Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Donald Clark Associates, Inc.

File: B-238857; B-238857.2

Date: August 2, 1990

Donald M. Clark, for the protester.
James F. Trickett and Mike Colvin, Esq., Department of Health & Human Services, for the agency.
Anne B. Perry, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest challenging the award under a small business set-aside on the ground that the awardee is a nonprofit organization is denied where the awardee qualifies as an organization for the handicapped and the regulations provide that such organizations may compete in acquisitions set aside for small business concerns.

2. Protest that agency's failure to conduct an impact study on small disadvantaged firms before awarding contract to a nonprofit organization is improper is denied where there is no such requirement.

3. Protest challenging awardee's ability and intention to comply with the requirement that 75 percent of the work be performed by handicapped individuals is dismissed as it challenges issues of responsibility and contract administration, respectively, which we do not generally review.

4. Agency cost realism analysis had a reasonable basis where the agency reviewed the awardee's proposed costs in light of: (1) its prior performance costs as the incumbent; (2) a comparison between the awardee's costs and those of the protester; and (3) the Department of Labor certificate of exemption from the Service Contract Act for handicapped organizations.

DECISION

Donald Clark Associates, Inc. (DCA) protests the award of a contract to Jenkins Memorial Center under request for

proposals (RFP) No. 222-90-2012(P), a 100 percent small business set-aside, issued by the National Center for Toxicological Research (NCTR) of the Department of Health & Human Services (HHS), for non-technical laboratory support and ancillary administrative services. DCA primarily challenges the award on the basis that Jenkins is not qualified to compete in this procurement and that its estimated cost is unrealistically low and violates the applicable Department of Labor (DOL) wage determinations. We deny the protest in part and dismiss it in part.

The solicitation, issued October 16, 1989, called for a cost-plus-fixed fee, level-of-effort contract for a base year and 2 option years. Four proposals were received by the revised closing date of December 16. As a result of the initial technical evaluation, three offerors, including DCA and Jenkins, who certified itself as a nonprofit, handicapped organization, were included in the competitive range. Following a round of discussions, best and final offers (BAFOs) were received on February 23, 1990. Award was made to Jenkins on February 28 as the offeror with the higher-ranked technical proposal and lower estimated cost.

Initially, on March 7, DCA protested the award to Jenkins on the grounds that: (1) Jenkins was a nonprofit organization, and therefore, ineligible to receive an award under a small business set-aside; and (2) DCA doubted whether Jenkins qualified as a handicapped organization. As a consequence of information DCA received in response to its Freedom of Information request at HHS, DCA also filed a second protest, in which it essentially challenges the reasonableness of the awardee's estimated costs.

DCA's challenge to the award of the contract to a nonprofit organization under this solicitation is two-fold. DCA argues that: (1) to qualify as a small business concern by definition, a firm must be organized for profit; and (2) "[t]he award was made by [HHS] without requesting an impact study on the adverse factors of a small minority business."

With respect to both of these allegations, however, the regulations provide the opposite of what the protester urges us to hold. Section 133 of Public Law 100-590 (102 Stat. 3005) authorizes public (also known as nonprofit) and private organizations for the handicapped to participate for fiscal years 1989 through 1993 in acquisitions set aside for small business concerns. This statute was implemented in the Federal Acquisition Regulation (FAR) § 19.501(k) (FAC 84-48) and the full text of its associated clause was included in the solicitation. FAR § 52.219.15 (FAC 84-56). In light of this statutory and regulatory scheme we have no

reason to object to the award to Jenkins on this basis. Moreover, since the solicitation expressly permitted award to nonprofit organizations, if DCA thought such an award would be improper it should have protested this issue prior to receipt of initial proposals, and not after an award consistent with the solicitation provisions was made. This basis for protest is therefore untimely. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1990).

The protester's next argument, that prior to awarding a contract to a nonprofit organization, the agency is required to conduct an impact study on small disadvantaged businesses, is also based on a misinterpretation of regulatory requirements. The regulation to which DCA refers requires an impact study on small business concerns before the Small Business Administration (SBA) accepts a procurement into the 8(a) program. 13 C.F.R. § 124.309(c) (1990). Since this procurement was a 100 percent small business set-aside, and was not involved with the 8(a) program, there is no requirement that the agency, or the SBA, conduct an impact study on small disadvantaged business concerns.1/

DCA next alleges that, due to the nature of the work involved, Jenkins cannot perform at least 75 percent of the work under this contract using handicapped people, as is required by the terms of FAR § 19.501(k). Whether Jenkins is able to comply with the requirements of its contract by using a work force consisting of 75 percent handicapped individuals is a question of Jenkins' responsibility. Before awarding the contract, the contracting officer must make an affirmative determination that Jenkins would fulfill its obligation in this regard.

Our Office will not review an affirmative determination of responsibility, which is largely a business judgment, unless

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1/ DCA did file an appeal with the SBA dated March 15, 1990, pursuant to 13 C.F.R. § 121.2005, which provides for an appeal to the SBA from any for-profit small business concern that has experienced or is likely to experience severe economic injury as the result of a proposed award of a small business set-aside to an organization for the handicapped. The SBA, in a letter received by DCA on April 2, denied DCA's appeal on the ground that DCA would not have received the award regardless of the handicapped organization's participation because, according to HHS, adequate funds were not available to make award to DCA at its BAFO price. The SBA did state, nevertheless, that the information submitted by DCA in its appeal was insufficient to demonstrate the requisite economic injury.

the protester shows possible fraud or bad faith on the part of the procurement officials, or that the solicitation contains definitive responsibility criteria that allegedly have not been applied. 4 C.F.R. § 21.3(m)(5). Neither exception applies here. Moreover, to the extent that DCA alleges that the awardee will fail to use the appropriate amount of handicapped personnel to perform the work, its allegation concerns a matter of contract administration which is not appropriate for our consideration. 4 C.F.R. § 21.3(m)(1).

In a similar vein, DCA alleges that Jenkins proposed to use trainees as opposed to fully certified individuals, and that this violates the specifications, and is prejudicial to DCA because if it had been permitted to use trainees its price would have been lower as well.

Our review of the solicitation reveals that it did not preclude offerors from using trainees. Rather, the solicitation requires only that personnel possess the fitness to perform the specific contract tasks. Although DCA alleges that it believed that it could not propose trainees, an incorrect assumption, it does not dispute that they could fulfill the contract requirements, nor does DCA contend that trainees are unfit to perform the tasks associated with the contract. Accordingly, we find that the awardee's use of trainees does not violate the specification requirements and, therefore, the agency's action was appropriate.

DCA also challenges the award to Jenkins on the basis of cost, noting that the contract is of the level-of-effort, cost-plus-fixed-fee type, and alleging that Jenkins' costs are unrealistically low.2/ Specifically, the protester argues that: (1) DCA's offer has to include profit whereas Jenkins, as an nonprofit organization, waived the fixed fee; and (2) Jenkins' proposed wage rates do not comply with the DOL wage determination.

Since this is a cost-reimbursement contract, the agency evaluated Jenkins' proposed cost to determine whether it was realistic. The purpose of a cost realism analysis by an agency under a level-of-effort, cost-type contract is to determine the extent to which the offeror's proposed labor

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2/ DCA also alleges that the agency failed to inform offerors of the number of level-of-effort hours that would be required. We dismiss this allegation as untimely since it was apparent on the face of the solicitation but not raised until after award. 4 C.F.R. § 21.2(a)(1).

rates are realistic and reasonable. Since an evaluation of this nature necessarily involves the exercise of informed judgment, the agency clearly is in the best position to make this cost realism determination; consequently, we will review such a determination only to ascertain whether it is reasonable. JWK Int'l Corp., B-237527, Feb. 21, 1990, 90-1 CPD ¶ 198.

We find that the agency reasonably found Jenkins' costs to be realistic. The agency performed a cost analysis on each offeror in the competitive range, and examined each element of cost for reasonableness. Not only did HHS evaluate each offeror's costs, but the agency also analyzed DCA's and Jenkins' cost proposals from the standpoint of the handicapped worker exemption as compared to the costs if no such exemption were granted to Jenkins.3/ Moreover, the agency considered Jenkins' proposed costs in light of the costs it is now incurring as the incumbent on the preceding contract. Despite DCA's allegations to the contrary, Jenkins' cost proposal did include labor fringe benefits, which the agency found reasonable. Moreover, although DCA contends that it is improper for HHS to permit Jenkins to waive a fixed fee, or profit, there is no legal basis upon which to object to this business judgment. See Mar, Inc., B-215798, Jan. 30, 1985, 85-1 CPD ¶ 121.

In its comments to the agency report, DCA discussed the requisite process for obtaining a handicap exemption from the wage rates of the Service Contract Act (SCA) from the DOL. Although DCA does not so allege, we presume from this discussion that it challenges whether Jenkins has obtained the necessary certificate. Our review of the record shows that Jenkins did submit the required certificate in its proposal, which for our purposes is sufficient. Our Office neither reviews the accuracy, nor the propriety of DOL wage determinations, nor do we review whether an offeror will violate these wage determinations during contract performance, since these are issues to be resolved by the DOL, the agency responsible for enforcement of the SCA. Scientific Radio Sys., Inc., B-228033; B-228033.2, Nov. 13, 1987, 87-2 CPD ¶ 483.

For the first time, in a letter received on April 23--its comments on the agency's supplemental report--DCA challenged the technical evaluation of its proposal and BAFO. We

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3/ The handicap exemption is a DOL certificate which permits contractors employing the handicapped to pay them at a rate which is 85 percent of the DOL wage determination for the job.

dismiss these allegations as untimely because they were not filed within 10 days of April 3, which is the date when DCA was advised of its technical weaknesses by the contracting officer. See 4 C.F.R. § 21.2(a)(2). Our Regulations are designed to give protesters and agencies an opportunity to present their cases with the least disruption possible to the orderly and expeditious process of government procurement; hence, we do not permit a piecemeal presentation of arguments, evidence, or analysis. Curl's Bldg. Maintenance, Inc.--Recon., B-237012.2, Mar. 26, 1990, 90-1 CPD ¶ 329. Here, the protester has submitted many letters with new allegations at different stages of the protest process, without explaining why it was not possible to assert these issues initially.

DCA's final allegation is in response to a comment made by the agency that if it were not for Jenkins' offer the agency would have had to cancel and resolicit under a reduced scope of work because the costs proposed by all of the other offerors in their BAFOs exceeded the funding the agency possessed for this contract. DCA argues that if its initial cost proposal exceeded the funds available to the agency for this contract it was improper for the agency to include DCA's proposal in the competitive range, since the firm had no reasonable chance for award. We note initially, that if DCA is correct, and it should have been eliminated from the competitive range, DCA would not be an interested party to challenge the propriety of the award to Jenkins. Nonetheless, we find the contracting officer's decision to include DCA in the competitive range is consistent with FAR § 15.609(a) (FAC 84-16) which requires the inclusion in the competitive range of all proposals that have a reasonable chance for award, and provides that "when there is doubt as to whether a proposal is in the competitive range, the proposal should be included." Monarch Enters., Inc., B-233303 et al., Mar. 2, 1989, 89-1 CPD ¶ 222. It is not uncommon for offerors to reduce their estimated costs in their BAFOs, sometimes substantially, so it would not be unreasonable for the agency to anticipate a reduction in DCA's estimated costs. In fact, DCA did reduce its costs in its BAFO by approximately $86,000. We are unable to perceive any prejudice to DCA as a result of its being included in the competitive range.

The protest is denied in part and dismissed in part.

Robert P. Murphy

James F. Hinchman
General Counsel