

Becker



Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** RG Software Systems, Inc.

**File:** B-261851

**Date:** July 18, 1995

## DECISION

RG Software Systems, Inc. protests the award of a contract by the Defense Information Systems Agency under solicitation No. DCA100-94-R-0114, a small business set-aside, and the subsequent determination by the Small Business Administration (SBA) that the proposed awardee is a small business and eligible for award.

We dismiss the protest.

We will not consider RG's contention regarding the awardee's size status. The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives SBA, not our Office, the conclusive authority to determine matters of small business size status for federal procurements. See 4 C.F.R. § 21.3(m)(2) (1995); Survive Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. Thus, we will not review a protester's challenge to another company's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of conducting federal procurements.<sup>1</sup> Survive Eng'g Co., *supra*; Antenna Prods. Corp., B-227116.2, Mar. 23, 1988, 88-1 CPD ¶ 297.

<sup>1</sup>To the extent the protester contends that the agency officials acted in bad faith with respect to determining the small business status of the awardee, there is no basis in the record for its contention. The record shows that the challenge to the awardee's status was considered by SBA, which determined that the awardee is a small business. The protester apparently filed an appeal of that determination, and states that the contracting officer proceeded to make award while the appeal was pending, suggesting that this was improper. In fact, there is no requirement that award be withheld pending appeal of a size status determination. See Federal Acquisition Regulation (FAR) § 19.303(h)(1) and (i).

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The protester also contends that the agency officials have acted in bad faith in conducting the procurement. For example, the protester states that the contracting officer "advised bidders of all their product and technical deficiencies in their bids and permitted bidders to correct same," and "conducted unsupervised private, verbal meetings with bidders . . . ." While the protester offers these statements as evidence of improper conduct, without more, they do not demonstrate bad faith or violation of statute or regulation. The actions described—for example, discussing specific proposal deficiencies with each offeror—are consistent with the FAR provisions regarding discussions in negotiated procurements. See FAR § 15.610. Similarly, the protester objects that during its debriefing, agency officials refused to provide certain information requested by the protester regarding the awardee's proposal. As the FAR makes clear, however, there are limitations on the type of information that contracting officials may disclose during a debriefing, including proprietary information regarding the awardee. See FAR § 15.1003. To the extent the protester attributes improper motives to the agency officials—stating, for example, that during discussions, the contracting officer "had the opportunity to disclose pricing information from original bids"—the protester is engaging in speculation. Contracting officials are presumed to act in good faith, and prejudicial motives will not be attributed to contracting officials on the basis of unsupported allegations, inference and supposition. Crown Logistics Servs., B-253740, Oct. 19, 1993, 93-2 CPD ¶ 228.

To the extent the protester challenges the agency's decision to hold discussions and request best and final offers (BAFO), the protester fails to state a valid basis for protest. A protest must include a detailed statement of the legal and factual grounds of protest, 4 C.F.R. § 21.1(c)(4), and the grounds stated must be legally sufficient. 4 C.F.R. § 21.2(e). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. Robert Wall Edge-Recon., 68 Comp. Gen. 352 (1989), 89-1 CPD ¶ 335. In support of its challenge to the agency's decision to conduct discussions and request BAFOs, the protester here states only that the contracting officer "utilized minute 'nit' technicalities" to justify requesting BAFOs. This statement simply is not sufficient to establish the likelihood that the agency's decision was improper.

In any event, this contention is untimely. To be timely, a protest on this ground had to be filed with the contracting agency or our Office before BAFOs were due on March 30. RG contends that it timely protested the issue to the agency via a Congressional inquiry dated March 17. Even if that letter is regarded as an agency-level protest, the subsequent protest to our Office is untimely. When a protest is initially filed with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of initial adverse action on the agency-level protest. 4 C.F.R. § 21.2(a)(3). Here, the initial adverse agency action was proceeding to

accept BAFOs as scheduled. Thus, to be timely, any protest on this ground should have been raised with our Office within 10 working days of March 30. Since the protest was not filed until June 27, this issue is untimely.

The protester also challenges the agency's failure to test the product offered by the awardee for compliance with the specifications in the solicitation. Since there is no indication in the record that the solicitation specifically called for such testing,<sup>2</sup> the agency was not obligated to conduct testing. If the protester believed that the solicitation should have called for testing, it was required to file a protest on this basis before initial proposals were due. See 4 C.F.R. § 21.2(a)(1) (protests based on alleged solicitation improprieties must be filed before the closing time for initial proposals).

Citing security concerns, the protester also questions the award of the contract to a company, such as the awardee, with foreign affiliation. The protester does not contend that the solicitation itself barred award to such a firm. If the protester believed that the solicitation should have contained such a limitation due to the type of product being procured, any protest on this basis should have been filed before the time set for submission of initial proposals. See 4 C.F.R. § 21.2(a)(1).

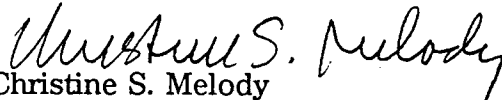
Finally, RG contends that the awardee cannot perform the requirements of the contract at the prices offered. The fact that the awardee may have offered a low price is not for consideration by our Office. A protester's claim that a bidder or offeror submitted an unreasonably low price—or even that the price is below the cost of performance or the fair market value—is not a valid basis for protest since a

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<sup>2</sup>The protester argues that "any reasonable person would expect that product testing would be performed when a highly technical product is being purchased," and the solicitation contains detailed specifications, requires the product to be submitted with the proposal, requires that the product offered meet all technical requirements, and states that there will be an evaluation period. In the absence of an explicit requirement for testing in the solicitation, we see no basis to conclude, simply because the solicitation calls for an evaluation of the product proposed for compliance with the specifications, that the agency was required to conduct testing.

bidder, in its business judgment, properly may decide to submit a price that is extremely low, Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375, and it is up to the agency to decide if the bidder can perform the contract at the offered price. See JWK Int'l Corp., B-237527, Feb. 21, 1990, 90-1 CPD ¶ 198.

The protest is dismissed.

  
Christine S. Melody  
Acting Associate General Counsel