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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Maryland State Department of Education

File: B-400583; B-400583.2

Date: November 7, 2008

Elliott L. Schoen, Esq., and Lauri A. McGuire, Esq., State of Maryland, Office of the Attorney General, for the protester.

Lt. Col. James A. Lewis, Department of the Army, and Jeff Rosen, Esq., Department of Education, for the agencies.

Katherine I. Riback, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Government Accountability Office will not consider protest by state licensing agency (SLA) challenging the elimination of its proposal from the competitive range under a solicitation issued pursuant to the Randolph-Sheppard Act (RSA) because mandatory binding arbitration procedures by the Department of Education are provided for under the RSA to resolve the SLA's complaint.

DECISION

The Maryland State Department of Education (MSDE) of Baltimore, Maryland protests the elimination of its proposal from consideration under request for proposals (RFP) No. W91QF6-07-R-0007, issued by the Department of the Army for food services at Fort Meade, Maryland.

We dismiss the protest.

The RFP noted that this procurement would be conducted pursuant to the Randolph-Sheppard Act (RSA), which establishes a priority for blind persons recognized and represented by state licensing agencies (SLA) under the terms of the RSA, in the award of contracts for, among other things, the operation of cafeterias in federal buildings. 20 U.S.C. § 107 (2000); 34 C.F.R. § 395.33(a) (2008). Thus, while the RFP generally provided for the procurement to be set aside for small businesses, it indicated that the designated SLA would also be able to submit a proposal. RFP at 132. Under the RSA's implementing regulations, if a designated SLA submits an offer found to be within the competitive range for the acquisition, award must

generally be made to the SLA. 34 C.F.R. § 395.33(b); Army Regulation 210-25 ¶ 6.b(1)(b) (June 30, 2004). The only evaluation factors in the RFP were past performance and price. The RFP stated “the competitive range will be determined based on the evaluation factors set forth in this section and will include all of the most highly rated proposals.” RFP at 129.

Three proposals were submitted to the agency in response to the RFP, including that of the protester, the designated SLA. The agency determined that all three offerors had a past performance rating of “low risk.” MSDE’s offered price was higher than the independent government estimate and significantly higher than the prices submitted by the other two offerors. Consequently, the agency concluded that the MSDE’s price was unreasonably high, and for this reason MSDE’s proposal was not included in the competitive range. Protest attach. 1, Army Letter to MSDE (Sept. 4, 2008); Army Submission to GAO (Oct. 10, 2008) at 3. This protest followed.

MSDE protests the elimination of its proposal from the competitive range because of its high price. MSDE also contends that the agency, in evaluating proposals, did not determine whether the offerors’ proposals were in compliance with the Service Contract Act (41 U.S.C. §§ 351 et seq.), unreasonably determined that the past performance of the competitive range offerors was equal to MSDE’s, and allowed a potential offeror a site visit after the designated site visit.

The Army requests dismissal of the protest on the basis that the authority for administering the requirements of the RSA—and specifically for resolving disputes between SLAs and contracting agencies—has been placed with the Secretary of Education and the mandatory binding arbitration established by the Department of Education. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37(a). In this regard, the Army notes that our Office has consistently dismissed protests by SLAs for this reason. See, e.g., Washington State Dept. of Servs. for the Blind, B-293698.2, Apr. 27, 2004, 2004 CPD ¶ 84; Mississippi State Dept. of Rehabilitation Servs., B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 3.

MSDE maintains that our Office should consider its protest here because the protest does not allege a violation of the RSA, but involves “standard procurement issues that have been addressed by GAO numerous times in protest decisions and are independent of the application of the RSA.” Protest at 14. In support of its contention that our Office should take jurisdiction in this matter, the SLA references a 2005 decision of the Court of Appeals for the Federal Circuit in Kentucky, Educ. Cabinet, Dept. for the Blind v. U.S., 424 F.3d 1222 (Fed. Cir. 2005), which addressed this issue.

The RSA has the stated purpose of “providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting.” 20 U.S.C. § 107(a). The RSA directs the Secretary of Education to designate state agencies responsible for training and licensing blind persons, and provides that “[i]n

authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency.” 20 U.S.C. § 107(b). For purposes of the instant case, the RSA includes cafeterias and snack bars within the definition of a “vending facility.” 20 U.S.C. § 107e(7). With respect to the operation of cafeterias at federal facilities, the Act directs the Secretary of Education to issue regulations to establish a priority for blind licensees whenever “such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.” 20 U.S.C. § 107d-3(e).

Pursuant to this authority, the Secretary of Education has promulgated regulations addressing the RSA’s requirements. Among the matters covered by these regulations are rules governing the relationship between the SLAs and blind vendors, rules for becoming a designated SLA within the meaning of the Act, procedures for the oversight of SLAs by the Secretary, and rules governing the relationship between SLAs and other federal government agencies. 34 C.F.R. Part 395.

With respect to disputes between SLAs and federal agencies, both the statute and the regulations provide for the filing of complaints with the Secretary, which are then resolved by binding arbitration. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37. Specifically, the regulation, which tracks closely the language of the statute, provides:

Whenever any [SLA] determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary.

34 C.F.R. § 395.37(a). An arbitration panel would then be established to resolve such SLA complaints, whose decision would be “final and binding,” subject to appeal and review. 34 C.F.R. § 395.37(b).

As indicated above, the regulations issued by the Department of Education (DOED) implementing the RSA provide for SLAs to submit proposals for cafeteria services on solicitations that “establish criteria under which all responses will be judged” and “[i]f the proposal received from the [SLA] is judged to be within a competitive range and has ranked among those proposals which have a reasonable chance of being selected for final award,” the SLA should generally be selected to provide the cafeteria services. 34 C.F.R. § 395.33(b); Army Regulation 210-25 ¶ 6.b(1)(b). The regulation issued by the DOED further provides that “[i]f the [SLA] is dissatisfied with an action taken relative to its proposal, it may file a complaint with the Secretary” under the binding arbitration provisions of 34 C.F.R. § 395.37. 34 C.F.R. § 395.33(b).

As stated above, we have interpreted the RSA and its implementing regulations as vesting authority with the Secretary of Education regarding SLA complaints concerning a federal agency's compliance with the RSA, including challenges to agency decisions to reject or not include SLA proposals in the competitive range. Washington State Dept. of Servs. for the Blind, supra; Mississippi State Dept. of Rehabilitation Servs., supra. In our view, this meant that such complaints are subject to the RSA's binding arbitration provisions. Washington State Dept. of Servs. for the Blind, supra. Our view in this regard is consistent with the stated purpose of the arbitration process, as set forth in the preamble to the regulations issued to govern the arbitration process: "It is expected that when [an SLA] is dissatisfied with an action resulting from its submittal of a proposal for the operation of a cafeteria, it will exercise its option to file a complaint with the Secretary."¹ 42 Fed. Reg 15,802, 15,809 (1977). Our position also reflects our more general view that where, as here, Congress has vested oversight and final decision-making authority in a particular federal official or entity, we will not consider protests involving issues subject to review by that official or entity. Washington State Dept. of Servs. for the Blind, supra; see, e.g., High Point Sec., Inc.—Recon. and Protest, B-255747.2, B-255747.3, Feb. 22, 1994, 94-1 CPD ¶ 169 at 2 (determinations by the Small Business Administration under the certificate of competency program pursuant to 15 U.S.C. § 637(b)(7)) (2000); ARA Envtl. Servs., Inc., B-254321, Aug. 23, 1993, 93-2 CPD ¶ 113 at 2 (protest of award under the Javits-Wagner-O'Day Act, 41 U.S.C. §§ 46-48c) (2000).

Here, the MSDE argues that it should not be required to use the arbitration procedure outlined above because the Court of Appeals for the Federal Circuit found in Kentucky, Educ. Cabinet, Dept. for the Blind v. U.S., 424 F.3d 1222 (Fed. Cir. 2005), that the authority of the DOED to arbitrate complaints by state agencies applies to "only those complaints that allege a violation of the RSA or its attendant

¹ We believe that our view is also consistent with the congressional intent as reflected in the legislative history of the 1974 amendments to the Act, which established the arbitration procedure. In this regard, a Senate report on the bill declared that:

It is the expectation of the Committee that the arbitration and review procedures adopted in S. 2581 will provide the means by which aggrieved vendors and State agencies may obtain a final and satisfactory resolution of disputes. It is not anticipated that these mechanisms will be used with great frequency, and it is expected that the Secretary will refuse to convene an arbitration panel if, in his reasoned and documented opinion, a complaint is specious or has been brought solely for the purpose of harassment.

S. Rep. No. 937, 93d Cong., 2d Sess. 20 (1974).

regulations.” Id. at 1225. Because MSDE here protests only the Army’s determination that MSDE’s proposed price was “unreasonable and outside the competitive range,” as well as other violations of procurement regulations, and does not specifically allege a violation of the RSA, the protester contends that our Office should assume jurisdiction of its protest.

We solicited the views of the DOED regarding this matter. A representative of the Office of General Counsel of that agency expressed the view, based on its review of the protest pleadings filed by the protester and the Army, that because MSDE did not specifically contend that there was a violation of the RSA or its implementing regulations, “in a manner consistent with the Kentucky case, we believe that this issue is not appropriate to be handled through arbitration under the [RSA].” DOED Letter to GAO (Oct. 10, 2008).

While we recognize the arguments in favor of our taking jurisdiction, we conclude, for the reasons set out below, that dismissal is appropriate.

The key question for our Office is whether the Federal Circuit’s decision in the Kentucky case warrants abandoning our settled case law in this area. MSDE points, appropriately, to language in that decision that emphasizes the limits of the scope of arbitration under the SRA:

Arbitration, however, was not meant to cover every complaint by a state licensing agency concerning the procurement of vending services. Congress enacted the arbitration provisions to fill a gap in the existing statutory scheme, under which vendors and state licensing agencies could bring claims based on a breach of contract or a violation of other federal procurement provisions, but could not bring a claim arising under the RSA. [citation omitted] Congress specifically sought to fill that gap in a targeted fashion, covering only claims alleging a failure to comply with the RSA. There is no reason to believe that Congress meant to funnel every complaint by a state licensing authority against a federal agency into arbitration, thus duplicating remedies that the failed bidders already had against the government. The Senate report on the arbitration provisions noted that “[i]t is not anticipated that these [arbitration] mechanisms will be used with great frequency.” S.Rep.No. 93-937, at 20. Congress had that expectation because it intended that the arbitration provisions would be triggered only if the state licensing agency alleged a violation of the RSA, and not in the case of other, more common allegation such as a breach of contract or a violation of government procurement provisions.

Id. at 1226.

Because of the facts—and the outcome—of the Kentucky case, we conclude that the court’s decision does not weigh against dismissal of the protest before our Office

here. Specifically, as in the present protest, in the Kentucky case, the SLA (the Kentucky Department for the Blind) protested to our Office that its proposal was improperly excluded from the competitive range because the contracting agency had determined that its price was too high as compared to the proposals found to be in the competitive range. On May 4, 2004, we dismissed this protest in an unpublished decision, consistent with our prior precedent, stating that we “will not review issues that go to the question of whether the SLA should have been included in the competitive range, because such issues ultimately challenged whether agency’s actions improperly denied the SLA the priority required under the statutes and regulations, and therefore must be resolved through the [RSA] arbitration process.”

The Kentucky SLA then took its protest to the Court of Federal Claims, which also declined to consider the SLA’s complaint concerning its elimination from the competitive range because the SLA had not exhausted the RSA’s mandatory arbitration process provided for SLA complaints. Kentucky, Educ. Cabinet, Dept. for the Blind v. United States, 62 Fed. Cl. 445 (2004). The Court of Federal Claims found that the arbitration process was mandatory for the SLA’s complaint about its exclusion from the competitive range because the matter of the SLA’s exclusion from the competitive range could not be said to be a procurement issue separate from the RSA. In so doing, the Court of Federal Claims also observed, “[i]t is doubtful, however, whether procurement award issues exist that are truly independent of the Act,” and that the “very broad language” of the RSA’s arbitration provisions “encompasses all federal agency actions that have a reasonable nexus to the Act, which beyond a doubt would include a challenge to any agency decision to reject a proposal in response to a solicitation involving (in the term of the Act) the ‘operation’ of a vending facility.” 62 Fed. Cl. at 462.

The Kentucky SLA appealed to the Court of Appeals for the Federal Circuit, and it is the Federal Circuit’s decision that the MSDE is relying on before us in the instant protest. We recognize, of course, that the Federal Circuit’s decision included the language quoted above with respect to the limited scope of the arbitration process. More importantly, however, the Federal Circuit affirmed the decision of the Court of Federal Claims that the court lacked jurisdiction to consider the Kentucky SLA’s complaint because the SLA had not exhausted the mandatory administrative remedy, that is, the RSA binding arbitration provisions. Kentucky, Educ. Cabinet, Dept. for the Blind v. United States, 424 F.3d at 1229. The Federal Circuit found that the SLA’s complaints about its exclusion from the competitive range also included contentions that the exclusion violated the RSA and related regulations, given that the SLA’s proposal’s inclusion in the competitive range would have resulted in the SLA receiving priority for award under the competition, so that the SLA’s complaint was required to be resolved under the RSA’s binding arbitration provisions. Id. at 1227. The parallel with the instant protest is so close that we believe that the outcome in the Kentucky case—dismissal—is appropriate here as well.

We recognize that the MDSE’s protest did not specifically assert a violation of the RSA or its implementing regulations. Indeed, the protest does not mention the RSA

except to argue that the protest is not alleging a violation of the Act. Our jurisdiction, however, should turn on the substance of a challenge to a procurement action, not the form or language in which it is couched. Notwithstanding the careful wording used by the MDSE here, the resolution of its protest of the SLA's exclusion from the competitive range has specific consequences set forth in the RSA's implementing regulations, which provide that the SLA would generally receive the award if its proposal were included in the competitive range. 34 C.F.R. § 395.33(b); Army Regulation 210-25 ¶ 6.b(1)(b). In this regard, we note the striking similarity between the contention at the heart of MDSE's protest here and that of the SLA in the Kentucky case, that is, that the Army unreasonably eliminated the SLA's proposal from the competitive range because its price was determined to be too high in relation to the competitive range proposals.² Faced with the similar facts and the similar challenge, the Federal Circuit found that the SLA in Kentucky was required to submit its complaint to the administrative remedy of binding arbitration, and affirmed that the Court of Federal Claims therefore did not have jurisdiction over the SLA's complaint. We believe that the approach endorsed by the Federal Circuit in the Kentucky case, dismissal of a protest challenging an SLA's proposal's exclusion from a competitive range, is appropriate here as well. This is because we find, contrary to the contentions of the MDSE and the DOED,³ that the protest implicates a potential violation of the RSA and its implementing regulations through the Army's allegedly improper elimination of the SLA's proposal from the competitive range, given that if that proposal were in the competitive range, the RSA's implementing regulations would provide for the SLA to receive the award.

The protest is dismissed.

Gary L. Kepplinger
General Counsel

² While we recognize that MDSE's protest includes allegations about the other proposals included in the competitive range, these relate to the assertion that the Army improperly eliminated MDSE's proposal from the competitive range.

³ Although we have considered DOED's interpretation of the Federal Circuit's decision, we do not agree that it requires our Office to consider this protest. We note in this regard that DOED does not state that it would not consider a complaint from the MDSE under its mandatory arbitration procedures and in fact it appears that challenges by SLAs relating to the exclusion of an SLA from the competitive range that involve procurement related issues have been considered under DOED's RSA arbitration procedures. See Alabama Dept. of Rehabilitation Servs. v. United States Dept. of Defense, Randolph-Sheppard Arbitration Panel Decision, Nov. 16, 1998, 65 Fed. Reg. 26,591 (2000); Mississippi Dept. of Rehabilitation Servs. v. United States Dept. of Defense, Department of the Air Force, Randolph-Sheppard Arbitration Panel Decision, June 11, 1996, 62 Fed. Reg. 40,509 (1997).