



Comptroller General
of the United States

Washington, D.C. 20548

144369

Decision

Matter of: Little Susitna, Inc.

File: B-244228

Date: July 1, 1991

Dominic S. F. Lee for the protester,
David W. Wells, Esq., for I-NET, an interested party,
John R. McCaw, Jr., Esq., Federal Aviation Administration,
Department of Transportation, for the agency.
Stephen J. Gary, Esq., and David Ashen, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

1. General Accounting Office (GAO) will not review a decision by the Small Business Administration (SBA) that a firm satisfies the eligibility requirements for a competitive award under Section 8(a) of the Small Business Act; SBA, not GAO, has conclusive statutory authority to determine such matters for federal procurements under the 8(a) program.
2. Whether a potential contractor can comply with limitation on subcontracting provision in a solicitation issued under Section 8(a) of the Small Business Act is a matter of responsibility not reviewable by the General Accounting Office absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria on the part of contracting officials; whether the contractor in fact complies is a matter of contract administration, also not reviewable under the bid protest function.
3. Allegation that awardee's offer is unrealistically low and represents a buy-in provides no basis for overturning award, since buy-ins are not inherently improper; whether the awardee can perform at the price offered is a matter of responsibility generally not for review by the General Accounting Office.
4. Allegation that employees of a subcontractor of awardee shared office space with contracting agency prior to award, and that awardee may have gained unfair competitive advantage as a result, is dismissed, since the allegation of impropriety amounts to no more than unsupported speculation.

DECISION

Little Susitna, Inc. (LSI) protests the award of a contract to I-NET, Inc. under request for proposals (RFP) No. DTFA11-90-R-00100. The RFP was issued as a competitive small, disadvantaged business set-aside under Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 & Supp. I 1989), by the Federal Aviation Administration (FAA), Department of Transportation, for automation support services. LSI principally asserts that I-NET fails to comply with 8(a) eligibility requirements and thus should have been ineligible for the award.

We dismiss the protest.

The FAA awarded the contract to I-NET on May 23, 1991. On May 25, LSI protested the award to the Small Business Administration (SBA), and 3 days later filed this protest with our Office. LSI generally challenges I-NET's eligibility for the Section 8(a) program and specifically argues that I-NET failed to meet SBA regulations requiring that at least 50 percent of the cost of labor in performing an 8(a) service contract be expended for employees of the 8(a) firm. 13 C.F.R. § 124.314(a)(1) (1991). According to the protester, it is "probable" that I-NET certified falsely that it would perform 54 percent of the services with its own employees. LSI further argues that I-NET's proposed price was substantially lower than the fair market price established by the agency for this procurement and, in reality, represented a "buy-in."

Section 8(a) contracts which meet certain statutory and threshold amount requirements are to be awarded based on competition among eligible 8(a) program participants (*i.e.*, socially and economically disadvantaged small business concerns) if there is a reasonable expectation of receiving offers from two eligible firms and award can be made at a fair market price. Federal Acquisition Regulation (FAR) § 19.805(b); 13 C.F.R. § 124.311. Although we will review competitive 8(a) procurements for compliance with certain applicable procurement regulations, see Morrison Constr. Servs., Inc., B-240789, Dec. 18, 1990, 70 Comp. Gen. ___, 90-2 CPD ¶ 499, our review generally does not extend to matters that are solely within the purview of the SBA. See A-1 Stevens Van Lines, Inc., B-243358.2, May 20, 1991, 91-1 CPD ¶ ___, see also Ktech Corp., Physical Research, Inc., B-241808; B-241808.2, Mar. 1, 1991, 91-1 CPD ¶ 237. Under the applicable regulations, the SBA is responsible for verifying that a Section 8(a) firm is eligible for a particular procurement that has been reserved for the 8(a) program, 13 C.F.R. § 124.311, and is the sole arbiter of such eligibility, which cannot be challenged by a program participant or any other party. 13 C.F.R. § 124.311(g); FAR § 19.805-2(e).

The record here shows that on April 22--a month prior to award--the SBA certified to the FAA that I-NET was eligible for award. That certification was based in part on the SBA's determination of I-NET's size status, and included a review of the percentage of work to be performed by subcontractors; the SBA determined that I-NET would be performing 54 percent of the work. LSI's subsequent protest of I-NET's eligibility was dismissed by the SBA. In view of the SBA's conclusive authority to determine matters of small business size status for federal procurements, we dismiss LSI's protest to the extent it questions SBA's determination of I-NET's compliance with the Section 8(a) eligibility requirements. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1991); see also A-1 Stevens Van Lines, Inc., B-243358.2, supra.


Similarly, to the extent LSI contends that I-NET will fail to comply with applicable limitations on subcontracting, including the clause at FAR § 52.219-14, "Limitations on Subcontracting," which was incorporated into the solicitation, the matter is not for review by our Office. Whether I-NET can comply with the limitations on subcontracting is a matter of responsibility, see Truetechn, Inc.--Recon., B-232407.2, Nov. 16, 1988, 88-2 CPD ¶ 483; Liberty Excavators, Inc., B-212520, Aug. 22, 1983, 83-2 CPD ¶ 224; we will not review an affirmative determination of responsibility absent a showing of possible fraud, bad faith, or misapplication of definitive responsibility criteria on the part of contracting officials. 4 C.F.R. § 21.3(m)(5). Definitive criteria are not in issue, and LSI does not allege fraud or bad faith on the part of agency officials in determining that I-NET is responsible. Thus, this issue is not for our consideration. Furthermore, whether LSI in fact complies with subcontracting limitations when performing the contract is a matter of contract administration also not reviewable under our bid protest function. 4 C.F.R. § 21.3(m)(1); Diversified Computer Consultants, B-230313, B-230313.2, July 5, 1988, 88-2 CPD ¶ 5.

LSI's claim that I-NET's proposed price represents a "buy-in" is not a valid basis for protest. An offeror, for various reasons, in its business judgment, may decide to submit a below-cost offer, and such an offer is not inherently invalid. See Diemaster Tool, Inc.--Recon., B-238877.4, Mar. 20, 1991, 91-1 CPD ¶ 304. Whether an awardee can perform the contract at the price offered is a matter of responsibility which, as discussed above, we will not review absent a showing of possible fraud or bad faith or that definitive responsibility criteria have not been met, exceptions that do not apply here. Id.; 4 C.F.R. § 21.3(m)(5).

Finally, LSI alleges that one of I-NET's subcontractors shared office space and telephones with FAA contracting officials.

LSI claims that this situation created the potential for a significant conflict of interest since the subcontractor may have had access to information concerning the procurement prior to other competitors, including information bearing on the FAA's deliberative process and other information that may have given the subcontractor an unfair competitive advantage. This argument amounts to no more than an assertion that there is a possibility that improprieties in the procurement process may have occurred. In fact, the record contains no evidence that any such improprieties occurred; LSI has submitted no evidence that the subcontractor's office arrangement, which is not improper by itself, resulted in the agency's improperly disclosing procurement information. A mere allegation of possible impropriety, unaccompanied by supporting evidence, amounts to speculation, Delta Ventures, B-238655, June 25, 1990, 90-1 CPD ¶ 588, and as such does not provide a basis for protest. Key Book Serv., Inc., B-226775, Apr. 29, 1987, 87-1 CPD ¶ 454.

The protest is dismissed.


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