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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Tiger Enterprises, Inc.

File: B-292815.3; B-293439

Date: January 20, 2004

Monty Mauldin and Lillian K. Mauldin, for the protester.
Julius Rothlein, Esq., and A. Neil Stroud, Esq., U.S. Marine Corps, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, 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

Where the awardee was found by the Small Business Administration to be other than small based on a timely size protest filed after award on a small business set-aside, and this determination was not appealed, the agency, in the absence of legitimate countervailing reasons, should have terminated the contract and obtained these services from a small business.

DECISION

Tiger Enterprises, Inc. protests the decision of the U.S. Marine Corps (USMC) to continue performance of contracts awarded to Tarheel Specialties, Inc. under request for quotations (RFQ) No. M67001-04-Q-0001, issued as a small business set-aside, for the lease and maintenance of washers and dryers at Camp Lejeune, North Carolina. Tiger contends that Tarheel was ineligible for award because it was a large business.

We sustain the protests.

In anticipation of the expiration of the USMC's contract for these services with Block's Management Company (a large business) on October 31, 2003, the agency issued a solicitation on July 22 as a small business set-aside. Five proposals, including Tiger's and Tarheel's, were submitted by the August 15 closing date in response to the solicitation. On August 28, the agency made award to Tarheel.¹ On

¹ It has been alleged by Tiger that Tarheel and Block's are essentially the same entity.

September 1, Tiger filed a timely size protest against Tarheel with the Small Business Administration (SBA), which was subsequently joined by the contracting officer. Tiger's protest was dismissed by SBA on September 15 because it was determined not to be an interested party. The contracting officer subsequently determined that the solicitation contained the incorrect North American Industrial Classification System (NAICS) code and corresponding size standard, and therefore terminated Tarheel's contract for convenience and cancelled the solicitation on September 25.

The agency then engaged in negotiations with the incumbent contractor, Block's, to extend its contract. According to the USMC, these negotiations were unsuccessful and Block's reiterated its intention to remove the machines provided under its contract by the October 31 expiration date.

On October 8, the contracting officer executed a justification and approval (J&A) to obtain the services under other than full and open competition, based on a finding that the agency's need for the services was of an unusual and compelling urgency, pursuant to 10 U.S.C. § 2304(c)(2) (2000). The J&A stated that "[t]he loss of laundry capabilities will significantly impact and degrade their overall health, welfare, and quality of life, thereby, impeding the mission of the Marine Corps." The J&A further stated that this requirement would be synopsized, and full and open procedures utilized, when the contracting activity was not operating under "urgent time restraints." Agency Report (AR), Tab AA, J&A.

On that same day, the agency issued this RFQ to the three firms that had submitted proposals under the previous solicitation, including Tarheel and Tiger. The RFQ contemplated the award of two fixed-price requirements contracts (one for each of two locations) for base periods of 11 months with three 1-year options. The RFQ was set aside for small business concerns and included the appropriate NAICS code and corresponding size standard. Quotations were originally due on October 10, 2 days after the RFQ was issued.² Prior to that time, Tiger protested that this acquisition should not be conducted on an urgency basis and that the timeframe for submission of quotations was insufficient. In response to the protest, the agency extended the due date to October 15. On October 13, Tiger renewed its protest that this acquisition should not be conducted on an urgency basis and that this urgency was intended to allow for award to Tarheel, even though that firm was a large business.

² On October 10, an SBA Procurement Center Representative (PCR) objected to the "piecemeal actions" taken by the USMC to "rush" the contract award, and instead advocated extending the contract with Block's, and issuing a "well-thought out" solicitation that was set aside for small businesses. AR, Tab AF, SBA's PCR E-mail (Oct. 10, 2003).

Three vendors, including Tarheel and Tiger, submitted five quotations in response to the RFQ. Tarheel's lowest-priced, technically acceptable quotation was selected for award. On October 15, the head of the contracting activity made a determination to make award, notwithstanding the protest, based on urgent and compelling circumstances, and award was made to Tarheel on October 16, 2003. Tarheel is currently performing the contract work.

On October 20, Tiger filed a timely protest with the SBA challenging Tarheel's size status. The contracting officer joined this protest on October 29. On December 2, the SBA issued its formal size determination finding Tarheel to be other than small. On December 5, Tiger protested to our Office, challenging the award and the continued performance under this small business set-aside by Tarheel, because the SBA had found Tarheel to be other than small.

Upon receipt of the size determination, on December 3, the contracting officer suspended performance of Tarheel's contracts, and on December 8 the USMC issued a notice to Tarheel to show cause why the contracts should not be terminated for cause due to its false size certification. On December 12, Tarheel responded to the show cause notice arguing that its certification had been made in good faith. Based on the contracting officer's review of Tarheel's submission, she determined that there was insufficient evidence to terminate Tarheel's contracts for cause or to further suspend contract performance. Tarheel was informed by the agency on December 18 that the stop work order was rescinded, that it was expected to proceed with performance for the base period of the contracts, and that "[p]erformance under the option periods [would] be determined at a later date." USMC Letter to Tarheel (Dec. 18, 2003).

On December 22, the USMC notified our Office that it did not intend to disturb the award to Tarheel because "the evidence [did] not support a finding of bad faith" on Tarheel's part in making its size status certification (citing Kleen-Rite Corp., B-184313, Apr. 26, 1976, 76-1 CPD ¶ 279). The USMC advised our Office that it would allow Tarheel to perform the base period of the contracts, but that it would not exercise any options.

We requested and received an SBA report on Tiger's protests. SBA recommended that we sustain Tiger's protests and recommend termination of Tarheel's contracts because, according to SBA regulations, "[a] formal size determination becomes effective immediately and remains in full force unless and until reversed by OHA [Office of Hearings and Appeals]."³ 13 C.F.R. § 121.1009(g) (2003). SBA's regulations also provide that "[a] timely filed protest applies to the procurement in question even though a contracting officer awarded the contract prior to receipt of the protest."

³ SBA has conclusive authority to determine the size status of businesses for all government procurements. See 15 U.S.C. § 632(a)(2) (2000).

13 C.F.R. § 121.1004(c). Both Tiger and SBA argue that there are no reasons that would justify allowing Tarheel to continue performing these contracts until September 30, 2004. We agree.

We previously have found, in circumstances such as these, where a timely size protest has been filed, there is no appeal of the SBA's size ruling, and there are no countervailing circumstances that would weigh in favor of allowing the large business concern to continue performance, that termination of the awardee's contract is appropriate. Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56; Diagnostic Imaging Tech. Educ. Ctr., Inc., B-257590, Oct. 21, 1994, 94-2 CPD ¶ 148 at 2-3. In the absence of countervailing reasons, we view it as inconsistent with the integrity of the Small Business Act, 15 U.S.C. §§ 631-657a, for an agency to permit a large business, which was ineligible under the terms of the solicitation, to continue performance. Adams Indus. Servs., Inc., *supra*.

The record shows that in the present circumstances, all of these conditions are met. First, although Tiger filed its size status protest after award, it could not have done otherwise because simplified acquisition procedure acquisitions do not require the agency to issue a pre-award notice to unsuccessful vendors, and none was issued here. See Federal Acquisition Regulation (FAR) § 13.106-3(c). Because the size protest was filed within 5 days of Tiger receiving notice from the USMC of the awards to Tarheel, Tiger's protest was timely under SBA's size status regulations. 13 C.F.R. § 121.1004(a)(2). Moreover, a contracting officer's size protest is always timely. 13 C.F.R. § 121.1004(b). Second, according to SBA, Tarheel has not appealed the SBA's size determination.

Third, there are no countervailing reasons that would justify allowing Tarheel to perform these contracts until September 30, 2004. The J&A, prepared by the agency based on urgency, does not discuss why an 11-month base period of the award was required. As noted by Tiger and SBA, an urgency justification cannot support the procurement of more than a minimum quantity or time period needed to satisfy the immediate urgent requirement.⁴ See Signals & Sys., Inc., B-288107, Sept. 21, 2001, 2001 CPD ¶ 168 at 12; Tri-Ex Tower Corp., B-239628, Sept. 17, 1990, 90-2 CPD ¶ 221 at 5. While the USMC states that termination of the contracts is impractical due to the substantial performance of the contracts,⁵ it has not explained why that should be the case, given the apparent availability of other sources for these relatively mundane services, such as the two other vendors (including Tiger), who responded

⁴ For this reason, and as apparently recognized by the USMC, the options for the subsequent years should not have been included in this solicitation.

⁵ On the other hand, the agency's show-cause notice indicates that the agency believes that these services could be obtained from another firm, even if Tarheel's contracts were terminated.

to the RFQ.⁶ We also note that, pending a competition conducted under full and open competition, the interim requirement for the services can be quickly satisfied from small businesses, as is evidenced by the expeditious matter in which the competition under this RFQ was conducted.⁷

The protests are sustained.

We recommend that the contracts awarded to Tarheel be terminated as soon as feasible, and that the agency obtain the services under a small business set-aside. We also recommend that the protester be reimbursed the reasonable costs of filing and pursuing the protests. 4 C.F.R. § 21.8(d)(1) (2003). The protester's certified claim for costs, detailing the time spent and costs incurred, must be submitted to the agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

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⁶ In contrast, in Resource Applications, Inc., B-271079.6, Aug. 12, 1996, 96-2 CPD ¶ 61 at 4-5, we did not recommend termination of an award under a small business set-aside, notwithstanding SBA's adverse determination in response to a timely size protest, because there was no other offeror eligible for award, and the agency demonstrated that it had a continuing, urgent need for the services.

⁷ As noted above, the agency cites Kleen-Rite Corp., *supra*, for the proposition that termination for convenience is not required where the agency is satisfied that the firm, which is ultimately found to be large, did not certify its size status in bad faith. This decision is not applicable here. The SBA regulations have significantly changed since the Kleen-Rite decision was issued in 1976. Moreover, unlike the present situation, which involves an initial SBA area office size determination, Kleen-Rite involved a situation where the area office had found the firm small and it was only on appeal that it was determined to be other than small; under the currently applicable regulations, an appellate size determination does not apply to the procurement in question unless it is received before award. FAR § 19.302(i); Jensco Marine, Inc., B-278929.7, Feb. 11, 1999, 99-1 CPD ¶ 32 at 4.