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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: American Multi Media, Inc.--Reconsideration

File: B-293782.2

Date: August 25, 2004

Frederic G. Antoun, Esq. for the protester.
William L. Walsh, Jr., Esq. and Amy J. McMaster, Esq., Venable LLP, for Potomac Talking Book Services, Inc., an intervenor.
Emily Vartanian, Esq., Library of Congress, for the agency.
Jeanne W. Isrin, Esq., and Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Prior decision dismissing protest as untimely because it was filed more than 10 days after a telephone conversation in which the contracting officer told the protester/original awardee to stop work because consideration of whether an evaluation preference should have been applied to another bid could result in the contract going to that bidder is reversed; a firm is not required to file a "defensive protest" while an agency is considering action inimical to the firm's interests.
 2. Where solicitation provided for 10-percent evaluation preference for "nonprofit-making institutions or agencies whose activities are primarily concerned with the blind and with other physically handicapped persons," protest that awardee should not have been found eligible for the preference because it lacks federal tax-exempt status under 26 U.S.C. § 501(c) is denied, since the agency was not unreasonable in determining that the preference could be applied based on registration as a not-for-profit corporation under applicable state law.
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DECISION

American Multi Media, Inc. (AMI) requests that we reconsider our May 10, 2004 decision dismissing as untimely its protest of the award of a contract to Potomac Talking Books Services, Inc. (PTBS) under invitation for bids (IFB) No. S-LCO4004, issued by the Library of Congress for recording magazines on cassettes in accordance with the National Library Service for the Blind and Physically Handicapped specifications. In its protest, AMI, which initially had been awarded a contract that included the recording of *Good Housekeeping* magazine, complained

that the agency terminated that portion of its contract in order to award the requirement to PTBS after the agency decided that in evaluating bids it had neglected to apply a 10-percent price preference for nonprofit organizations that serve the blind and physically handicapped. AMI argued that PTBS was not a nonprofit organization, and it challenged the Library's interpretation of the statutory preference and its application of the preference to PTBS's bid.

On reconsideration, we reverse our prior dismissal, but we deny the merits of AMI's protest.

Based on AMI's apparent low bid and satisfactory technical rating, the firm was awarded the contract that included the recording of *Good Housekeeping* magazine effective December 16, 2003. After award, however, it came to the attention of contracting officials that the 10-percent evaluation preference for nonprofit organizations that serve the blind and physically handicapped had not been applied to PTBS's bid, possibly erroneously, and that PTBS's bid would have been low had the preference been applied.

A telephone conversation took place between AMI and the contracting officer on or about December 23; the content of that conversation is at issue here. The agency maintains that the contracting officer informed AMI that its contract "would be amended to remove Good Housekeeping." Library's Rebuttal Response, Apr. 22, 2004 at exh. 1. AMI states that it was told only to stop work because the agency's consideration of the matter might result in the award going to PTBS. Both the agency and AMI have submitted affidavits to support their conflicting statements as to the conversation's content, and the record does not establish the accuracy of either.

Some 2 weeks after the telephone conversation, on January 7, 2004, AMI received an amendment/modification that terminated the *Good Housekeeping* portion of its contract. On January 13, AMI filed an agency-level protest regarding the termination and the Library's decision to award a contract for the *Good Housekeeping* work to PTBS, arguing that PTBS was not a nonprofit organization entitled to the preference. On February 24, the protester received the Library's denial of its protest, in which the Library stated that it had reviewed PTBS's nonprofit status and determined that the company was properly registered in Maryland as a nonprofit organization offering services for the blind, and as such qualified for the preference. AMI filed its protest with our Office on March 5.

Where a protest initially is filed at the agency level, any subsequent protest to our Office will be considered timely if it is filed within 10 calendar days of actual or constructive knowledge of initial adverse agency action, but only if the agency-level protest was filed within the time limits for filing a protest with our Office (unless the agency imposes a more stringent time for filing). Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (2004). Therefore, for our Office to consider AMI's protest the firm's

filing with the Library had to be within 10 days after AMI knew, or should have known, its basis for protest. 4 C.F.R. § 21.2(a)(2).

In our original decision dismissing the protest, we found that the late-December telephone conversation with the contracting officer provided AMI with sufficient information to protest the agency's action. Since AMI did not file its agency-level protest until January 13, more than 10 calendar days later, we determined that it was untimely, which precluded consideration of the subsequent protest here.

In requesting reconsideration, AMI claims that the late-December conversation conveyed to AMI only that PTBS had filed a complaint alleging that it should have received award after application of the 10-percent preference, and that the agency was imposing a stop-work order until a decision could be made, which would be made known to AMI at that time. According to AMI, it became aware that the agency had made a final determination to terminate the *Good Housekeeping* portion of AMI's contract only when it received the amendment/modification to that effect on January 7, and that the timeliness period therefore should commence on that date, making the January 13 agency protest timely.

Our original decision found that the stop-work order plus the contracting officer's explanation that application of the 10-percent preference could result in the contract going to PTBS gave AMI sufficient information to file a protest. On reflection, however, and in light of our rule that doubt as to when a protester became aware of its basis for protest should be resolved in favor of the protester, Metro Monitoring Servs., Inc., B-274236, Nov. 27, 1996, 96-2 CPD ¶ 204 at 4, we have decided that AMI should be given the benefit of the doubt about the content of the conversation with the contracting officer.

While the information given to AMI in late December clearly conveyed that the *Good Housekeeping* portion of its contract was in jeopardy, we are willing to assume, for purposes of determining timeliness of the subsequent protest, that the agency left AMI with reason to believe that a final determination had yet to be made. When a firm has been notified that the agency is considering taking an action adverse to the firm's interests, but has not made a final determination, the firm need not file a "defensive protest," since it may presume that the agency will act properly. See Haworth, Inc.; Knoll North America, Inc., B-256702.2, B-256702.3, Sept. 9, 1994, 94-2 CPD ¶ 98 at 4-5; Tamper Corp., B-235376.2, July 25, 1989, 89-2 CPD ¶ 79 at 2; Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23 at 6.

Since, for timeliness purposes, we have decided to resolve the doubt in favor of AMI's position that it was informed in the late-December conversation only that the agency was considering whether the *Good Housekeeping* portion of its contract should be terminated, and since AMI was aware of no final determination until notified of the amendment/modification on January 7, we reverse our prior decision as to the untimeliness of the January 13 agency-level protest, and we therefore will consider the merits of the protest subsequently filed in our Office.

The solicitation, at § C.1.3, informed vendors that, pursuant to the mandate of Public Law 89-522,¹ the Library's policy is to give "preference to nonprofit institutions whose activities are primarily concerned with the blind and other physically handicapped persons where bids submitted by such institutions are determined to be fair and reasonable." Section M.1.3. provided:

The Library reserves the right to give preference to nonprofit-making institutions or agencies whose activities are primarily concerned with the blind and with other physically handicapped persons, in all cases where the price or bids submitted by such institutions or agencies are under all the circumstances and needs involved determined to be fair and reasonable (for these purposes fair and reasonable means no greater than 10 percent higher than prices quoted by commercial sources), and if such organizations meet the requirements or the policy set forth in section C.1.3 in the preface to this invitation.

IFB § C.1.3 provided further that, in order to qualify for the preference, the institution or agency had to perform a minimum of 50 percent of the narration and cassette duplication activities, or it had to perform either the narration or the cassette duplication activities including mastering, packaging and shipping.

AMI argues that PTBS should not have qualified for the 10-percent preference because, according to AMI, PTBS is not a legitimate nonprofit entity within the meaning of the statute. AMI maintains that PTBS was created and is operated by a profit-making corporation that performs the same type of work, specifically for the purpose of being able to take advantage of the 10-percent preference. AMI argues that bidders should be required to possess Internal Revenue Service federal tax-exempt status under 26 U.S.C. § 501(c)² in order to qualify for the preference, and

¹ As IFB § C.1.1 pointed out, Public Law 89-522 requires the National Library Service for the Blind and Physically Handicapped to provide reading materials in recorded and braille formats to U.S. residents and U.S. citizens living abroad who are unable to use conventional print materials because of visual and physical limitations. The statute states that, in purchasing books, the Library "shall give preference to nonprofitmaking institutions or agencies whose activities are primarily concerned with the blind and with other physically handicapped persons, in all cases where the prices or bids submitted by such institutions or agencies are . . . under all the circumstances and needs involved, determined to be fair and reasonable." Public Law 89-522, July 30, 1966, 2 U.S.C. § 135a.

² Section 501(c) lists organizations that, according to § 501(a), are exempt from federal income taxation.

that since PTBS does not have § 501(c) status, it should not have been afforded the preference.

The Library points out that PTBS is registered in the State of Maryland as a not-for-profit corporation, and that its Articles of Incorporation state that it was “organized and operated exclusively for literary and educational purposes, for the audio recording of books and other audio services for the blind.” Agency Report, exh. 10. The Library argues that PTBS therefore qualifies for the preference under the IFB. (The record also contains PTBS’s bid certification that it will meet the requirements of IFB § C.1.3. Agency Report, exh. 12.) The Library maintains that its position regarding “nonprofit,” as used in its IFB and the underlying statute, is a reasonable one that it has applied for many years. It argues that there is no single definition for “nonprofit” organization, that it is defined differently by different sources for different purposes, and that it does not necessarily imply or include federal tax-exempt status. The Library claims that it has never, at least in the 30-year memory of long-term employees, required a bidder alleging nonprofit status for purposes of the preference to possess § 501(c) status.

An agency’s interpretation of a statute that it is responsible for implementing is entitled to substantial deference, and should be upheld if it is reasonable. Appalachian Council, Inc., B-256179, May 20, 1994, 94-1 CPD ¶ 319 at 16. Therefore, we will not question an agency’s implementation of statutory procurement requirements unless the record shows that the implementation was unreasonable or inconsistent with congressional intent. HAP Constr., Inc., B-280044.2, Sept. 21, 1998, 98-2 CPD ¶ 76 at 4. Where a statute does not specify a particular way to give a provided preference to a class of potential contractors, agency acquisition officials have broad discretion in selecting the way to effectuate the statutory mandate. See id.

We have no basis to conclude that the Library’s position is unreasonable or inconsistent with congressional intent.

As is evident from the above, neither the statute nor the solicitation defines “nonprofit” for purposes of an evaluation preference. Moreover, as the Library correctly asserts, the term “nonprofit” has no single meaning, and we see no legal basis to conclude that for purposes of the preference in issue here the term necessarily is defined by § 501(c) status. For example, while the Federal Acquisition Regulation (FAR) governs only executive agency procurements, FAR § 1.101, and therefore is not controlling as to the procurements of legislative agencies such as the Library, it nevertheless is instructive as to the different definitions of “nonprofit organization” that are used in government. FAR § 31.701, which pertains to cost principles in contracts between the government and nonprofit organizations, provides a definition of “nonprofit organization” that includes § 501(c) status. However, FAR § 27.301 provides that, for purposes of FAR Subpart 27.3, “Patent Rights Under Government Contracts,” “nonprofit organization” means (1) “a university or other institution of higher education;” or (2) an organization exempt

from federal income taxation under § 501(c) of the Internal Revenue Code; or (3) “any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.” Since PTBS would meet the third definition under FAR § 27.301, it presumably would be considered a “nonprofit organization” for purposes of that section, irrespective of whether its lack of § 501(c) status would preclude it from being considered a “nonprofit organization” under FAR § 31.701.³

Further, our review of the legislative history of Public Law 89-522, H.R. Rep. No. 1600 (Committee on House Administration) and S. Rep. No. 1343 (Committee on Rules and Administration), discloses no reference to federal tax-exempt status, or language or discussion that otherwise would lead us to conclude that § 501(c) status is needed in order to receive the “nonprofit” evaluation preference.

In sum, AMI’s protest provides no legal basis for our Office to object to the Library’s decision that PTBS qualifies for the 10-percent preference in this procurement; we consequently have no reason to object to the corrected award. We reverse our prior dismissal with respect to the timeliness of AMI’s challenge, but we deny the merits of the protest.⁴

Anthony H. Gamboa
General Counsel

³ The Library also notes other definitional examples that do not reference federal tax status. See Agency Report at 8.

⁴ In its comments on the agency report, AMI raises two new arguments: (1) that PTBS is not a nonprofit “institution” or “agency” as those terms are used in the statute and the IFB, and (2) that the FAR § 31.701 definition of “nonprofit organization” which, as noted above, includes § 501(c) status, should control since the FAR governs most federal procurements. We will not address these arguments in this decision, however, since they could have been, but were not, raised by AMI in its initial protest, and therefore are untimely. See Dismas Charities, Inc., B-289575.2, B-289575.3, Feb. 20, 2004, 2004 CPD ¶ 66 at 3-4.