

L. Glass



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Caltech Service Corporation

File: B-234424

Date: May 1, 1989

DIGEST

Since the Small Business Administration determines whether a firm is small and disadvantaged for purposes of eligibility for Department of Defense small disadvantaged business (SDB) set-asides, the General Accounting Office will not consider a protest challenging awardee's SDB eligibility status for award of a contract.

DECISION

Caltech Service Corporation protests the award of a contract to Moore Federal Services, Inc., under request for proposals (RFP) No. F64605-88-R-0043, a total small disadvantaged business (SDB) set-aside, issued by the Department of the Air Force to procure transient aircraft services at Hickam AFB, Hawaii.^{1/} In general, Caltech challenges Moore's status as an SDB and contends that Moore's proposed wage rates are not in compliance with the Service Contract Act of 1965, 41 U.S.C. §§ 351-358 (1982).^{2/}

We dismiss the protest.

^{1/} These services include management control, coordination and preparation for aircraft arrivals and departures, and minor maintenance of aircraft.

^{2/} Although Caltech initially advanced several other objections concerning the award to Moore, the protester, in its comments after receipt of the agency report, did not address these other issues. We therefore deem these other issues to have been abandoned and will not address them in this decision. See The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218.

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A total SDB set-aside of the type at issue here is provided for in regulations issued by the Department of Defense (DOD) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3973, and section 806 of Pub. L. No. 100-180, 101 Stat. 1126 (the DOD Authorization Act for Fiscal Years 1988 and 1989), which establish for DOD a goal of 5 percent for contracting with certain minority businesses and institutions, including small business concerns owned and controlled by socially and economically disadvantaged individuals. See DOD Federal Acquisition Regulation Supplement (DFARS), Part 219 (1988 ed.); Arbor Landscaping Inc., B-231515, June 13, 1988, 88-1 CPD ¶ 564.

Section 1207(a)(1) of Pub. L. No. 99-661 defines the firms to which the statute applies by reference to section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1982), which in turn defines the term "small business concern owned and operated by socially and economically disadvantaged individuals," and to regulations issued under section 8(d). The Small Business Administration (SBA) has issued final regulations which provide for SBA to determine SDB status. See 54 Fed. Reg. 10271 (1989). Further, DOD's regulations require filing of an SDB eligibility protest with the contracting officer who then must forward the protest to the SBA for a conclusive determination. DFARS § 219.302.

The regulations clearly envision final and conclusive determination by SBA of SDB status. Accordingly, we have taken the position that we generally will not review a protest challenging a firm's SDB eligibility. See C & J Service, B-230579.3, Sept. 23, 1988, 88-2 CPD ¶ 280. Therefore, we will not consider Caltech's first issue.

Caltech also alleges that Moore's price is too low to allow for compliance with certain wage determinations of the Department of Labor (DOL) under the Service Contract Act.

The submission of a below-cost offer, however, is not a valid basis upon which to challenge an award. See Virginia Mfg. Co., B-202393, July 9, 1981, 81-2 CPD ¶ 25. Rather, the question is whether the offeror can perform the contract at its price, a question which relates to an offeror's responsibility. See Condor Industries, Inc., B-203545, Oct. 21, 1981, 81-2 CPD ¶ 326.

Here, the record shows that on December 15, 1988, the SBA issued a certificate of competency (COC) which certified that Moore was responsible to perform the proposed contract contemplated by the RFP. The SBA's issuance of the COC requires the Air Force to let the contract to Moore without

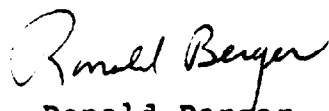
requiring Moore to meet any other requirement of responsibility. See A-1 Pure Ice Co., B-215215, Sept. 25, 1984, 84-2 CPD ¶ 357.

In addition, should Moore violate the Service Contract Act during the performance of the contract, that violation is a matter for the DOL, not this Office, since the DOL is responsible for administration and enforcement of the Act. NonPublic Educational Services, Inc., B-204008, July 30, 1981, 81-2 CPD ¶ 69.

Finally, Caltech apparently also alleges that Moore proposed inappropriate job classifications in its technical proposal that were inadequate to perform the tasks required by the RFP's performance work statement. However, the record shows that Caltech is the third low, technically acceptable offeror under the RFP which provided for award to the low, technically acceptable offeror. Under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1988), a party must be "interested" in order to have its protest considered by our Office. Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester to be too remote to establish interest within the meaning of our Bid Protest Regulations. Airtrans, Inc., B-231047, May 18, 1988, 88-1 CPD ¶ 473. A party will not be deemed interested where it would not be in line for the protested award even if its protest were sustained. Id.

As Caltech has not contested the acceptability of the second ranked offeror, we have no reason to believe that Caltech would be in line for award if its protest were sustained. Accordingly, Caltech is not an interested party entitled to protest.

We dismiss the protest.



Ronald Berger
Associate General Counsel