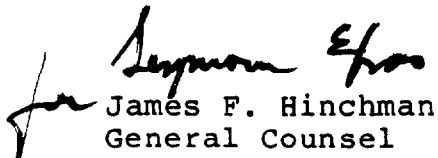
one acquisition approach was unsuccessful and the agency then had to start another one. We see nothing unreasonable in that explanation.

As additional evidence of DLA's bad faith, ERA contends that DLA fraudulently represented to our Office that BAFOs in the competitive procurement were opened on July 14, after the decision to withdraw the contract from the 8(a) program, when, in fact, BAFOs were opened on June 22, about the time DLA made that decision. ERA seems to be suggesting that DLA would not have opened those proposals before the SBA appeal period had run if the agency really had any serious intention of using the 8(a) program.

We deny this aspect of the protest. Again, ERA's argument does not establish any bad faith on DLA's part. Clearly, the opening of BAFOs did not prevent SBA from seeking a timely appeal of the contracting officer's determination to withdraw bid lot 5. Additionally, we note that the opening occurred after the contracting officer first notified SBA, on June 19, that DLA was withdrawing bid lot 5 because ERA could not approach the estimated fair market price. We simply do not see how the fact that the contracting officer opened competitive BAFOs earlier than originally admitted and prior to the completion of the appeal process proves that DLA had a malicious and specific intent to injure ERA.

Finally, ERA contends that DLA's fair market price determination is based on a number of incorrect assumptions and calculations. We will not consider this matter. The Small Business Act mandates that disagreements between the SBA and the contracting officer with regard to the terms and conditions of section 8(a) contracts be pursued with the head of the procuring agency. 15 U.S.C. § 637(a)(1)(A). We will not interfere with that process, or permit a disappointed 8(a) firm to circumvent it, simply because a firm believes that the agency's judgment, which the SBA has chosen not to contest, is wrong. See Amertex Enterprises, Ltd., 63 Comp. Gen. 22 (1983), 83-2 C.P.D. ¶ 461.

The protest is dismissed in part and denied in part.


James F. Hinchman
General Counsel