



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Detek, Inc.

File: B-261678

Date: October 16, 1995

Ronald W. Scott for the protester.

Charles J. Roedersheimer, Esq., Defense Logistics Agency, for the agency.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer reasonably determined that the protester was ineligible for award because of its affiliation with a debarred contractor where the record shows, among other things, that: (1) the protester is a newly activated company, purchased by a key employee of the debarred company and reorganized shortly after its affiliate was debarred; (2) the protester and the debarred contractor share several key management employees; (3) the protester and the debarred firm share a common street address and the protester will lease the debarred contractor's manufacturing equipment and other facilities; and (4) the protester planned to subcontract with the debarred firm.

DECISION

Detek, Inc. protests the Defense Electronics Supply Center's (DESC) determination that it was ineligible for award of two contracts (Nos. SPO935-95-C-0032 and SPO935-95-C-0030) for supplying electrical receptacle connectors.¹ Detek asserts that the contracting officer improperly determined that it was ineligible for award of the contracts because of its affiliation with debarred bidders. We deny the protest.

The first procurement was initiated on December 16, 1994, when RFP No. SPO935-95-R-A016 was issued for 261 units; four offers were received. The lowest-priced offer was rejected because that offeror refused to submit to a pre-award survey; the second-lowest offer was rejected because that offeror, Ikard Manufacturing

¹The two contracts were awarded to Rodelco Electronics Corporation (Rodelco) for requirements represented by request for proposals (RFP) No. SPO935-95-R-A016, purchase request No. YPE95-115-000893, and purchase request No. YPE95-115-000894.

Company, was on the General Services Administration's (GSA) debarred bidders list. Of the two remaining offers, submitted by Detek and Rodelco, Detek was the lower-priced.

Based upon the results of a pre-award survey, the contracting officer initially determined that Detek was not responsible because Detek proposed to use a debarred firm (Ikard) as a subcontractor in contravention of Federal Acquisition Regulation (FAR) section 9.405-2.² The contracting officer also determined that Detek did not qualify as a manufacturer of the part in accord with the Walsh-Healey Public Contracts Act, as implemented in 41 C.F.R. § 50-206.51 (1994). Detek, a small business concern, requested that the matter of its responsibility be referred to the Small Business Administration (SBA) for a certificate of competency (COC) review.

While Detek and the contracting officer wrote each other expressing their divergent interpretations of the FAR's restrictions on subcontracting provisions and their applicability to the procurement, the contracting officer ultimately determined that Detek was not eligible for contract award because it was affiliated with two debarred companies--IMCO, Inc. and Ikard. On May 17, 1995, the contracting officer prepared a determination and findings of ineligibility in which she listed 11 indicia that Detek was affiliated with IMCO and Ikard. On that same date, citing an urgent need for electrical receptacle connectors, DESC awarded a contract on a sole-source basis³ to Rodelco for supplying 212 units (representing purchase requests Nos. YPE95-115-000893 and YPE95-115-000894). By letter of May 23, 1995, the contracting officer notified Detek that it was ineligible for award of a contract pursuant to RFP No. SPO935-95-R-A016 and that a contract for supplying 261 additional units had been awarded to Rodelco, the sole remaining viable offeror. Detek's protest of its exclusion from consideration for award of the two contracts was filed in our Office shortly thereafter.

Detek contends that it was unlawful, arbitrary, and capricious for the contracting officer to find an affiliation of Detek to debarred parties without referring the matter to the SBA for a determination of responsibility under the COC program. Detek also contends that the contracting officer erred in finding it ineligible for award because it is not, and never has been, affiliated with any debarred contractors.

²Generally, the FAR prohibits contractors from entering into subcontracts with debarred contractors. FAR § 9.405-2 (FAC 90-29).

³The agency cited 10 U.S.C. § 2304(c)(2) as authority for procuring on the basis of other than full and open competition.

The FAR provides that contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and that agencies shall not solicit offers from, award contracts to, or consent to subcontracts with such contractors unless the agency head determines that there is a compelling reason for such action. FAR § 9.405(a) (FAC 90-29). The term "contractors" is defined, for debarment purposes, to include firms that submit offers through affiliates. FAR § 9.403 (FAC 90-28).

Because the FAR mandates that agencies exclude debarred contractors and their affiliates from receiving federal contracts, and prohibits contracting officers from even soliciting offers from debarred contractors and their affiliates (absent a compelling reason to do otherwise), the contracting officer did not have to find Detek nonresponsible in order to declare Detek ineligible for award. In this regard, FAR § 9.405(d) states that bids received from debarred contractors shall be rejected and that proposals received from such firms shall not even be evaluated. Thus, once the contracting officer determined that Detek was precluded from receiving any contracts because of its affiliation with one or more debarred contractors, the matter of Detek's responsibility became irrelevant. The fact that the contracting officer made a preliminary finding that Detek was nonresponsible before she declared Detek ineligible for award based upon its affiliation with debarred firms did not compel referral to the SBA, since Detek could not be awarded a contract in any event.

Concerning the allegation that the contracting officer's finding of affiliation was erroneous, our review is restricted to an examination of whether the contracting officer's determination of affiliation was reasonable. See Solid Waste Servs., Inc., B-218445; B-218445.2, June 20, 1985, 85-1 CPD ¶ 703; Atchison Eng'g Co., B-208148.5, Aug. 30, 1983, 83-2 CPD ¶ 278.

The record reflects that Ikard and IMCO were debarred throughout the entire time during which these procurements were conducted.⁴ After reviewing the entire record, including the agency's report and the protester's comments rebutting the report, we conclude that there was ample evidence to support the finding of affiliation and that the contracting officer's determination of ineligibility was therefore reasonable.

Concerning "affiliation" for debarment purposes, FAR § 9.403 states:

"Business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other, or (b) a third party controls or has the power to

⁴Jerry W. Ikard was also listed individually on GSA's debarred contractors list; the GSA list also indicated that Jerry W. Ikard, Ikard, and IMCO were affiliated.

control both. Indicia of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the debarment, suspension, or proposed debarment of a contractor which has the same or similar management, ownership, or principal employees as the contractor that was debarred, suspended, or proposed for debarment." [Emphasis added.]

The contracting officer's determination and findings of ineligibility listed 11 factual circumstances indicating that Detek was affiliated with the Ikard and IMCO. We will not discuss each and every reason listed by the contracting officer, or the protester's rebuttal to each, in this decision; rather we discuss two of the more significant indicia of control which in our view clearly support the agency's decision to exclude Detek.

One significant indication of affiliation is that Ikard and Detek employ some of the same individuals in key principal positions, thus showing the interlocking nature of their managements. It is undisputed that Mr. Scott, the owner and chief executive officer of Detek, is also employed by Ikard as contract manager. Similarly, the person who was Ikard's quality assurance manager resigned from his position with Ikard after the first of these procurements was initiated and was proposed by Detek as its quality assurance manager. Moreover, Detek's proposed production manager was formerly Ikard's quality assurance manager and is still employed by Ikard.

A second significant indication of control is that Detek was inactive for several years and only became active following its purchase by Mr. Scott in October 1994, just 1 month after Ikard was formally listed as debarred. Detek apparently does not own facilities and equipment for manufacturing the required electrical receptacle connectors, and therefore planned to lease Ikard's production lines and equipment for the purpose of performing these contracts. Thus, Detek is located at the same street address as Ikard. In addition, Detek plans to purchase component parts for the electrical receptacle connectors from Ikard.⁵

⁵The pre-award survey team characterized Ikard as a "major subcontractor" to Detek. Detek disputed this characterization, but did not submit any cost or price information to show the extent of Ikard's role as subcontractor. The agency's view is that, in accord with FAR § 9.405-2, Detek would be prohibited from using Ikard, a debarred contractor, as a subcontractor.

In sum, the record shows, among other things, that: (1) Detek is a newly activated company, purchased by an Ikard employee and reorganized shortly after Ikard was debarred; (2) Detek and Ikard share several key management employees; (3) Detek shares a common street address with Ikard and would lease Ikard's manufacturing equipment and other facilities to perform the contracts; and (4) Detek planned to subcontract with Ikard. In these circumstances, the contracting officer reasonably concluded that Detek was affiliated with a debarred bidder or bidders, and properly declared Detek ineligible for award. See Atchison Eng'g Co., supra.

The protest is denied.

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