

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219107.2 **DATE:** November 7, 1985
MATTER OF: Consolidated Construction, Inc.

DIGEST:

1. When a size protest is filed with the contracting officer before award of a contract under a small business set-aside, he must promptly forward that protest to the Small Business Administration (SBA). The Federal Acquisition Regulation contains no exceptions to this requirement, and the fact that the contracting officer believes that the protest lacks sufficient evidence to be valid does not provide a reasonable basis for his failure to forward the protest promptly to SBA.
2. Claim for bid preparation costs is denied where the protester was not in line for contract award because its bid exceeded the available funds for award.
3. Claim for the costs of filing and pursuing the protest, including attorney's fees, is granted where the protester has been prevented from having a fair opportunity to compete. It is apparent that if the agency had acted properly and promptly forwarded the protester's size status protest to the SBA, the solicitation would have been canceled and the requirement resolicited.
4. Claim for bid preparation costs filed by the second low bidder, in comments submitted as an interested party, is denied since it was the protester's utilization of the bid protest process that revealed the procurement deficiency in the case, and the second low bidder would not be in line for contract award in any event.

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Consolidated Construction, Inc. protests the award of a contract to Hardrives, Inc. under invitation for bids (IFB) No. DACA45-85-B-0061, a small business set-aside issued by the Department of the Army for the construction of site improvements and roadways at 11 missile launch facilities. We sustain the protest.

BACKGROUND

The five bids received were opened at 2:00 p.m. on May 8, 1985. Hardrives was the low bidder; Western States Construction Company was second low; Nebrette, Inc. was third, and the protester was fourth. In a May 10 telegram, and by confirming letter of May 11, Consolidated filed a size protest with the agency concerning all three lower bidders. Consolidated alleged that Hardrives was undergoing a corporate reorganization, that it had represented to other parties that it had a bonding line of \$45,000,000, and that it had previously operated as a large contractor. Consolidated alleged that Western States' annual receipts exceeded the \$17,000,000 size standard set for the procurement and that Nebrette was not an active company that could perform the contract on its own.^{1/} The Army did not forward Consolidated's protest to the Small Business Administration (SBA) at the time. Instead, the agency found that the protest did not contain sufficient detailed evidence to support Consolidated's allegations and decided to wait until the preaward survey was completed before determining whether it would forward the protest to SBA.

Because Hardrives' bid was substantially below the second low bid, the agency asked the firm on May 16 and again on May 23 to verify its bid. It finally did so on May 28 or 29, and at the same time provided information necessary to complete the preaward survey. On June 3, contract No. DACA-45-85-C-0135 was awarded to Hardrives notwithstanding Consolidated's pending size protest. On June 4, the agency sent Consolidated's size protest to SBA requesting only a determination as to whether Hardrives was a small business within the criteria set forth in the IFB. The Army stated to SBA that a determination as to Western States was not requested because the agency was concerned only with the low bidder. (The reasons for the agency's decision to forward the protest to SBA at this time are

^{1/}Nebrette's bid was subsequently rejected as nonresponsive for failure to use the revised bid form required by an amendment to the IFB.

unclear; the record indicates, however, that the decision was not due to any information obtained during the preaward survey.)

After receiving notice of the award, Consolidated filed a protest of the three lower bidders' size status with this Office (B-219107). We dismissed the protest as a matter exclusively within the jurisdiction of SBA. See 4 C.F.R. § 21.3(f)(2) (1985). Subsequently, SBA issued a decision that Hardrives is other than a small business for purposes of this procurement, and Consolidated filed this protest, alleging that the Army's handling of Consolidated's size protest and the award to Hardrives were improper.^{2/}

The agency argues that Consolidated is not in line for award and, therefore, is not an interested party to protest this procurement. The agency states that all bids other than Hardrives' bid exceeded the available funds for the procurement and that in any event, Consolidated was only the third low responsive bidder. However, since the eventual referral of Consolidated's original size protest to SBA was made only as to Hardrives and did not include the protest against western States' size status, we will consider Consolidated to be an interested party since it would have been next in line for award if SBA also had found Western States to be other than a small business for purposes of this procurement. Moreover, we do not consider the Army's funding limitations to affect Consolidated's status as an interested party since the agency has emphasized the importance of this procurement to national defense, and thus apparently would have canceled the IFB and resolicited if Hardrives had been found ineligible for award due to size status.

ANALYSIS

Federal Acquisition Regulation (FAR), § 19.302(c)(1) requires that a contracting officer who receives a protest of a bidder's small business representation promptly forward

^{2/}Consolidated also contends that since bid opening was at 2:00 p.m. on May 8, 1985, but Hardrives' bid modification telegram making its bid low was stamped as received by the agency at 1439 hours (2:39 p.m.) on that day, the modification was late and improperly accepted. This Office has been advised by the agency that its time/date stamp is set at "Zulu," or Greenwich Mean Time, which is several hours ahead of local time. Consequently, the bid modification was timely received and accepted.

the protest to SBA. 48 C.F.R. § 19.302(c)(1) (1984). The FAR also requires that after receiving a size protest, a contracting officer withhold award of the contract pending an SBA size determination or the expiration of 10 business days from SBA's receipt of the protest, whichever occurs first. The contracting officer may proceed with award only if he determines in writing that the award must be made to protect the public interest. 48 C.F.R. § 19.302(h)(1). Consolidated contends that the Army's actions violated these requirements. We agree.

The contracting officer did not promptly forward Consolidated's size protest to the SBA; in fact, he waited nearly a month after its receipt and until after contract award to send the protest to SBA. The agency maintains that this action was justified by the contracting officer's determination that the protest was not valid because it did not contain sufficient specific, detailed evidence and by the results of the preaward survey, which indicated that Hardrives met the applicable size standard. The agency also suggests that it was entitled to delay forwarding the protest to SBA until after the agency had determined that Hardrives' bid was valid and contained no errors.

The regulations provide that a size protest should contain detailed evidence to support its claims; however, the regulations leave the decision as to what constitutes sufficient evidence not to the contracting officer, but to SBA, which has the authority to dismiss any protest that does not contain specific grounds. FAR, 48 C.F.R. § 19.302(c)(2). Moreover, the regulations provide no exception to the requirement that the contracting officer promptly forward a size status protest to SBA. Therefore, we find no reasonable basis for the contracting officer's decision not to comply with the requirement.^{3/}

Furthermore, we find no merit to the agency's argument that even assuming that Consolidated's protest was valid (and therefore should have been forwarded promptly to SBA), the contracting officer's decision to proceed with award in the face of Consolidated's protest was justified because he determined that time was of the essence and award must be

^{3/}We note that once it received the size protest concerning Hardrives, the SBA did not dismiss the protest for want of specific grounds, but concluded that Hardrives was not small for purposes of this procurement.

made to protect the public interest. The contracting officer admits that he did not reduce this determination to writing, as required by FAR, § 19.302(h)(1), and the record otherwise contains no indication that urgency was a consideration during the period that the size protest was held by the contracting officer. In fact, the record shows that the agency permitted substantial delays in the preaward process by allowing Hardrives an extended time to respond to the agency's request for bid verification and for information necessary to complete the preaward survey.

We are mindful of the agency's contention that because this procurement involves the modification of missile launch facilities to accommodate new MX missiles, any delay in contract award would have adversely affected the national defense. Nonetheless, the fact remains that nearly one month passed between the time the agency received Consolidated's size protest and the time the agency awarded the contract. Thus, even if at the time of contract award no further delay could be permitted, there was ample time prior to award for the contracting officer to forward the protest to SBA and to meet the regulatory requirement that he withhold award for 10 business days.

We conclude that the agency's failure promptly to forward Consolidated's size protest to SBA was unreasonable and improper. We therefore sustain the protest.

REMEDY

Consolidated requests that we recommend that Hardrives' contract be terminated and that Consolidated's protest of Western States' size status be forwarded to SBA. The agency argues, however, that termination of Hardrives' contract is not warranted because all other bids received under the IFB exceeded the available funds for the project, and resolicitation would seriously delay the MX missile program and jeopardize the national defense. The agency also has informed this Office that the contract is approximately 45 percent complete and that payments of approximately 60 percent of the contract's value have been made to Hardrives.

Because such a substantial portion of the contract has already been performed and paid for, and because delay of performance would have an adverse effect on national defense, we do not believe that corrective action in the

form of contract termination would be appropriate. See Bid Protest Regulations, 4 C.F.R. § 21.6(b) (1985); Computer Data Systems, Inc., B-218266, May 31, 1985, 85-1 CPD ¶ 624; Rel Inc., B-213252, Mar. 27, 1984, 84-1 CPD ¶ 356.^{4/} Nonetheless, we are notifying the Secretary of the Army by letter of today that we have sustained the protest, and we are recommending that steps be taken to avoid a repetition of the procurement deficiencies that occurred here.

Consolidated requests that it be allowed recovery of its bid preparation costs and the costs of filing and pursuing its protest, including attorney's fees. We will allow a protester to recover its bid preparation costs only where (1) the protester was in line for award but was unreasonably excluded from the competition, and (2) the remedy recommended is not one delineated in 4 C.F.R. § 21.6(a)(2-5). See EHE National Health Services, Inc., B-219361.2, Oct. 1, 1985, 85-2 CPD ¶ _____. Since the agency indicates that Consolidated was not in line for award because its bid exceeded the available funding for this procurement, we find no basis for award of bid preparation costs here, and Consolidated's request for recovery of those costs therefore is denied.^{5/}

Our regulations permit recovery of the costs of filing and pursuing a protest in situations where the protester unreasonably is excluded from the procurement, except where this Office recommends that the contract be awarded to the protester and the protester receives the award. 4 C.F.R. § 21.6(e). We have construed this to mean that where the protester is given an opportunity to compete for the award

^{4/}Consolidated suggests that under 4 C.F.R. § 21.6(c), we are precluded from considering the extent of performance, cost to the government, or disruption to the agency's mission that might arise from contract termination here because the agency proceeded with contract performance notwithstanding a pending GAO protest. However, section 21.6(c) is inapplicable here as this protest was not filed with our Office within 10 days of the award date. See 4 C.F.R. § 21.4(b). While Consolidated's protest of the three lower bidders' size status was filed here within 10 days of award, we dismissed the protest for lack of jurisdiction, and thus the agency was not required to suspend performance.

^{5/}We note that contrary to the protester's suggestion, there is no requirement that funding limitations be disclosed to bidders before bid opening. Sammy Garrison Construction Co., B-215453, Nov. 21, 1984, 84-2 CPD ¶ 545.

under essentially the same solicitation, the recovery of the costs of filing and pursuing the protest is generally inappropriate. See Federal Properties of R.I., Inc., B-218192.2, May 7, 1985, 85-1 CPD ¶ 508; The Hamilton Tool Co., B-218260.4, Aug. 6, 1985, 85-2 CPD ¶ 132. However, where the protester has been prevented from having a fair opportunity to compete for the basic contract award, we have allowed the recovery of protest costs. See EHE National Health Services, Inc., B-219361.2, supra.

In this case, we find that Consolidated was denied a fair opportunity to compete for the award. We reach this conclusion because it is apparent that if the agency had acted properly here and promptly forwarded Consolidated's size status protest to SBA, the solicitation would have been canceled and the requirement resolicited, since Hardrives' would have been ineligible for award due to its size status and funds were not available for award at a higher price.

Accordingly, we conclude that Consolidated was prevented from having a fair opportunity to compete as a result of the agency's improper actions in this case, and we allow recovery of Consolidated's costs of filing and pursuing the protest, including attorney's fees.

We note that in comments filed as an interested party to Consolidated's protest, Western States (the second low bidder) has also requested the costs of preparing its bid. We do not consider Western States eligible for the recovery of its bid preparation costs since it neither protested Hardrives' size status to the contracting officer nor filed a timely protest against any of the agency's procurement actions with our Office. It is Consolidated's utilization of the bid protest process that resulted in the revelation of the procurement deficiency here, and accordingly, we consider Consolidated the only appropriate party for recovery of bid preparation costs. See Vulcan Engineering Co.--Request for Reconsideration, B-214595.2, Feb. 27, 1985, 85-1 CPD ¶ 243. Moreover, we note that we would deny Western States' request for bid preparation costs in any event, since like Consolidated, Western States' bid exceeded the funds available for the procurement. In addition, even in the

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absence of the funding limitations here, it would be unclear whether Western States was in line for award, as Consolidated's protest of Western States' size status was never forwarded to SBA by the agency.

for 
Comptroller General
of the United States