



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: J.B. Kies Construction Company, Inc.

File: B-250797; B-250799; B-250801

Date: February 11, 1993

Jamie M. McMillan, Esq., Jaquith & McMillan, for the protester.

John A. Dodds, Esq., Department of the Air Force, for the agency.

Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined that no compelling reason existed to consider the bid of a debarred contractor.

DECISION

J.B. Kies Construction Company, Inc., protests the rejection of its bids under invitation for bids (IFB) Nos. F04684-92-B-0019, F04684-92-B-0027, and F04684-92-B-0032, issued by the Department of the Air Force. The agency rejected Kies's bids because, at the time of the bid openings, Kies appeared on the ineligible bidders list. Kies contends that, due to the underlying factual circumstances, the agency should have found that a compelling reason existed to make an award to Kies notwithstanding Kies's inclusion on the ineligible bidders list.

We deny the protests.

In a February 2, 1987 letter, the Department of Labor recommended to the General Accounting Office (GAO) that Kies be placed on the ineligible bidders list for violations of the Davis-Bacon Act, 40 U.S.C. § 276a et seq. (1988). GAO concurred in the recommendation and advised Kies in a May 12, 1987, letter that it would be included in the list of bidders ineligible for award of federal contracts. That letter notified Kies that it would be debarred "until 3 years have elapsed from the date of publication of such list."

Because of an administrative oversight, the action necessary to cause Kies to appear on the ineligible bidders list was not taken until September 1989. It was not until that month that the 3-year period began, during which Kies actually appeared on the published list, now entitled the Lists of Parties Excluded From Federal Procurement Or Nonprocurement Programs. The listing indicated that debarment would end on September 26, 1992, and Kies appeared in the monthly updates of the list through (and including) the September 1992 issue.

Kies submitted bids for the three IFBs that are the subject of these protests. At bid opening, Kies's bid was the low bid for each IFB. Pursuant to Federal Acquisition Regulation (FAR) § 9.405(d), the contracting officer reviewed the ineligible bidders list after bid opening and found that Kies appeared on the list. FAR § 9.405(d) provides as follows:

"(1) After the opening of bids or receipt of proposals, the contracting officer shall review the List of Parties Excluded from Procurement Programs.

"(2) Bids received from any listed contractor in response to an invitation for bids shall be entered on the abstract of bids, and rejected unless the acquiring agency's head or designee determines in writing that there is a compelling reason to consider the bid."

Accordingly, on September 24, 1992, the contracting officer notified Kies that its bids for the three procurements were being rejected because the company was on the ineligible bidders list. Kies states that this September 24 notice was the first time it learned that it was not to be removed from the list until September 26, 1992.¹ Immediately after Kies

¹The record does not indicate why Kies did not learn earlier that the list, which is published every month and is readily available, consistently specified September 26, 1992 as the date for the end of the company's debarment. We note that an offeror is generally required to certify whether it is presently debarred, and that certification is to reflect the "knowledge and information . . . which is normally possessed by a prudent person in the ordinary course of business dealings." FAR § 52.209-5(d). In its bids, Kies certified, inaccurately, that it was not debarred at the time of its certification. We believe that it is incumbent upon any offeror who has been debarred to consult the list, because there is no other way to know with certainty whether it is still debarred.

learned that its bids were being rejected, the contracting officer was informed of the administrative delay which had led to Kies' remaining on the ineligible bidders list through September 26, 1992. Having been made aware of those circumstances, the contracting officer nonetheless determined that no compelling reason existed to consider Kies' bids.

Kies contends that the result of the government's administrative oversight was effectively to debar Kies for more than 5 years (from February 1987 through September 26, 1992). Because there was no justification for a 5-year debarment, Kies argues that the Air Force should have found that a compelling reason existed to accept Kies's bids, particularly since the debarment was due to end shortly and, in fact, award was not made until after Kies's debarment ended on September 26, 1992.

As provided in FAR § 9.405(d), which implements the mandate of 10 U.S.C. § 2393(a) (1988), a bid submitted by a debarred party must be rejected unless the agency determines that a compelling reason exists to consider the bid. The Department of Defense Federal Acquisition Regulation Supplement (DFARS), at § 209.405, sets forth four examples of such compelling reasons:

"(1) Only a listed contractor [i.e., a party appearing on the ineligible bidders list] can provide the supplies or services;

"(2) Urgency requires contracting with a listed contractor;

"(3) The contractor and a department or agency have an agreement covering the same events which resulted in the listing and the agreement includes the department/agency decision not to debar or suspend the contractor; or

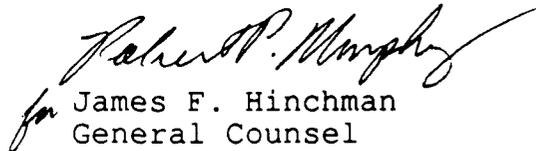
"(4) The national defense requires continued business dealings with the listed contractor."

The determination of whether a compelling reason exists to contract with a debarred party is within the discretion of the agency, and we will review the exercise of that discretion only to ensure that it was reasonable. Cf. Pager One, B-238685, June 28, 1990, 90-1 CPD ¶ 596 (where FAR requires that contracting officer have a compelling reason to cancel an invitation for bids after bid opening, determining whether a compelling reason exists is within the contracting officer's discretion, and GAO's review is limited to determining whether the exercise of that discretion was reasonable).

Here, the statutory and regulatory scheme provides guidance as to the contours defining a reasonable exercise of discretion by indicating that agencies are to make only infrequent exceptions to the general rule that the government is barred from doing business with a debarred contractor. See 10 U.S.C. § 2393 ("Prohibition against doing business with certain offerors or contractors"). In order to consider the bid of a debarred contractor, an agency must make a determination, not that doing so would serve fairness or be in the interests of the government, but that there is a "compelling reason" which warrants making an exception to the general rule. 10 U.S.C. § 2393(a)(2); FAR § 9.405(d). The examples set out in DFARS § 209.405 refer to situations in which the government has no realistic alternative to contracting with the listed contractor, thus confirming that the regulatory intent is to carve out an extremely narrow exception to the general rule.

In light of agencies' discretion in determining whether a compelling reason exists as well as the statutory and regulatory guidance that the bids of debarred parties are rarely to be considered, we find that the Air Force reasonably concluded that no compelling reason existed to consider Kies's bids.

The protests are denied.


for James F. Hinchman
General Counsel