The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Gino Morena Enterprises--Reconsideration

File: B-224235.2

Date: May 13, 1987

DIGEST

1. Large business protester contending that it would have competed for award of a concession agreement had the agency not limited the field of potential awardees to small businesses is an interested party for purposes of objecting to the agency's definition of the field of potential awardees.

2. Where an award of a concession agreement is justified in part on the basis of urgency, the inclusion in the agreement of options to extend the term of the agreement is not justified.

DECISION

The Department of the Air Force requests reconsideration of our decision Gino Morena Enterprises, B-224235, Feb. 5, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 121, in which we denied a protest by Gino Morena Enterprises of the award by the Basic Military Training School (BMTS), Lackland Air Force Base, Texas, of a 1-year concession agreement to obtain initial haircuts for BMTS recruits. Although we denied the protest, we recommended that the agency not exercise options contained in the agreement allowing the agency to extend the agreement up to 2 additional years. The Air Force contends that Gino Morena was not an interested party for purposes of pursuing the protest and that our recommendation with respect to the options was unreasonable. We affirm our prior decision.

Prior to October 1, 1986, Gino Morena was providing initial haircut services at the BMTS under a subcontract with the Army and Air Force Exchange Service (AAFES), a nonappropriated fund instrumentality. The prime contract for these services was between the Air Force and the AAFES. Because the prime contract was due to expire on September 30, with

no further renewal options available, the Air Force issued a competitive solicitation, restricting participation to eligible small business concerns. The solicitation contemplated that the Air Force would pay for the initial haircut services using appropriated funds. The AAFES did not submit a bid, nor did Gino Morena Enterprises, which is not a small business concern. The agency received three bids.

The Air Force canceled the solicitation on September 25 upon learning that, contrary to earlier assumptions, no appropriated funds would be available to fund a contract for initial haircuts. Because the BMTS still needed to have a contractor ready by October 1, however, the BMTS Commander signed a concession agreement for the initial haircuts with the low offeror under the canceled solicitation. Under the concession agreement, the recruits must pay for the haircuts.

We denied Gino Morena's protest of this concession agreement because in our view the grounds on which the agency justified its action were reasonable: first, by the time the set-aside solicitation had been canceled, the BMTS had an urgent need to arrange for initial haircut services by October 1, when the existing contract with the AAFES would expire; and second, the record indicated that the BMTS Commander decided to base the award of the concession agreement on the results of the recently completed set-aside competition in furtherance of the congressional policy that a fair proportion of contracts be awarded to small business concerns. We also said, however, that since the agency justified the award in part on the basis of urgency, the inclusion of option provisions to extend the contract was not justified. We recommended that the options not be exercised. Neither Gino Morena nor the concessionaire has requested reconsideration of our prior decision.

In requesting reconsideration, the Air Force argues first that Gino Morena was not an interested party under our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1986). According to the agency, since Gino Morena was not a small business concern it lacked standing to challenge an award that we determined properly to have been made as a continuation of a small business set-aside. The agency says that the longstanding position of this Office is that large businesses do not have standing to protest matters relating to small business set-asides.

We disagree. It is true that once a particular procurement properly has been reserved for exclusive small business participation, firms that are not small business concerns

are not interested parties for purposes of objecting to how the procurement is conducted. The question of whether the procurement properly has been set aside, however, is one that may be the subject of a protest by a firm that is not a small business concern. See, e.g., Litton Electron Devices, B-225012, Feb. 13, 1987, 66 Comp. Gen.____, 87-1 CPD ¶ 164.

In this case, even though it canceled the small business set-aside solicitation, the agency decided to base the award of the concession agreement on the results of competition obtained under that solicitation. Gino Morena contended that it would have competed for award of the concession agreement had the agency not selected an awardee from a field of competitors that it never had an opportunity to join. In other words, Gino Morena was objecting to how the agency had defined the field of potential awardees, which in our view is analogous to objecting to an agency determination to set aside a procurement for small business. As a prospective offeror whose direct economic interest was affected by the award of the concession ageement, Gino Morena was an interested party under our regulations. As we said in our prior decision, however, we have no basis for objecting to the agency's decision to consider only small business concerns for award of the concession agreement.

The agency further requests that we reconsider our recommendation that the renewal options contained in the concession agreement not be exercised. The agency argues that the option provisions were an integral part of the small business set-aside solicitation and that the prices submitted were based on a high probability that the options would be exercised. As we understand the agency's position, awarding a concession agreement that included renewal options was necessary in order to preserve all of the terms and conditions under which prices were submitted. In addition, argues the agency, whether the exercise of the renewal options is appropriate is a matter for the contracting officer to decide.

We recognize that whether to exercise contract options must be determined solely by the contracting agency. Nevertheless, we recommended that the renewal options not be exercised in this instance based on our view that including renewal options in the concession agreement was not appropriate. We based our recommendation on the fact that the agency had sought to justify its award of the concession agreement (rather than conduct a new competition following cancellation of the set-aside solicitation) in part on the existence of urgent circumstances. In our view, when an

agency cites the existence of urgent circumstances to justify the award of a contract on the basis of less competition than otherwise might be available, the inclusion of options to extend the contract is not justified. See IMR Systems Corp., B-222465, July 7, 1986, 86-2 CPD ¶ 36. While the existence of urgent circumstances may justify sacrificing competition to some extent in order to meet a current requirement, it cannot be said that there is any urgency with respect to future periods covered by renewal options.

Further, we fail to see how any of the firms that participated in the small business set-aside would be treated unfairly should the agency adopt our recommendation. There is no reason to conclude that the relative standing of the bidders would have been different had the solicitation not contained option provisions.

Our prior decision is affirmed.

Milton J. Socolar

Comptroller General
of the United States