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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-190505

DATE: July 3, 1978

MATTER OF:

D.B. Saxon Company, Inc.--
Reconsideration

DIGEST:

Prior decision recommending cancellation of request for proposals and resolicitation under small business restricted advertising procedures and that agency submit Standard Form 98 (Notice of Intention to Make a Service Contract) to Department of Labor is affirmed where request for reconsideration makes no showing of erroneous legal conclusions and thrust of request is negative impact of our recommendations on apparent low offeror's ability to satisfactorily consummate Chapter XI bankruptcy proceedings.

Gary Aircraft Corporation (Gary) requests reconsideration of our decision B.B. Saxon Company, Inc., B-190505, June 1, 1978, 57 Comp. Gen. ____, 78-1 CPD ____. Gary requests that GAO withdraw our recommendation that the agency resolicit the procurement, or that in the alternative, that "the rules announced in [the] decision be given a prospective rather than a retrospective application.

Saxon, supra, was a pre-award protest involving request for proposals (RFP) F41608-77-12-R-8635 issued by the Department of the Air Force for a multi-year requirements contract for the repair, overhaul and modification of aircraft engines and repairable parts. The procurement was a 100% small business set-aside. B.B. Saxon Company, Inc. (Saxon) cited eight alleged deficiencies in the RFP, among them the exclusion of the procurement from the coverage of the Service Contract Act (SCA), 41 U.S.C. 351 et seq. (1970 and Supp. V 1975), and the use of negotiated procurement procedures rather than formal advertising procedures for the procurement. Saxon did not submit

a proposal under the RFP, and the record indicates that no award had been made as of the date of our decision. Gary Aircraft Corporation was an interested party which submitted comments during our consideration of the protest.

Our original decision sustained the protest on the issues stated above. On the SCA issue, we concluded that the Department of Labor's (DOL) determination that the SCA applies to a contract for the overhaul of aircraft engines was not "clearly contrary to law" and thus the Air Force must comply with the DOL regulations implementing the SCA. We also concluded that the agency's contention that the applicability of the SCA should be determined by the Office of Federal Procurement Policy (OFPP) rather than DOL did not justify the agency's failure to comply with DOL regulations under circumstances where OFPP had not taken a substantive position on the matter. In this respect we did not decide the extent of OFPP authority in this area, since under the circumstances the only issue for resolution was whether the Air Force complied with existing requirements concerning the SCA.

With respect to the formal advertising issue, our decision found that even though a small business set-aside was technically a negotiated procurement, where the contract was to be awarded solely on price, and the record did not support the agency's assertion that the specifications were not sufficiently definite to permit formal advertising, the mere fact that negotiation would be desirable to enhance offeror understanding of the complex procurement did not provide a legal basis for the use of negotiation in lieu of small business restricted advertising.

As a result of our conclusions, our decision recommended that the Air Force submit a Standard Form 98 (Notice of Intention to Make a Service Contract) to DOL, and that the RFP be canceled and the requirement resolicited in the form of small business restricted advertising.

Gary, the incumbent contractor, is apparently the low offeror under the RFP. As background, Gary advises that it is presently engaged in proceedings for an arrangement with its unsecured creditors under chapter XI of the Bankruptcy Act, and that our decision "will retard Gary's efforts to propose and consummate a

plan for an arrangement * * * will impede Gary's efforts to reach an equitable settlement of its controversies with several government agencies, and will thereby impact on Gary and its creditors * * *." Gary offers the following reasons for its requested relief:

1. Our decision recommending the RFP be canceled and the requirement resolicited under formal advertising procedures requires a change in the Air Force traditional practice of procuring these requirements by negotiation.

2. Recompetition serves no useful purpose in this case since "all the competition that would or could have been obtained through formal advertising was obtained through solicitation of offers."

3. Our decision regarding the applicability of the Service Contract Act is premature because the Office of Federal Procurement Policy has final jurisdiction to determine the applicability of the Act and has stated it will do so.

4. The decision may affect only Gary Aircraft with the negative impact resulting from its inability to satisfactorily consummate its chapter XI bankruptcy proceedings.

Section 20.9(a) of our Bid Protest Procedures, 4 C.F.R. 20.9(a) (1977) states in pertinent part that:

"The request for reconsideration shall contain a detailed statement of the factual and legal grounds upon which reversal or modification is deemed warranted, specifying any errors of law made or information not previously considered."

There has been no showing of any erroneous legal conclusions in our original decision. To some extent, there has been merely a reiteration of what we previously considered. For the most part, however, the thrust of Gary's offer of "information not previously considered" is the impact of our recommendations on Gary as a debtor in the bankruptcy proceedings. This information does not warrant an award

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under a defective solicitation in derogation of our prior holdings on the existing authority of the Secretary of Labor in regard to the SCA and the basic requirements regarding the use of formal advertising procedures in small business set-asides.

The decision is affirmed.



Deputy Comptroller General
of the United States