Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Security Consultants Group, Inc.

File: B-276405; B-276405.2

Date: June 9, 1997

James H. Roberts III, Esq., Manatt, Phelps & Phillips, LLP, for the protester.
Hector Gonzalez Sanchez, for H.G. Security System, Inc., an intervenor.
Scarlett D. Grose, Esq., General Services Administration, and David R. Kohler, Esq., and Timothy C. Treanor, Esq., Small Business Administration, for the agencies.
Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In offering a requirement to the Small Business Administration (SBA) for acceptance into its 8(a) program, the contracting agency prejudicially failed to comply with the regulatory requirement to provide SBA with complete and accurate information regarding the proposed offering by not identifying the protester as an 8(a) concern which had expressed an interest in being considered for the acquisition.

DECISION

Security Consultants Group, Inc. (SCG) protests the failure of the General Services Administration (GSA) to advise the Small Business Administration (SBA) of its interest in being considered for the award of a subcontract by SBA under its 8(a) program for the performance of site assessments and the installation of security systems for various GSA controlled buildings and/or facilities within Metropolitan New York City and the states of New Jersey and New York. SCG argues that it was prejudiced by GSA's failure to comply with the applicable regulation governing the offering of the requirement to SBA.

We sustain the protests.

GSA's requirement was for an indefinite quantity contract with a minimum ordering limitation of $300,000 and a maximum ordering limitation of $3,000,000. GSA's contracting officer's offering letter to SBA stated the following:

> "To confirm our previous conversations, the above requirement has been identified by our agency as suitable for procurement under Section 8(a) of the Small Business Act. This is an indefinite quantity contract with an estimated minimum of $300,000 and an estimated

> maximum of $3,000,000. The contract performance will begin March 1, 1997 and end December 31, 1997. When you [SBA] identify a suitable 8(a) subcontractor, please have them contact me to begin negotiations."[1]

SBA subsequently notified GSA that it accepted GSA's offering on behalf of H.G. Security System, Inc. (HGSS), an 8(a) concern located in Brooklyn, New York.

SCG, an 8(a) concern located in Oak Ridge, Tennessee, protests the failure of GSA to advise SBA of the firm's interest in being considered for the award of a subcontract under SBA's 8(a) program to perform GSA's requirement. The record shows that before GSA even offered the requirement to SBA, SCG met with GSA contracting personnel and expressed its interest in performing GSA's requirement. GSA concedes that it was aware, prior to sending its offering letter to SBA, of SCG's interest. GSA's offering letter, however, contained no reference to SCG.

Section 8(a) of the Small Business Act authorizes SBA to contract with government agencies and to arrange for performance of such contracts by awarding subcontracts to socially and economically disadvantaged small businesses. 15 U.S.C. § 637(a) (1994). The Act affords SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program. We will not consider a protest challenging a decision to procure under the 8(a) program absent a showing of possible bad faith on the part of government officials or that regulations may have been violated. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(3) (1997); Grace Indus., Inc., B-274378, Nov. 8, 1996, 96-2 CPD ¶ 178 at 2. Here, SCG argues that GSA prejudicially failed to comply with the requirement at 13 C.F.R. § 124.308(c) to furnish SBA with complete and accurate information regarding the proposed offering which directly impacted SBA's selection of an 8(a) concern to perform GSA's requirement.

In making decisions regarding 8(a) acquisitions, SBA is entitled to rely on the contracting officer's representations regarding the offered requirement. In this regard, SBA's regulations place the primary responsibility on the procuring agency to submit all relevant information necessary to SBA's decision-making process.

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[1]SBA characterizes this acquisition as an "open requirement," that is, SBA, as opposed to the contracting agency, chooses a qualified 8(a) concern to perform the requirement. 13 C.F.R. § 124.308(f) (1997). Since this procurement was for a non-construction requirement, SBA may select any eligible, responsible 8(a) concern nationally to perform the requirement. 13 C.F.R. § 124.308(f)(2).

13 C.F.R. § 124.308; Comint Sys. Corp., B-274853; B-274853.2, Jan. 8, 1997, 97-1 CPD ¶ 14 at 3. In this case, the SBA states, and we agree, that GSA's offering letter did not provide complete and accurate information as required under 13 C.F.R. § 124.308(c).

Specifically, under 13 C.F.R. § 124.308(c)(14), the procuring activity is unambiguously required to include in its offering letter to SBA, among other things, the "[i]dentification of all 8(a) concerns which have expressed an interest in being considered for the acquisition." In its offering letter, GSA did not identify SCG to SBA as an 8(a) concern which had expressed an interest in being considered for the performance of GSA's requirement. Under these circumstances, we conclude that GSA's offering letter failed to comply with the requirement at 13 C.F.R. § 124.308(c)(14) and that as a result, GSA effectively deprived SBA of the opportunity to make a fully informed decision with respect to this 8(a) acquisition.[2] Comint Sys. Corp., supra at 4-5.

We further conclude that GSA's failure in this regard prejudiced SCG. Our Office will not sustain a protest unless the protester demonstrates a reasonable possibility that it was prejudiced by the agency's actions, that is, unless the protester demonstrates that, but for the agency's actions, it would have had a substantial chance of receiving the award. McDonald-Bradley, B-270126, Feb. 8, 1996, 96-1 CPD ¶ 54 at 3; see Statistica, Inc. v. Christopher, 102 F.3d 1577, 1581 (Fed. Cir. 1996). Here, if GSA had properly notified SBA of SCG's interest, SCG could have been awarded the contract. Thus, SCG obviously was prejudiced by what occurred here. Accordingly, we sustain its protests. Comint Sys. Corp., supra at 7.

In light of GSA's prejudicial failure to comply with the regulatory requirement to provide SBA with complete and accurate information regarding the proposed offering and in light of SBA's becoming aware of SCG's interest through the protest process, we recommend that SBA reopen the process of accepting GSA's requirement on behalf of an 8(a) concern. In this regard, SBA should consider the

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[2]GSA reports that it telephonically notified SBA of SCG's interest prior to sending the offering letter to SBA. SBA's regulation provides for use of the written offering letter, not telephonic identification of interested 8(a) concerns, 13 C.F.R. § 124.308(c), (d), and SBA's contract negotiator denies being telephonically notified by GSA of SCG's specific existence and interest. Under these circumstances, where SBA denies being orally advised by GSA of what was required by regulation to be in writing, we cannot conclude that SBA was aware of SCG's interest. See I.E. Levick and Assocs., B-214648, Dec. 26, 1984, 84-2 CPD ¶ 695 at 3. (GSA also reports that on two occasions it forwarded to SBA correspondence from SCG in which the firm, among other things, expressed its interest in performing GSA's requirement. The record shows, however, that both of these occasions were weeks after SBA accepted the requirement on behalf of HGSS.)

qualifications of both SCG and HGSS. Depending on the results of SBA's reopened process, the contract with HGSS should be continued or terminated with award made to SCG, as appropriate. We also recommend that SCG be reimbursed its costs of filing and pursuing its protests, including reasonable attorneys' fees, by GSA. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (1997). SCG should submit its certified claim for costs to GSA within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protests are sustained.

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