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United States
General Accounting Office
Washington, D.C. 20548



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Office of the General Counsel

B-223985

October 8, 1986

The Honorable John Glenn
United States Senate

Dear Senator Glenn:

This is in response to your September 10, 1986, letter to our Office on behalf of Ernie Green Industries (EGI), in which you express interest in EGI's request for reconsideration of our July 10, 1986, decision on its protest of a Department of the Army procurement.

We acknowledged your expression of interest in our letter on September 25, with which we enclosed a copy of our decision of August 21 affirming our initial holding. We also referred to another bid protest EGI had pending in our Office, that one under solicitation No. DAAA09-85-R-0517 for the M13 Decontaminating Apparatus. We stated that we would furnish you our decision on that matter, which we were processing in accordance with our Bid Protest Regulations, as soon as it was resolved.

We received a report from the Army on EGI's protest on September 24. By notice of today, we have dismissed the protest because EGI did not comment on the report or otherwise express interest in our decision within 7 working days after report receipt, as required by our Regulations.

Enclosed is a copy of our dismissal notice. Also enclosed is a copy of the August 20 notice we sent EGI to acknowledge receipt of its protest, and in which we caution the firm about its comment responsibility.

Sincerely yours,

Robert M. Strong
Deputy Associate
General Counsel

Enclosures - 3

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We dismiss the protest on this issue since the matter was not timely raised. Our Bid Protest Regulations require a protest like EGI's to be filed in our Office no later than 10 days after the basis of the protest became known or should have become known. 4 C.F.R. § 21.2(a)(2) (1986). EGI received the mailgram on December 9, 1985, but EGI did not protest until April 21, 1986. Moreover, EGI's contentions appear to be without merit. The mailgram in question was directed only to the SBA and EGI. EGI has presented no evidence that anyone outside the government obtained access to the information or that competition was affected in any way. Rather, EGI merely notes that two potentially competing firms were located in the same general area as the SBA office that received the mailgram. Our Office will not sustain charges of improper price disclosure where there is no indication that competition was affected and the charges are based on conjecture and inference. Beech Aerospace Services, Inc., B-219362, Aug. 20, 1985, 85-2 C.P.D. ¶ 203; Dynal Associates, Inc., B-197348, July 14, 1980, 80-2 C.P.D. ¶ 29.

EGI's next basis for protest relates to the negotiations AMCCOM conducted under RFP-1126. EGI maintains that such negotiations, coupled with the alleged disclosure discussed above, constituted an improper auction.

We again conclude that EGI's protest is untimely. By letter dated February 5, 1986, AMCCOM advised EGI that it would be conducting negotiations concerning RFP-1126. Since EGI did not raise the issue of an auction until April 1986, its protest on this matter does not comply with our regulations' 10-day timeframe. In any case, even if we considered this issue on its merits, EGI would be unsuccessful. As stated above, there is no evidence of public disclosure of pricing data; EGI's charge that AMCCOM conducted an auction presumes such disclosure.

EGI's final basis for protest concerns RFP-0517, issued by AMCCOM on July 16, 1985, to the SBA for award to EGI under the authority of section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1982). The product involved in RFP-0517 is the same one solicited under RFP-1126. EGI charges that AMCCOM intentionally delayed the award under that solicitation to preclude EGI from improving its competitive position with respect to RFP-1126; EGI contends that if the contract under RFP-0517 had been timely negotiated and awarded, EGI, as an existing producer at that point, could have submitted a lower offer on RFP-1126.

A contracting officer is given broad discretion to let contracts under section 8(a) of the Small Business Act upon such terms and conditions as may be agreed upon by the procuring agency and the SBA. Accordingly, our review of actions under the 8(a) program generally is limited to determining whether regulations have been followed and whether there has been fraud or bad faith on the part of government officials. Forway Industries, B-217046, Nov. 26, 1984, 84-2 C.P.D. ¶ 573. To show that the contracting officer or SBA officials acted in bad faith, the protester has the heavy burden to present irrefutable proof that these officials had a specific and malicious intent to injure the protester. Prospect Associates, Ltd., B-218602, June 17, 1985, 85-1 C.P.D. ¶ 693.



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ernie Green Industries, Inc.

File: B-222517

Date: July 10, 1986

DIGEST

1. Protest alleging that agency publicly disclosed proprietary information and conducted an auction is dismissed where protest was not filed within 10 days of the time the basis of the protest became known.
2. Protest alleging bad faith by an agency in negotiating a contract under section 8(a) of the Small Business Act is denied where protester has not presented proof that agency officials had specific and malicious intent to injure protester.

DECISION

Ernie Green Industries, Inc. (EGI) protests any award made under request for proposals (RFP) No. DAAA09-85-R-1126 and requests cancellation of that solicitation. RFP-1126 is a competitive small business set-aside and was issued by the U.S. Army Armaments, Munitions and Chemical Command (AMCCOM), Rock Island, Illinois. EGI charges that AMCCOM publicly disclosed EGI pricing information and then, in effect, conducted an auction by opening negotiations with other firms. EGI also charges that AMCCOM deliberately delayed dealing with it on a related solicitation, RFP No. DAAA09-85-R-0517, in order to make EGI noncompetitive on RFP-1126.

We dismiss as untimely EGI's protest that AMCCOM disclosed proprietary information and conducted an auction. We deny the protest on the remaining issue.

AMCCOM issued RFP-1126 on September 4, 1985, for 66,000 units of the M13 Decontaminating Apparatus. EGI responded with a proposal on November 29. On December 4, AMCCOM sent a mailgram to EGI, via the Small Business Administration (SBA), concerning this and other on-going procurements of the M13 Decontaminating Apparatus, which contained a reference to the price EGI had submitted in its proposal, and which EGI received on December 9. AMCCOM conducted negotiations under the RFP from February 5 to March 5, 1986.

EGI's first basis for its protest concerns AMCCOM's December 4 mailgram. EGI charges that this correspondence constituted public disclosure of proprietary information.



business standpoint), it is only a matter of time before all of the budget is divided by the dozen or so big boys and the thousands who continually study the question of why the industrial base is dying. The GAO decision herein would make an excellent reference for such studies.

EGI requests that GAO decision on EGI's allegations, not GAO's allegations, be provided, that the relief requested be granted and, further, that EGI be reimbursed for proposal and claim preparation, negotiation, and processing expenditures.

Very truly yours,

Richard C. Antolini
Manager, Government Systems Division

lmb

cc AMCCOM (Attn: Mr. John B. Pierce)
Internal SYSX

GAO FORM 126 (10/85)

Case:

B-223985.1

Ernie Green Industries

RFP: DAAA09-85-R-0517

Issued by: U.S. Army Materiel Command

Report Due: Sep 24, 1986

ACKNOWLEDGMENT OF PROTEST

This will acknowledge receipt of your protest concerning the referenced procurement. Please refer to our file number in future correspondence regarding this matter. Also, the contracting agency is required to file a report in response to your protest. Under 4 CFR § 21.3(e), you are required within 7 working days of receipt of the report to submit written comments or to advise our Office that you wish to have the protest decided on the existing record. For your convenience, we have indicated the date the agency's report is due. Please notify our Office at that time if you do not receive the report since, unless we hear from you within seven working days of our receipt of the report, we will close our file without action.

-- For the Associate General Counsel

Mr. Richard C. Antolini
Ernie Green Industries
1785 Big Hill Road
Dayton, OH 45439

Aug 20, 1986
rmw:RS/211