

Arsenoff



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Ebon Research Systems

File: B-240391.2

Date: November 6, 1990

Daniel J. Piliero II, Esq., Piliero, Tobin & Mazza, for the protester.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is dismissed for failure to state a valid basis of protest where protester seeks General Accounting Office (GAO) to direct a sole-source award, change the Standard Industrial Classification Code in a solicitation or direct that a procurement be changed from a Section 8(a) set-aside to an unrestricted acquisition, since these are forms of relief that GAO does not grant.

DECISION

Ebon Research Systems protests actions of the Drug Enforcement Agency (DEA) taken with respect to an earlier protest filed with this Office, B-240391, by Diversified Technical Services, Inc., challenging provisions of request for proposals (RFP) No. DEA-90-R-1685, for computer related services which was reserved for socially and economically disadvantaged small business firms pursuant to Section 8(a) of the Small Business Act. 15 U.S.C. § 637(a) (1988).

We dismiss the protest.

Diversified protested to this Office on July 11, 1990. The protester complained that the solicitation lacked a proper Standard Industrial Classification (SIC) Code^{1/} as well as the proper area wage determination. The protester further complained that the evaluation criteria were unclear and not related to the agency's minimum needs. On July 19, Ebon received notification of that protest, but DEA's letter was

^{1/} The SIC Code determines what size firms will qualify as a small business for a particular requirement.

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not accompanied by a copy of the protest and did not inform the firm that it should submit comments directly to us in the matter; rather, it instructed Ebon to contact the agency for information. See Federal Acquisition Regulation § 33.104(a)(3) and Bid Protest Regulations, 4 C.F.R. § 21.3(a) (1990). On July 20, Ebon wrote to DEA requesting a copy of the protest and Ebon reports that DEA never responded to its request; Ebon did not contact this Office at that time. On July 25, Diversified withdrew its protest as the result of a settlement agreement in which the agency agreed to change the applicable SIC Code from 7379 to 7374, to attach the appropriate wage determination, and to revise the evaluation criteria. Ebon is not eligible to compete under SIC Code 7374.

The crux of Ebon's protest is that the allegedly inadequate notice from DEA effectively precluded it from intervening in Diversified's July 11 protest to assert that we do not have jurisdiction over SIC Code matters, since they are within the exclusive jurisdiction of the Small Business Administration (SBA). See 15 U.S.C. § 637(b)(6); Tri-Way Sec. & Escort Serv., Inc.--Recon., B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380. In Ebon's view, the opportunity to intervene would have directly led to a summary dismissal under 4 C.F.R. § 21.3(m)(2) and, thus, the settlement agreement which it believes will improperly lead to its exclusion from the procurement would have been precluded. Ebon further suggests that DEA's allegedly inadequate notice, its failure to request a dismissal, and its precipitous agreement to settle Diversified's protest by changing the SIC Code, all represent the agency's acquiescence in what the protester believes to be a bad faith scheme on Diversified's part to eliminate it from competition--either by getting the SIC Code changed or by delaying the procurement past October when Ebon is no longer eligible for the 8(a) program.

We do not view the agency's failure to specifically advise Ebon that it could directly comment to this Office on Diversified's protest or its failure to provide a copy of that protest to Ebon as a valid basis of protest. Although the notice should have advised Ebon to submit comments to our Office, it did promptly alert Ebon to the existence of a protest before this Office. Ebon did not contact this Office to obtain a copy of Diversified's protest or to inquire about the status of the case or to notify us of its interests in the matter. Our Bid Protest Regulations are published in the Code of Federal Regulations and Ebon should have reviewed them and found that it had the right to participate directly in the protest. 4 C.F.R. §§ 21.0(b), 21.3(a). Where a firm is notified of the existence of a protest we simply do not

believe that it is reasonable for that firm to rely on another party, in this case the agency, to protect its interests. See J.W. Cook, Inc.--Recon., 67 Comp. Gen. 366 (1988), 88-1 CPD ¶ 319.

More important, Ebon's presumption that we would have summarily dismissed Diversified's protest had it intervened is simply not correct. In characterizing Diversified's protest as "frivolous" because, in Ebon's view, it merely contained allegations, such as SIC Code matters over which we have no jurisdiction, Ebon has failed to recognize that the original protest also contained a separate allegation challenging RFP evaluation criteria--an issue within our jurisdiction and the reason we would not have dismissed the protest without reviewing an agency report.^{2/}

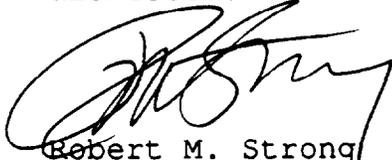
We also fail to see any practical or legal distinction between a summary dismissal (which Ebon states it would have sought) and a withdrawal, and the significance of either to whether DEA could, if it decided to, change the SIC Code. While, according to Ebon, the RFP has yet to be amended, we are unaware of any statutory or regulatory prohibition against DEA changing the SIC Code through an amendment. In fact, 13 C.F.R. § 121.1102(c) (1990) invests the contracting officer with the authority to determine the appropriate SIC Code for 8(a) procurements subject only to an appropriate appeal to SBA. See 13 C.F.R. § 124.308(b). In any event, as Ebon recognizes, this Office does not determine whether a given SIC Code is correct or not, no matter what DEA may decide. Tri-Way Sec. & Escort Serv., Inc.--Recon., B-238115.2, supra.

As for Ebon's allegation that DEA may have acted in bad faith to preclude it from competition by "intentionally or unintentionally" acquiescing in a purported anticompetitive scheme by Diversified, we note that, in order for this Office to sustain a protest on such a basis, the record must contain convincing evidence that government officials had a specific and malicious intent to injure the protester. Tri-Way Sec. & Escort Serv., Inc.--Recon., B-238115.2, supra. Our review of the information provided by Ebon in this regard reveals that rather than containing convincing evidence of bad faith, it consists largely of unsupported allegations and inferences which do not provide a basis for us to conclude that DEA has acted in bad faith.

^{2/} As the record reflects, the settlement agreement which prompted Diversified to withdraw its protest also contained a provision relating to the revision of the RFP evaluation criteria.

Finally, Ebon has requested three alternative forms of relief which we do not grant. First, the protester requests a directed sole-source procurement. In view of the objective of our bid protest function to ensure full and open competition, as a general matter our Office does not review protests seeking sole-source procurements. Moog, Inc., B-237749, Mar. 19, 1990, 90-1 CPD ¶ 306. Second, the protester requests us to direct a new set-aside solicitation with SIC Code 7379. As discussed above, such a determination lies solely within the authority of the contracting agency and SBA. Tri-Way Sec. & Escort Serv., Inc.--Recon., B-238115.2, supra. Third, Ebon requests that we direct DEA to issue a new unrestricted solicitation. Again, whether a procurement is to be reserved under the 8(a) program is not reviewable by this Office under the circumstances of this case. See Greenway Enters., Inc., B-238943.2, May 4, 1990, 90-1 CPD ¶ 454.

In light of the foregoing, we find that Ebon has failed to state a valid basis for protest and the protest is, therefore, dismissed. 4 C.F.R. § 21.3(m).



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