



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** South Texas Turbine Supply

**File:** B-272163

**Date:** September 5, 1996

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Cynthia S. Emerson, Esq., for the protester.

Jean V. Zurface, Esq., Defense Logistics Agency, for the agency.

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## DIGEST

Since the requirement to reject the bid of a contractor proposed for debarment at the time of bid opening--notwithstanding the fact that the proposed debarment is lifted prior to award--extends to any of that contractor's affiliates, a contracting agency may not award a contract to a firm alleged to be an affiliate of such a contractor unless it has determined that the firms are not affiliated.

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## DECISION

South Texas Turbine Supply protests the proposed award of a contract to Sierra Sales Corporation under the invitation for bids covering Sale No. 31-6317, issued by the Defense Logistics Agency's Defense Reutilization and Marketing Service (DRMS).<sup>1</sup> South Texas principally argues that Sierra is affiliated with a firm that was proposed for debarment at the time of bid opening, and consequently is ineligible for award.

We sustain the protest.

The solicitation sought bids to purchase more than 300 line items of assorted electrical, electronic, and aircraft parts that are no longer needed by the government. The solicitation incorporated the agency's "Sale by Reference" pamphlet, which states that award will be made to the responsible bidder whose conforming bid is most advantageous to the government, price and other factors considered. The only factor to be considered under this solicitation, however, is

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<sup>1</sup>We consider this nonstatutory protest under 4 C.F.R. § 21.13 (1996). By letter dated January 13, 1987, the agency agreed to our considering bid protests involving its surplus property sales. Resource Recovery Int'l Group, Inc., B-265880, Dec. 19, 1995, 95-2 CPD ¶ 277.

price-award of each line item will be made to the responsible bidder submitting the highest price.

The bid closing date was January 11, 1996. The contracting officer's review of bids disclosed that Sierra's bid of \$6,858 was the highest received for line item number 295, a quantity of turbine engine nozzles; South Texas submitted the second-highest bid. South Texas subsequently contacted the agency and alleged that Sierra was affiliated with Garlick Helicopter, Inc., a firm which was proposed for debarment at the time of bid opening and, thus, ineligible to participate in this sales program.

On January 17, the contracting officer asked Sierra to establish its nonaffiliation with Garlick. Sierra responded by stating that it was a minority investment stockholder in Garlick, and that the same person served as both a director and president of Sierra, and a director and chief financial officer of Garlick. The contracting officer determined that she did not have adequate information to make an affiliation determination, and asked Sierra to explain whether it shared offices with Garlick and to provide evidence of separate bank accounts. She also asked the firm to extend its bid acceptance period to allow the agency more time to resolve the matter. Sierra informed the agency that the two firms did not share offices and provided a copy of a deposit slip in its name as evidence that it had its own bank account. Sierra also extended its bid acceptance period. The contracting officer subsequently received a report from Dunn & Bradstreet indicating that no record of a business telephone listing under Sierra's name existed; no record of Sierra being granted a business or occupational license existed; and the address given for Sierra was a plot of land. In the face of this report, Sierra sent the contracting officer copies of its certificate of incorporation and its Internal Revenue Service new employer identification number form, and stated that no business license was required by its local government.

While the contracting officer was considering this information, the proposed debarment of Garlick was lifted based upon the firm's entering into a settlement and compliance agreement with the Environmental Protection Agency and DRMS. The contracting officer informed South Texas that, in light of the fact that the proposed debarment had been lifted, she was proceeding to make award to Sierra. South Texas' agency-level protest of this intended action was denied, and the firm filed the same protest in our Office. The agency has withheld award pending the resolution of this protest.

South Texas principally contends that award to Sierra under the circumstances here would be contrary to the applicable regulations. We agree.

The Federal Acquisition Regulation (FAR) mandates the rejection of a bid from a firm which is debarred, suspended, or proposed for debarment at the time of bid opening, and does not provide the contracting agency with discretion to do

otherwise unless the agency head or a designee determines that there is a compelling reason for such action.<sup>2</sup> FAR §§ 9.405(a), 9.405(d)(2), 14.404-2(h); see Southern Dredging Co., Inc., 66 Comp. Gen. 300 (1987), 87-1 CPD ¶ 245; Instruments by Precision Ltd., Inc., B-235339, Aug. 14, 1989, 89-2 CPD ¶ 138. Hence, the agency would have been required to reject a bid submitted by Garlick because the firm was proposed for debarment as of January 11, 1996, the bid closing date. Since the prohibition against award to firms which are debarred, suspended, or proposed for debarment at the time of bid opening extends to their affiliates,<sup>3</sup> FAR § 9.403 (definition of "contractor"); Detek, Inc., B-261678, Oct. 16, 1995, 95-2 CPD ¶ 177, the agency here cannot make award to Sierra if that firm was affiliated with Garlick at the time of bid opening.

The contracting officer never made an affiliation determination with respect to Sierra and Garlick, but, citing FAR § 9.405(d)(3), asserts that she was relieved of the obligation to do so when the proposed debarment of Garlick was lifted prior to award.

Section 9.405(d)(3) of the FAR provides instructions for those situations where the agency receives proposals, quotations, or offers in a negotiated procurement. In such situations, contracting agencies have the discretion to accept the proposal, quotation, or offer of a contractor proposed for debarment where the proposed debarment is lifted by the time of award. However, the instant solicitation is an invitation for bids which required interested firms to submit sealed bids and, as the protester correctly points out, FAR § 9.405(d)(2)—not FAR § 9.405(d)(3)—governs. See Auto-X, Inc., B-238046.2; B-238046.3, June 6, 1990, 90-1 CPD ¶ 532. As noted above, that section requires the rejection of such bids and does not afford

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<sup>2</sup>The policies, procedures, and requirements of FAR subpart 9.4 are incorporated by reference and made applicable to contracts for, and to contractors who engage in, the purchase of federal personal property. 41 C.F.R. § 101-45.601(b) (1995). Pursuant to 41 C.F.R. § 109-45.304-50, the procedures in FAR subpart 14.4 are applicable to the evaluation of bids and award of contracts for the sale of personal property.

<sup>3</sup>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 control both. Indicia of control include 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. FAR § 9.403.

contracting agencies discretion absent circumstances not present here. See Instruments by Precision Ltd., Inc., supra. As a result, the agency must determine whether Sierra was affiliated with Garlick at the time of bid opening before it may properly award a contract to Sierra.

South Texas also contends that the agency improperly asked Sierra to extend its bid acceptance period. The protester alleges that the agency's failure to make an affiliation determination within Sierra's original bid acceptance period is evidence of bad faith.

Sierra offered a 60-day bid acceptance period, which was to expire on March 11. By letter dated March 5, the contracting officer asked Sierra to extend its bid acceptance period pending resolution of the affiliation issue. On March 11, Sierra agreed to a 30-day extension. On March 27, the debarment of Garlick was lifted, and by letter dated April 3, the contracting officer advised the protester that the agency planned to proceed with award to Sierra.

We see no basis to conclude that the agency's actions were improper. On the contrary, where award may be delayed beyond the bid acceptance period, FAR § 14.404-1(d) plainly contemplates that the contracting officer ask for extensions before expiration of the bids—precisely the action taken by the contracting officer here. See Right Away Foods Corp., B-216199, Jan. 3, 1985, 85-1 CPD ¶ 15. Moreover, to establish bad faith, a protester must present virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. Midwest Security Agency, Inc., B-222424, Apr. 7, 1986, 86-1 CPD ¶ 345. There is no evidence here that the agency asked Sierra to extend its bid acceptance period for any reason other than to ensure that it had sufficient information from Sierra to make an informed affiliation determination.

We recommend that the agency make an affiliation determination with respect to Sierra and Garlick. If the agency determines that Sierra was not affiliated with Garlick at the time of bid opening, the agency may proceed with award to Sierra if otherwise appropriate. If the agency determines that Sierra was affiliated with Garlick at the time of bid opening, Sierra is ineligible for award, and the agency may make award to the next eligible bidder or take other appropriate action.

The protest is sustained.

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