



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Lee Associates
File: B-232411
Date: December 22, 1988

DIGEST

1. In light of agency's broad discretion to decide to contract or not contract through the section 8(a) program, there is no legal basis to object to agency evaluation of a section 8(a) offeror's technical proposal as unacceptable in the absence of a showing of fraud or bad faith or that laws or regulations were violated.
2. The use of a technical review panel in conjunction with a procurement under section 8(a) of the Small Business Act is not inconsistent with the rules governing such procurements.

DECISION

Lee Associates protests the rejection of its proposal under request for proposals (RFP) No. 271-88-8241, issued by the National Institute on Drug Abuse (NIDA), Department of Health and Human Services (HHS), in contemplation of a contract award under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982 and Supp. IV 1986), for the development and testing of a model relapse prevention program. The protester disputes the findings of the technical review of its proposal, and argues that the use of a separate NIDA technical panel to evaluate its proposal was inconsistent with regulations governing the selection of 8(a) firms.

We deny the protest.

Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies and to subcontract for the performance of these contracts with socially and economically disadvantaged small business concerns. Often, the SBA, before accepting a section 8(a) contract, awaits

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the results of the procuring agency's evaluation of one or more 8(a)-eligible firms. Here, following its review of the capability statements of potential 8(a) contractors and preliminary general discussions with Lee, NIDA received approval from the SBA to initiate contract negotiations with Lee. The RFP, requesting technical and cost proposals, was then issued to the protester. The RFP provided that Lee's technical proposal would be evaluated pursuant to four criteria: understanding the project (15 points), technical approach (30 points), management plan (30 points) and personnel (25 points). The RFP stated that NIDA reserved the right to reject the proposal and cautioned that the issuance of the RFP did not commit the government to pay costs for the preparation and submission of a proposal.

On August 4, the technical review panel issued its findings and made recommendations to the contracting officer. Lee's proposal received the following average scores:

Understanding the Project	9.33
Technical Approach	10.83
Management Plan	16.83
Personnel	12.50
<hr/> Total	<hr/> 49.49

The panel noted significant weaknesses under each of the four criteria. For example, it found that the protester had significantly deviated from the RFP in proposing the direct training of only 200 drug abuse counselors while the solicitation called for training 2000 counselors as well as 200 AIDS trainers. The reviewers also criticized Lee's proposal for failing to discuss the manner in which training was to be developed, implemented and evaluated. In addition, the protester's proposed management plan was found to be deficient in several key areas--the plan for the second year of performance was not thoroughly described and there was no plan for organizational backup. Further, Lee's proposal was faulted for a failure to provide a letter of commitment from its proposed principal subcontractor and for a failure to describe its relationship to that subcontractor.

As a result, the review panel found Lee's proposal to be technically unacceptable by unanimous vote and informed the contracting officer that the magnitude and severity of the proposal's weaknesses were such that they could not be corrected through negotiations and that a complete rewrite

of the proposal would be necessary to correct the deficiencies. The contracting officer then advised Lee that its proposal would not be considered further.^{1/}

In its initial protest, Lee made three principal allegations: (1) that several of the determinations made by the reviewers regarding its proposal were simply incorrect; (2) that the process of using an independent NIDA technical review panel was inconsistent with 8(a) contracting procedures; and (3) that NIDA improperly induced Lee into using a particular consultant and then reneged when the reviewers found Lee's proposed use of the individual to be wanting.

It is clear from the Small Business Act that whether any particular contract should be awarded under section 8(a) is solely within the discretion of the procurement officers of the government and that no firm has a right to have the government satisfy a specific procurement need through the 8(a) program or award a contract through the program to that firm. Consequently, absent some showing of fraud or bad faith or a failure to comply with law or regulation, we have always viewed agency decisions concerning 8(a) procurements as legally unobjectionable. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(4) (1988); Electronic Systems Assocs., Inc., B-228685, Aug. 17, 1987, 87-2 CPD ¶ 170; Sam Gonzales, Inc.--Reconsideration, B-225542.2, Mar. 18, 1987, 87-1 CPD ¶ 306. Moreover, although we traditionally review protesters' assertions that their proposals have not been evaluated properly, we apply only the fraud or bad faith standard when the evaluation is conducted under the section 8(a) program in light of the agency's broad discretion to determine if it will contract through the program or with a particular 8(a) vendor and because the procedure leading to an 8(a) award is not encompassed by the competitive procurement statutes. See Pub. L. No. 98-369, § 2711(c) (set forth in note following 41 U.S.C. § 253 (Supp. IV 1986)); Arawak Consulting Corp., 59 Comp. Gen. 522 (1980), 80-1 CPD ¶ 404.

Lee does not allege, nor does the record support, that its specific disagreements with the findings of the technical review panel involve fraud or bad faith. That being so, we

^{1/} The agency reports that the procurement has been canceled and that it has no plans to fill the requirements until at least October 1989.

have no basis to object to the agency's evaluation. See Jones Steel Erections, Inc., B-196800, Dec. 4, 1979, 79-2 CPD ¶ 389.

Regarding its assertion that the role of the technical review panel was inconsistent with the rules governing 8(a) procurements, Lee states that the panel was never instructed to avoid, and did in fact make, determinations regarding its responsibility--matters alleged to be within the exclusive province of the SBA. Lee also states that it had been promised that further discussions would be conducted to resolve deficiencies found by the technical reviewers.

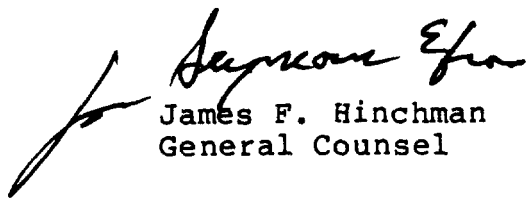
The protester has not cited a specific statute or regulation in support of its argument that the evaluation of its proposal was conducted in a manner inconsistent with the 8(a) program. We are unaware of any prohibition on the sort of technical evaluation conducted of Lee's proposal in either SBA or HHS regulations concerning 8(a) procurements. See 13 C.F.R. Part 125 (1988); 48 C.F.R. Subpart 319.8 (1987). Further, the general statutory requirement for discussions is not applicable to 8(a) procurements and there is no requirement in the regulations governing 8(a) procurements that discussions be held regarding an offeror's technical proposal. Arawak Consulting Corp., 59 Comp. Gen. 522, supra.

We disagree with Lee's position that HHS impermissibly interfered with SBA's exclusive authority to determine the "responsibility" of 8(a) firms. While SBA does have a role in determining the capability of 8(a) firms, in light of the broad discretion agencies have under section 8(a), we have held that a contracting agency may withdraw a project from the 8(a) program when it questions the ability of a proposed firm to perform, even if SBA determines that firm to be capable. Sam Gonzales, Inc.--Reconsideration, B-225542.2, supra. In any event, the panel here reviewed Lee's proposal in accordance with the stated evaluation criteria and the deficiencies it found under those criteria are properly considered matters of technical acceptability, and not responsibility. See Pacific Computer Corp., B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292.

Finally, concerning Lee's allegation that it was induced into using a particular consultant who allegedly could not qualify for the 8(a) work himself, HHS, in its report on the protest, denied any impropriety, and the protester did not continue any of its arguments with respect to this issue in its comments on that report. Accordingly, the issue is

deemed abandoned and will not be considered. Telemechanics, Inc., B-229748, Mar. 24, 1988, 88-1 CPD ¶ 304.

The protest is denied.

A handwritten signature in cursive script, appearing to read "James F. Hinchman".

James F. Hinchman
General Counsel