



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: GTA Containers, Inc.

File: B-240422

Date: November 14, 1990

Yatish J. Joshi for the protester.
George N. Brezna, Esq., United States Marine Corps, for the agency.
Sabina K. Cooper, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester is not an interested party eligible to challenge agency's failure to include evaluation preference clauses favoring small disadvantaged businesses (SDB) in a partial small business set-aside where it would not be in line for award even if the SDB evaluation preferences were applied and its protest were sustained.

DECISION

GTA Containers, Inc. protests the Marine Corps's failure to include small disadvantaged business (SDB) evaluation preference clauses in request for proposals (RFP) No. M67004-90-R-0055, a partial small business set-aside for collapsible fuel tanks and ground cloths.

We dismiss the protest.

GTA argues that the solicitation should be amended to include two clauses--the Evaluation Preference for SDB Concerns, Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 252.219-7007, and the Partial Small Business Set-Aside with Preferential Consideration for SDB Concerns, DFARS § 252.219-7010--in order to implement Federal Acquisition Regulation (FAR) § 52.219-8, which states that SDB concerns be given the maximum practicable opportunity to participate in performing contracts issued by federal agencies.

The RFP, issued April 24, 1990, contemplates multiple awards of fixed-price contracts to the low offerors under the small business set-aside and non-set-aside portions of the requirement. The fuel tanks are to be acquired under a partial small

050010/147453

business set-aside and the ground cloths are to be procured under a total small business set-aside. The RFP did not contain DFARS § 252.219-7007, Notice of Evaluation Preference for SDB Concerns, cited by the protester. That clause provides for a 10 percent evaluation preference for SDBs that do not elect to waive the preference, after all other evaluation factors are applied. The Marine Corps also did not include in the RFP the provision found at DFARS § 252.219-7010, Partial Small Business Set-Aside with Preferential Consideration for SDB Concerns. That clause provides that offers on the non-set-aside portion of the RFP are to be evaluated first for award. The set-aside portion would then be awarded to one or more small business concerns with a preference, in declining order, for SDBs that are also labor surplus area (LSA) concerns; small business concerns that are LSAs; other SDBs; and other small businesses. Award to SDBs on the set-aside portion is to be at the lower of either the price offered by the concern on the non-set-aside portion or a price that does not exceed the award price on the non-set-aside portion by more than 10 percent. The Marine Corps based its decision not to include the SDB preference clauses on the existence of a limited industrial base and the prior purchase history of the items.

The Marine Corps received a number of offers by the July 29 closing date. GTA protested the exclusion of the clauses in a June 20 telefax to the agency. The Marine Corps asserts that it denied GTA's protest by letter of June 27, telefaxed to GTA by the Marine Corps on that day. GTA filed another telefaxed protest to the agency on June 28. That protest was denied by telefaxed letter of June 29; however, GTA asserts that it did not receive the June 29 letter from the Marine Corps denying its protest until July 5. GTA then filed a protest in our Office on July 13. The Marine Corps has not awarded the contract pending our decision on the protest.

The Marine Corps argues that GTA is not an interested party to protest the exclusion of the clauses, and that GTA's protest is untimely. Based on our review of the record, we find that GTA is not an interested party to object to the exclusion of the clauses from the RFP.

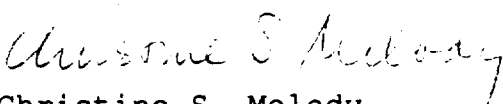
Our Bid Protest Regulations define an interested party for purposes of filing a protest as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract. 4 C.F.R. § 21.0(a) (1990). Where there are intermediate parties that have a greater interest than the protester, we generally consider the protester's interest to be too remote to qualify as an

interested party. Brunswick Corp. and Brownell & Co. Inc., B-225784.2; B-225784.3, July 22, 1987, 87-2 CPD ¶ 74. Specifically, a party will not be deemed interested where it would not be in line for the protested award even if its protest were sustained. Seals Servs., Inc., B-235523, June 20, 1989, 89-1 CPD ¶ 581.

Here, the abstract of offers shows that GTA would not be in line for award even if the evaluation preference clauses favoring SDBs had been included in the RFP. First, with respect to DFARS § 252.219-7007, the Notice of Evaluation Preference for SDB Concerns clause, even if the agency had applied the 10 percent evaluation preference, the record demonstrates that GTA's offer^{1/} would be among the highest priced offers for all items. Second, with respect to DFARS § 252.219-7010, the Partial Small Business Set-Aside with Preferential Consideration for SDB Concerns clause, even if the Marine Corps had evaluated offers in accordance with that provision, the record demonstrates that several other offerors that qualify as LSAs and SDBs would be in line for award ahead of GTA, and that GTA's price, which is among the highest offered, exceeds the award price on the non-set-aside portion of the RFP by a great deal more than 10 percent.

Thus, GTA's economic interest has not been affected by the Marine Corps's decision not to include the SDB evaluation preferences since GTA would not be in line for award even if its protest were sustained. Accordingly, GTA is not an interested party to protest this issue and we will not address the timeliness or merits of its protest. Technology Prods. Mfg. Corp., B-238182.3; B-238182.5, Apr. 10, 1990, 90-1 CPD ¶ 381; Training Eng'g Aviation Management Corp., B-235553, May 26, 1989, 89-1 CPD ¶ 516.

The protest is dismissed.


Christine S. Melody
Assistant General Counsel

^{1/} GTA submitted three offers, only one of which was found to meet the terms of the RFP.