



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Jenco Marine, Inc.

File: B-278929.7

Date: February 11, 1999

James M. Jacobs for the protester.

John A. Douglas, Esq., for General Offshore Corporation, an intervenor.

Arthur I. Rettinger, Esq., and William P. McGinnies, Esq., U.S. Customs Service, for the agency.

David R. Kohler, Esq., and Kenneth Dodds, Esq., for the Small Business Administration.

Adam Vodraska, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency's failure to give notice to unsuccessful offerors of an impending small business set-aside award prior to the actual award provides no basis for disturbing the award where the protester was not prejudiced by this procedural deficiency because it was able to file a timely size status protest with the Small Business Administration (SBA), which determined the awardee to be a small business concern. Although, on appeal, the SBA's Office of Hearing and Appeals (OHA) reversed the size determination, finding the awardee to be other than a small business due to its affiliation with a large business, such OHA rulings received after award do not apply to that acquisition and the protester has not shown that, even if the agency had provided the required pre-award notice, the agency would likely have been precluded from awarding the contract pending the issuance of the OHA ruling.

DECISION

Jenco Marine, Inc. protests the award of a contract to General Offshore Corporation under request for proposals (RFP) No. CS-97-012, issued as a total small business set-aside by the U.S. Customs Service, Department of the Treasury, for marine vessel maintenance.

We deny the protest.

BACKGROUND

Customs operates a fleet of marine vessels located throughout the United States engaging in drug interdiction and other law enforcement activities. The RFP, issued

on February 26, 1997, is for marine vessel maintenance and related services and equipment in connection with this marine enforcement program. The RFP contemplated the award of a cost-plus-fixed-fee contract for a base period, with four option periods, to the offeror whose proposal represented the best value to the government, certain technical factors and cost/price considered.

Seven proposals were received in response to the RFP by the July 31, 1997 closing date. Each offeror self-certified its eligibility for award as a small business concern. Based on the initial evaluation, five offerors' proposals were included in the competitive range: those of Jensco, General Offshore, WHECO Corporation, MAR, Inc., and Seaward Services. Following discussions and the receipt of best and final offers, the agency found the proposals to be technically equal. The agency's source selection official determined that General Offshore's proposal represented the best value on the basis of its lower evaluated cost/price. Customs awarded the contract to General Offshore on June 12, 1998, and notified the other unsuccessful offerors of the award 3 days later, on June 15.

Jensco, MAR, and Seaward filed timely size protests with the contracting officer on June 17, alleging that General Offshore was ineligible for award because it was not a small business. The following day, the contracting officer referred the size protests to the cognizant regional office of the Small Business Administration (SBA), which has conclusive authority to determine matters of small business size status for federal procurement. See 15 U.S.C. § 637(b)(6) (1994). Concurrently with the size protests, Jensco, MAR, and WHECO filed timely bid protests in our Office against the award of the contract to General Offshore on various grounds involving the agency's evaluation of proposals and resulting source selection decision. Based on the timely filing of the bid protests in our Office, Customs stayed performance of the awarded contract, as required by 31 U.S.C. § 3553(d)(3)(A) (1994).

On July 10, the SBA regional office issued a size determination which concluded that General Offshore was a small business as of the date of its self-certification, and was thus eligible for award. Jensco timely appealed the size determination to the SBA's Office of Hearings and Appeals (OHA) on July 23.

Two months later, our Office denied the bid protests, including the bid protest filed by Jensco, in Mar, Inc. et al., B-278929.2 et al., Sept. 28, 1998, 98-2 CPD ¶ 92. We found that Customs properly made award to General Offshore in accordance with the evaluation scheme set out in the RFP. Id. at 10. On September 29, based on our disposition of the bid protests, Customs authorized General Offshore to commence the transition phase of the contract. On October 23, General Offshore began performance under the contract.

On October 27, the OHA reversed the size determination of the SBA regional office, concluding that General Offshore was not an eligible small business because of its affiliation with a large business minority shareholder (a subsidiary of Cable and

Wireless (Marine)), an undisputed large business. Based on the OHA decision, Jensco requested Customs to terminate the contract with General Offshore and make award to Jensco, which would be next in line for award based on its price. Customs, however, did not disturb the award to General Offshore and Jensco filed this protest in our Office on November 3.

ANALYSIS

Jensco asserts in its protest that the agency's failure to provide it prior written notice of the award was improper, and that it resulted in circumvention of the small business size status procedures by precluding the firm from obtaining the remedy contemplated under those procedures, namely, prohibition of award of a contract to a business that is ineligible for award under a small business set-aside. Specifically, Jensco maintains that it was prejudiced because it was denied the opportunity to submit a timely pre-award size protest so that the subsequent OHA determination, when rendered, would apply to this procurement. Accordingly, Jensco states that the appropriate remedy is termination of General Offshore's contract and award to Jensco.

Under Federal Acquisition Regulation (FAR) § 15.503(a)(2) (formerly § 15.1003(a)(2) (June 1997)), in a small business set-aside, except where the contracting officer determines in writing that the urgency of the requirement necessitates award without delay, the contracting agency is required to inform each unsuccessful offeror in writing, prior to award, of the name and address of the apparent successful offeror, in order to permit challenges of the small business size status of that offeror. Generally, small business size status protests may be filed by an offeror within 5 days of the written notification. FAR § 19.302(d)(1); 13 C.F.R. § 121.1004(a)(2) (1998). After receiving a timely size protest, the contracting officer generally must withhold award of the contract until the SBA has made a size determination, or until 10 business days have elapsed since the SBA's receipt of the size protest, whichever occurs first. FAR § 19.302(h)(1).

Here, the agency's failure to notify Jensco of the award until after it had been made clearly was contrary to the FAR requirements. However, such a failure to provide pre-award notice is only procedural in nature and we will not sustain a protest of an agency's failure to comply with this pre-award notification requirement absent prejudice to the protester. See FKW Inc. Sys.; ColeJon Mechanical Corp., B-235989, B-235989.2, Oct. 23, 1989, 89-2 CPD ¶ 370 at 7; Automation Management Consultants, Inc., B-231540, Aug. 12, 1988, 88-2 CPD ¶ 145 at 4-5.

We conclude that Jensco was not prejudiced by the fact that it did not receive pre-award notice of the contract award, since it was able to file a timely size protest with the SBA, which was denied by the regional office. Such a size determination "becomes effective immediately and remains in full force and effect unless and until reversed by OHA." 13 C.F.R. § 121.1009(g)(1). Although the regional office's

determination was later reversed by OHA, Customs was not required by the FAR or SBA regulations to withhold award or performance on the contract while waiting for the appeal process to be completed. McCaffery & Whitener, Inc., B-250843, Feb. 23, 1993, 93-1 CPD ¶ 168 at 5; Verify, Inc., B-244401.2, Jan. 24, 1992, 92-1 CPD ¶ 107 at 5.

The OHA's reversal of the regional office's earlier size determination likewise does not require termination of the contract with General Offshore. There is no requirement that an agency terminate an award made on the basis of an SBA regional office size determination in circumstances where SBA later determines that the regional office was in error and the awardee is not a small business concern. FAR § 19.302(i) ("[OHA] rulings received after award shall not apply to that acquisition"); Valley Constr. Co., B-234292, Feb. 8, 1989, 89-1 CPD ¶ 130 at 2, aff'd, B-234292.2, Mar. 2, 1989, 89-1 CPD ¶ 227; Ultra Tech. Corp., B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42 at 7-8. Despite the fact that in this case the award was made before the initial size determination, the result is the same and termination of the contract is not required. McCaffery & Whitener, Inc., *supra*.

The SBA argues that, although Jensco was able to file a timely post-award size status protest, the failure of Customs to provide the pre-award notice, and its premature award of the contract, may have been prejudicial to Jensco because Jensco was thereby denied the opportunity to file a bid protest in our Office of the proposed award, which, under 31 U.S.C. § 3553(c)(1), would have precluded Customs from awarding the contract while the protest was pending. According to SBA, "[i]f there were a pre-award protest at GAO that stayed award pending a GAO decision, OHA may well have expedited its review of the size appeal and decided it before GAO decided the protest before it [on September 28]." SBA Dec. 11, 1998 Comments at 3. The OHA decision would thus have applied to this procurement under FAR § 19.302(i) ("[OHA] decision, if received before award, will apply to the pending acquisition").

However, it is unclear on what basis Jensco could have filed a pre-award bid protest in our Office and thus triggered a stay of award by the agency. The contentions in Jensco's post-award bid protest were based upon information it learned at the post-award debriefing it requested and Jensco does not claim to have had a basis to challenge the proposed award to General Offshore. Moreover, even if Jensco did have a basis for a pre-award bid protest, we decline to speculate as to whether the OHA decision likely would have been rendered more promptly than it actually was and thus during the pendency of the bid protest before our Office. Since there is no time limit for an OHA decision on a size appeal, there simply is no basis to reliably predict when the OHA decision would have been issued. In any event, the purpose of the pre-award notice requirement is to provide unsuccessful offerors an opportunity to challenge the prospective awardee's size status for the procurement at hand, and the stay of award requirement of 31 U.S.C. § 3553(c)(1) is

for purposes of our bid protest process. Neither requirement is for the purpose of assisting in delaying award of a contract pending an OHA ruling on a size appeal.

Finally, the protester contends that the contracting officer should have filed a pre-award size protest on her own after Jensco alleged to her in October 1997 and February or March 1998 that General Offshore was affiliated with, and had been purchased by, Cable and Wireless (Marine), an undisputed large business.

A contracting officer may properly rely on an offeror's self-certification that it is a small business unless she had information prior to award that would reasonably impeach the certification. 13 C.F.R. § 121.405(b) (1998); Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56 at 3. In the absence of a size protest from an offeror, there is no requirement that the contracting officer refer size status questions to the SBA. Rather, this is a matter of discretion, the exercise of which must be measured against a standard of reasonableness in the particular case. Adams Indus. Servs., Inc., supra. Here, the contracting officer did take steps to investigate the question of General Offshore's size status, specifically by filing a challenge with the SBA (which was dismissed as premature) and later consulting with SBA as to the validity of General Offshore's self-certification. We think the contracting officer's actions were reasonable in these circumstances.¹

In sum, we have no legal basis upon which to conclude that the award of the contract to General Offshore is invalid.

The protest is denied.

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¹Jensco did not bring the information that formed the basis of its successful OHA size appeal to the attention of the contracting officer prior to award, but discovered this information only after its own size protest was denied and after it then requested a copy of General Offshore's certificate of incorporation and bylaws.