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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Far West Meats

File: B-234642.2; B-234690

Date: June 9, 1989

DIGEST

1. Protest alleging de facto debarment because agency repeatedly failed to refer protester's nonresponsibility to the Small Business Administration (SBA) for a certificate of competency is dismissed as academic where, subsequent to the filing of the protest, agency takes corrective measures including referral of nonresponsibility determinations to SBA which cure earlier procedural errors.
2. Protester's allegation that agency, to avoid awards to firm, acted arbitrarily in proposing firm for debarment is denied where agency offers sufficient evidence to show that its actions were reasonable.

DECISION

Far West Meats protests the award of three contracts under request for proposals (RFP) No. DLA137-89-R-0801 (0801) issued by the Defense Logistics Agency (DLA) for the acquisition of various meat products. Far West also requests reconsideration of our previous decision, Far West Meats, B-234642, Mar. 31, 1989, 89-1 CPD ¶ 350, in which we dismissed Far West's protest against the award of two contracts under RFP No. DLA13H-89-R-2501 (2501), also issued by DLA for the acquisition of various meat products. We initially dismissed Far West's protest against the awards under RFP No. 2501 because DLA advised that Far West had been proposed for debarment and was ineligible for award. Far West argues in both cases that DLA has improperly instituted a de facto debarment against the firm and that DLA has arbitrarily instituted formal debarment proceedings against it.

We dismiss in part and deny in part the protests.

RFP No. 0801 contemplated the award of one or more contracts for some 42 different lots of meat products. As to that

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solicitation, Far West's protest concerns only the awards made for 6,000 pounds of diced pork, 1,000 pounds of beef knockwurst and 18,000 pounds of frankfurters. Far West timely submitted the apparent low offers for all three items.

As to RFP No. 2501, Far West's protest concerns the award of contracts for 15,000 pounds of pork sausage patties and 10,000 pounds of frankfurters. Far West submitted the apparent low offer for the pork patties.1/

DLA apparently found Far West nonresponsible under RFP No. 0801, and, in late February, awarded three separate contracts to the second-low offerors for those items. Although Far West was a small business, the Far West nonresponsibility determinations were not referred to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). However, on March 1 and 3, DLA terminated for the convenience of the government the three contracts which had been awarded. Also on March 1, DLA sent a letter to counsel for Far West which notified the firm that a recommendation for debarment had been forwarded by the regional contracting activity to DLA headquarters.

The agency subsequently conducted a preaward survey on Far West and formally found the firm nonresponsible for the contracts at issue under RFP No. 0801. DLA forwarded the nonresponsibility determination to the SBA on March 16 for possible issuance of a COC. Thereafter, on March 24, DLA issued a formal notice of proposed debarment to Far West in accordance with Federal Acquisition Regulation (FAR) § 9.406-3(c) (FAC 84-43). This debarment notice basically reports that, based on United States Department of Agriculture (USDA) test reports, Far West, on numerous occasions, supplied meat to the government which did not conform to specifications and repeatedly was late in delivering products under its contracts. By letter dated April 14, the SBA notified Far West that it was ineligible for a COC because the firm appeared on the suspended and debarred bidder's list dated April 7.

1/ Although Far West's original protest alleged that it was the apparent low offeror on the lot for frankfurters, the agency has informed our Office that Far West made a mathematical error in its calculations and was not therefore the apparent low offeror. Far West does not dispute this. We therefore dismiss this aspect of Far West's protest on grounds that the firm is not an interested party to maintain the protest. 4 C.F.R. § 21.0(a) (1988).

Under RFP No. 2501, the agency awarded a contract for the one item at issue to the second-low offeror on February 16. Subsequent to Far West's protest, DLA, on March 13, terminated for the convenience of the government the contract award and canceled the requirement.

Far West first asserts that, after the SBA's refusal to issue a COC in connection with a prior solicitation for meats, DLA refused to consider Far West's offers on the two solicitations at issue in these protests. According to Far West, this continuing course of action, all of which occurred before Far West was proposed for debarment, constituted an improper de facto debarment.

DLA has admitted that it made an error in rejecting Far West as nonresponsible without referring the nonresponsibility determinations to the SBA. However, it reports that it took corrective action which renders Far West's protest academic. We agree. First, as to RFP No. 2501, DLA has terminated the contract and canceled that requirement (an action which has not been challenged by Far West). This action renders Far West's protest academic regarding RFP No. 2501. See Aquasis Services, Inc., B-232053, Sept. 22, 1988, 88-2 CPD ¶ 278. Second, as to DLA's actions with regard to RFP No. 0801, DLA's termination of these contracts as well as its subsequent referrals of the nonresponsibility determinations to SBA renders academic the protester's allegation of de facto debarment. Consequently, we dismiss as academic Far West's allegation of de facto debarment in connection with RFP Nos. 2501 and 0801. See Spectrum Enterprises, B-221202, Dec. 31, 1985, 86-1 CPD ¶ 5 (small business firm not de facto debarred despite repeated nonresponsibility determinations where each determination is referred to SBA for COC review).

Turning therefore to Far West's allegation of arbitrary and capricious action in connection with DLA's formal debarment action, the protester argues that the various specific grounds for debarment cited by DLA (tendering of mislabeled and/or adulterated meat products, tendering of meat products containing excess water and fat, tendering of other nonconforming meat products, substitution of pork for beef, and late deliveries) are either not supported by the evidence or merely represent deviations which are the industry norm.

For example, as to the delivery of mislabeled and/or adulterated meat products and the alleged substitution of pork for beef, DLA's allegations concern the delivery by Far West of frankfurters which allegedly contained heart muscle, salivary glands or pork (in cases where all beef was required). Far West argues that the evidence in support of

this allegation is inconclusive because, in products which are significantly processed, it is virtually impossible to identify distinguishable tissues such as heart muscle or salivary glands. Far West also argues that less than half of the laboratory reports on this issue show the presence of these substances and that this tends to cast doubt upon the reliability of such reports since the tests were conducted on a single lot. Further, Far West asserts that the presence of beef heart tissue was an isolated incident which occurred because a beef heart had been caught on a conveyor mechanism and that proper equipment cleaning procedures have eliminated the problem. Far West argues that, as to the alleged substitution of pork for beef, the error resulted from improper species control procedures which have subsequently been corrected by the firm under the specific guidance of the USDA.

With regard to the delivery of meat products containing water and fat in excess of USDA maximum percentages, Far West argues that the product was manufactured at a time when, unknown to the firm, it had a broken scale and calibrating device. According to Far West, the equipment has been repaired and, thus, the problem was an isolated incident and insufficient to support DLA's debarment efforts.

Further, concerning the supplying of armbone chuck roasts which contained excess fat, bones, cartilage, backstrap, blood clots and foreign substances including hair, Far West reports that these violations did not cause DLA to reject the goods and, in any event, did not present a health hazard.

As to the late deliveries, Far West, while admitting to late deliveries, argues that its record in this regard is no more egregious than any other firm engaged in contracting with DLA for meat products.

In sum, Far West argues that the evidence presented by DLA in support of its proposed debarment is either inconclusive, or the result of isolated incidents which were corrected by the firm. Additionally, Far West argues that DLA is legally precluded from proposing it for debarment unless it submits many of its competitors for debarment as well.

In response, DLA argues simply that the evidence upon which it relies for the proposed debarment is sufficient. In this connection, DLA has submitted letters from USDA officials attesting to the accuracy and methodology of the testing relied upon by the agency. DLA has also submitted a statistical analysis of Far West and its competitors which it

believes illustrates that, from a comparative point of view, Far West has been cited for substantially greater nonconformance than any of its competitors. DLA also argues that whether or not a health threat is posed by these instances of nonconformance is not relevant to the question of whether tendered products meet the requirements called for in a given contract.

Our Office will consider protests of allegedly improper suspensions and debarment occurring during the pendency of an award decision to ensure that the contracting agency is not acting arbitrarily in order to avoid making award to a firm which is otherwise entitled to award and also to ensure that minimal due process standards have been met. See N.W. Ayer, Inc., B-225632, Jan. 16, 1987, 87-1 CPD ¶ 68; S.A.F.E. Export Corp., 65 Comp. Gen. 530 (1986), 86-1 CPD ¶ 413, aff'd on reconsideration, B-222308.2 et al., July 8, 1986, 86-2 CPD ¶ 44; Spectrum Enterprises, B-221202, supra. We point out, however, that the scope of our review is restricted to a consideration of whether the agency has put forth sufficient evidence to show the reasonableness of its decision not to make an award to the firm and whether it has followed proper procedure in suspending the firm. Simply stated, our Office is not the appropriate forum to consider the weight or sufficiency of evidence for purposes of the ultimate debarment decision or to consider whether an agency has acted properly in proposing one firm but not another firm for debarment.

Applying this standard, we conclude that DLA has made a showing sufficient to support its decision not to award to Far West and has also followed proper procedure in proposing the protester for debarment. In particular, the record contains numerous reports of nonconformance. These reports show that Far West has supplied a substantial number of deliveries which did not conform in one way or another to contract specifications. Also, the fact that the government made a business decision not to reject certain nonconforming deliveries does not affect the nonconforming nature of those deliveries vis-a-vis the contract specifications. Far West does not rebut the essential fact that it has at times supplied nonconforming meats, but rather submits that these were "isolated occurrences" caused by problems which were corrected. Far West further admits to late deliveries, but states its record is better than other meat supply firms. In our view, the number of instances of nonconformance, the types of nonconformance, late deliveries, and the fact that Far West does not dispute that these problems occurred, is sufficient to support the proposed debarment action. Far West's contention that other firms may have similarly poor

performance does not detract from the sufficiency of the record for the proposed debarment of Far West.

As to procedure, while DLA did previously err in failing to refer several nonresponsibility determinations to the SBA, its subsequent corrective action and the proper service of adequate notice to Far West of its proposed debarment satisfies us that the firm has been afforded adequate due process.

Under these circumstances, we cannot conclude that DLA acted unreasonably in not awarding these contracts to Far West.

The protest is dismissed in part and denied in part.

[Signature] James F. Hinchman

General Counsel