



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Tri-Ark Industries, Inc.--Declaration of Entitlement

File: B-274450.2

Date: October 14, 1997

Kevin P. Connelly, Esq., Seyfarth, Shaw, Fairweather & Geraldson, for the requester. Joel D. Malkin, Esq., General Services Administration, and David R. Kohler, Esq., Small Business Administration, for the agencies.

John L. Formica, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that procurement was improperly accepted into the Small Business Administration's (SBA) 8(a) program (because the SBA had not performed the required analysis of impact on small business concerns) was timely filed prior to the closing time for receipt of proposals under the competitive 8(a) solicitation, notwithstanding that the SBA had advised the protester prior to the solicitation's issuance that it believed that there was no adverse impact.
2. Protester is entitled to recover the costs of filing and pursuing its protest of the General Services Administration's (GSA) decision to acquire janitorial services under the Small Business Administration's (SBA) section 8(a) program, where GSA did not take corrective action until after the submission of the agency report in response to the timely protest and the protester's comments on the report, even though the SBA had informed GSA prior to the submission of GSA's agency report that the adverse impact analysis required by law had not been performed.

DECISION

Tri-Ark Industries, Inc. requests that we recommend that it be reimbursed the costs of filing and pursuing its protest of the General Services Administration's (GSA) decision to acquire janitorial and other services for the Metcalfe Federal Building in Chicago, Illinois, under the Small Business Administration's (SBA) section 8(a) program.

We recommend that Tri-Ark be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees.

Section 8(a) of the Small Business Act authorizes the SBA to enter into contracts with government agencies and to arrange for performance through subcontracts with socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a) (1994). Under its implementing regulations, the SBA may not accept any requirement into the 8(a) program if doing so "would have an adverse impact on other small business programs or on an individual small business." 13 C.F.R. § 124.309(c) (1997). SBA's regulations require it to execute a written impact statement before accepting a requirement into the 8(a) program. Id.; Atlantic Coast Contracting, Inc., B-260686, July 13, 1995, 95-2 CPD ¶ 19 at 3.

Tri-Ark, a small business concern which was awarded a contract by GSA in April 1993 to provide janitorial and other services at the Metcalfe Building, protested GSA's decision to acquire the services under the section 8(a) program to our Office on September 3, 1996. Tri-Ark argued in its protest that the government had failed to perform the required adverse impact determination, with respect to either Tri-Ark or other small businesses. In accordance with our requests, GSA and the SBA filed reports with our Office in response to the protest on October 15 and October 16, respectively, and the protester timely filed its comments on the reports with our Office on October 28.

Because neither agency report contained a written impact statement, our Office requested, by teleconference with attorneys for GSA, the SBA, and the protester, that either agency furnish a copy of the statement to our Office and the protester by November 1. During this teleconference it was also agreed that the agencies could submit comments on the statement by November 5, and the protester could submit comments by November 7.

On October 31, our Office received a document from the SBA, but our review indicated that the document was not an impact statement. When our Office contacted the SBA on November 1, the SBA advised that it could not provide a statement because no impact analysis had been performed.

On November 4, GSA notified our Office that GSA had

determined that an adverse impact analysis be performed for both Tri-Ark and other small business concerns prior to proceeding with the Metcalfe Building procurement as an 8(a) set aside. As provided in applicable Federal law and regulation, the SBA will perform the adverse impact analysis.

Upon receipt of this letter, our Office dismissed Tri-Ark's protest as academic, and on November 7, the protester filed this request that we find that it should be reimbursed the reasonable costs of filing and pursuing its protest, including reasonable attorneys' fees.

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the protester be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (1997). This does not mean that costs should be reimbursed in every case in which an agency decides to take corrective action; rather, a protester should be reimbursed its costs where an agency unduly delayed its decision to take corrective action in the face of a clearly meritorious protest. Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41 at 5; LB&M Assocs., Inc.--Entitlement to Costs, B-256053.4, Oct. 12, 1994, 94-2 CPD ¶ 135 at 4. A clearly meritorious protest is one that clearly would have been successful--that is, it must involve a matter over which our Office has jurisdiction, be filed by an interested party in a timely manner and otherwise comply with the requirements of our Bid Protest Regulations, and the record must establish that the agency prejudicially violated a procurement statute or regulation. Allied Materials & Equip. Co.--Entitlement to Costs, B-243631.3, Oct. 31, 1991, 91-2 CPD ¶ 412 at 2. This rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur the unnecessary effort and expense in pursuing its remedies before our Office. David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498, 501 (1992), 92-2 CPD ¶ 91 at 4.

GSA and the SBA first assert that the award of costs is unwarranted because Tri-Ark's protest to our Office was not timely filed, and therefore was not "clearly meritorious." In this regard, by letter dated October 2, 1995, the SBA informed the protester that it was considering this requirement for the 8(a) program, and requested information regarding the potential adverse impact on Tri-Ark. In response, the SBA received information in this regard from Tri-Ark, and, by letter dated February 16, 1996, advised Tri-Ark that "based on [Tri-Ark's] own analysis adverse impact does not exist in this situation." The agencies argue that Tri-Ark should have protested GSA's decision to acquire the services under the section 8(a) program within 10 days of its receipt of the SBA's February 16 letter, and that Tri-Ark's protest, filed on September 3, 1996, 2 days prior to the closing date for receipt of proposals, was thus untimely.

We disagree. The Competition in Contracting Act of 1984 (CICA) provides that our Office shall decide protests concerning alleged violations of procurement statutes or regulations. 31 U.S.C. § 3552 (1994). A protest is defined by CICA as

- a written objection . . . to any of the following:
- (A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.
- (B) The cancellation of a such solicitation or other request.
- (C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

31 U.S.C. § 3551(1) (1994).

The protested competitive 8(a) solicitation was issued on July 30, 1996. Because there was no solicitation for, or award or proposed award of, a contract for the services at the time of Tri-Ark's receipt of the SBA's February 16 letter, any protest filed by Tri-Ark at our Office within 10 days of its receipt of that letter could not have been considered by our Office as a protest as defined in CICA. A. Moe & Co., Inc., 64 Comp. Gen. 755, 756 (1985), 85-2 CPD ¶ 144 at 2; Aeronautical Components, Inc., et al., B-253719 et al.; June 16, 1993, 93-1 CPD ¶ 467; Brazil Van & Storage Corp., B-241327.2, Oct. 26, 1990, 90-2 CPD ¶ 342. Thus, Tri-Ark's protest of the alleged defective solicitation was timely filed prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1).

GSA also argues that it did not unduly delay its decision to take corrective action. Counsel for GSA concedes that "prior to GSA's submission of its agency report, [counsel for SBA] informed me that in his opinion, the SBA had not performed an adverse impact analysis required by law." Counsel for GSA states, however, that "it was not until GSA received the SBA's submission of October 31, 1996 that I saw first-hand that the SBA had in fact rendered no such adverse impact analysis."

GSA and the SBA had an obligation to promptly and adequately investigate the validity of the protester's position that SBA had failed to perform an adequate adverse impact analysis. LB&M Assoc., Inc.--Entitlement to Costs, *supra*; David Weisberg--Entitlement to Costs, 71 Comp. Gen. 498, 501 (1992), 92-2 CPD ¶ 91 at 3-4. Here, even though the counsel for GSA was told by counsel for the SBA, prior to the submission of the agency report, that the "SBA had not performed an adverse impact analysis as required by law," GSA did not at that time further investigate the matter to ascertain if corrective action was appropriate; instead, GSA and SBA proceeded to submit agency reports on the protest.

GSA's delay in taking corrective action until weeks later--after the submission of its agency report and the protester's comments--was not justified. GSA has failed to explain why, after being orally informed by counsel for the SBA that an adverse impact analysis had not been performed, GSA waited until after the protester had expended legal fees and other corporate resources to respond to the agency report

before GSA took corrective action. This delay frustrated the intent of CICA by impeding the economic and expeditious resolution of the protest. Griner's-A-One Pipeline Servs., Inc.-Entitlement to Costs, *supra*, at 6.

Accordingly, we recommend that Tri-Ark be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. Tri-Ark should submit its certified claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 60 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1).

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