



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Maximus, Inc.
File: B-231885
Date: November 10, 1988

DIGEST

Protest is sustained where, contrary to the Federal Acquisition Regulation (FAR), agency awarded a contract set aside for small business to a firm ultimately determined to be other than small without giving notice of the proposed award to other offerors for the purpose of size status protests or executing a written determination of urgency prior to award. Moreover, considering that the contract is for a 4-year period and the basis on which the awardee certified itself as a small business concern was found unpersuasive by the Small Business Administration, the continued performance of the contract would defeat a primary purpose of the Small Business Act.

DECISION

Maximus, Inc. protests the award of a contract to Meridian Corporation under request for proposals (RFP) No. 282-88-0014 issued by the Department of Health and Human Services (HHS) as a total small business set-aside to furnish services in support of the State Legalization Impact Assistance Grants (SLIAG) program. Maximus contends that the award to Meridian is improper because the firm is not a small business concern and HHS improperly failed to give preaward notification of the intended award to unsuccessful offerors, to the protester's prejudice.

We sustain the protest.

The solicitation requested proposals to provide support services under a cost-plus-fixed-fee contract for a period of 1 year plus 3 option years.^{1/} The RFP provided that the

^{1/} The contract as actually awarded, however, was for the entire 4-year term.

standard industrial classification (SIC) code for this procurement was 7374, Computer Processing and Data Preparation Services, with a small business size standard of \$7.0 million in average annual receipts. Offerors were to submit separate technical and business (cost) proposals and were advised by the RFP that "paramount consideration shall be given to the evaluation of technical proposals rather than cost or price unless, as a result of technical evaluation, proposals are determined to be essentially equal, in which case cost or price shall then become the determining factor."

Eleven proposals were received, four of which were included in the competitive range. All four offerors had self-certified as small businesses. In making its competitive range recommendation, the evaluation committee numerically scored the 11 technical proposals received on the basis of a maximum possible score of 100 points. The offerors included in the competitive range received the following ratings in descending order of technical merit: 84.0 (Meridian), 78.0 (offeror 2), 74.0 (Maximus), 72.0 (offeror 4). With regard to cost, offeror 2 and offeror 4 proposed the highest and second highest costs, respectively, while Maximus was second lowest and Meridian proposed the lowest cost. Following discussions and receipt of best and final offers, the agency reevaluated those four offerors and selected Meridian as the firm submitting the proposal deemed most advantageous to the government on the basis that it rated the highest technically and offered the lowest estimated cost. Award was made on June 20, 1988 to that firm and Maximus was notified by letter dated June 28 and received by Maximus on July 5.

In the interim, on June 23, Maximus learned "unofficially" that HHS intended^{2/} to award the contract to Meridian and on that same day it submitted a protest challenging Meridian's small business size status to the contracting officer, who forwarded it to the Small Business Administration (SBA) by letter dated June 28. During the pendency of the size protest, Maximus received HHS's official notice of award to Meridian and immediately filed a bid protest with our Office on July 5, the date it received written notification of award.

On July 20, SBA's Philadelphia Regional Office issued a decision in which it found that under the circumstances, Maximus' size protest was timely filed with the contracting officer, and that "Meridian Corporation is not a small

^{2/} Maximus was unaware at the time that award actually had been made 3 days earlier.

business concern for procurements having a size standard of \$7.0 million, including this procurement." Meridian appealed that decision to SBA's Office of Hearings and Appeals, which upheld the prior finding that Meridian is not a small business. The SBA concluded that the fact that Meridian had not yet filed its latest federal income tax return did not excuse the firm from reporting its gross annual receipts for its most recent fiscal year, which had ended approximately 8 months before the firm certified itself as small.

Federal Acquisition Regulation (FAR) § 15.1001(b)(2) provides that in a small business set-aside:

". . . upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer shall inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror [to permit challenges, if warranted of] the small business size status of the apparently successful offeror. The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay."

Small business size status protests may be filed by an offeror within 5 days of receipt from the contracting officer of this written notification of proposed award. Id.; 13 C.F.R. § 121.9 (1988). The FAR further provides that after receiving a timely size protest, the contracting officer must withhold award of the contract until the SBA has made a size determination or 10 business days have elapsed since SBA's receipt of the size protest, whichever occurs first. FAR § 19.302(h)(1).

Maximus argues that it was prejudiced by the contracting officer's failure to provide preaward notification of the intended awardee. Since its size protest was filed within 5 business days of when it did learn of the award and since the SBA's regional office's determination that Meridian is not a small business was made within 10 days of SBA's receipt of the size protest,^{3/} Maximus argues that its size protest was timely for purposes of this procurement and HHS should have terminated the contract. To remedy the

^{3/} We were informally advised by the SBA that it received the size protest from the contracting officer on July 6, 1988; thus, its decision of July 20 was issued 10 days after receipt of the size protest.

contracting officer's failure to terminate the contract, the protester requests that we recommend that the contract be terminated for convenience of the government and award made to the next highly evaluated offeror, which Maximus believes is it.

HHS responds that since the award was made prior to a determination that Meridian was not small, the award is proper. The agency states that between June 15 through 17, the contracting officer was repeatedly reminded by the program office that there was an urgent need for the contract services and that any delay in awarding the contract would adversely impact the timely and effective implementation of the SLIAG program and could result in the loss of fiscal year (FY) 1988 funds for the program. The contracting officer is therefore said to have made a "verbal determination" that urgent and compelling circumstances necessitated an immediate award to Meridian. The agency maintains that not only does the FAR permit a contracting officer to waive the preaward notice of the intended award where he determines that urgency necessitates award without delay, FAR § 15.1001(b)(2), but that the regulation does not require that the written determination of urgency precede the award; only that a written determination be made, at some point, that an urgency did in fact exist. HHS cites two previous decisions of this Office, Superior Engineering and Electronics Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698 and Conversational Voice Technologies Corp., B-224255, Feb. 17, 1988, 87-1 CPD ¶ 169 to support its position.

In Superior we did not object to an urgent award made, notwithstanding a timely size protest, to a firm subsequently determined to be other than small. In that case, the preaward notice was given to the unsuccessful offeror after which the contracting officer made a written determination to proceed with the award nevertheless because of unusual and compelling urgency for the requirement. We held that if an agency awards a contract pursuant to a bona fide urgency determination, the notice requirements concerning size status are waived and any subsequent SBA determination that the awardee is other than small is prospective and termination of the contract is not required.

In Conversational Voice the contracting officer properly awarded a contract, without giving notice of the intended award, prior to the size protest based on an urgency determination. Notwithstanding the validity of the award, we stated that an agency should consider terminating such an award if, pursuant to a timely size protest, the contractor is found to be a large business. In that case, termination was not warranted because the agency could not have made

award to the small business/protester because its prices were determined to be unreasonable.

We believe the circumstances here are readily distinguishable from the above two cases.

The record shows that as of June 3, the procurement had progressed to the point that the contract negotiator recommended award to Meridian as a responsible firm which had submitted the highest rated proposal with the lowest estimated cost, which was considered fair and reasonable. According to telephone memoranda in the file, on June 15 through 17 a series of three telephone calls was made from the agency's program office to the contract negotiator, the contracting officer, and to the Chief, General Acquisitions Branch, Public Health Service, in that order, in which the program office: (1) complained about the length of time being taken to process the award; (2) stressed the need to get the contractor "on-board immediately" in order for the agency to carry out its responsibilities under the SLIAG program; (3) pointed out that because the program was a temporary one, less than 10 federal employees had been assigned to it, so that the agency was dependent upon a large support service contract; and (4) indicated that there was a desire within the agency that the contract be awarded before the fourth quarter of the fiscal year because of budgetary concerns and limitations. From the fact that the last conversation, which occurred at the highest of the administrative levels involved, concluded with an instruction to the program office subordinate to "follow up with [the contract negotiator to] get [a] firm award date," we conclude that a commitment of some sort was made to award the contract promptly and it was, in fact, awarded 3 days later.

In none of the accounts of these telephone conversations, however, does there appear any reference to the requirements of FAR § 15.1001(b). Indeed, even in the document which the agency now says memorializes the contracting officer's "verbal determination"--a memorandum to the file prepared weeks after Maximus' protest was filed with us--the contracting officer states that following the telephone conversations of June 15 through 17:

". . . and subsequent conversations with the Contracting Officer; it was determined that immediate award of a contract was critical and of an urgent and compelling nature. Notwithstanding the requirements of [FAR §] 15.1001(b)(2), an award was made to that offeror who had provided

the most technically acceptable proposal at the lowest cost" (Emphasis added.)

This somewhat vague and passive language does not support the conclusion that the contracting officer deliberately made the appropriate determination to waive the requirements of FAR § 15.1001(b)(2) and simply failed to reduce it to writing.

Moreover, we question whether an urgency determination would have been justified. The file shows that a matter of extreme concern to agency administrators was that the award of this contract not occur within the fourth quarter of the fiscal year because of budgetary constraints on the dollar volume of procurements which the agency could award in that quarter. We do not think that such budgetary considerations justify a waiver of the preaward notification prescribed by FAR § 15.1001(b)(2), based on "urgency of the requirement," simply so that award could be made in the third quarter of the fiscal year.

HHS also emphasizes that although it has many functions to perform under the SLIAG program, SLIAG is in the nature of a temporary reimbursement program of limited duration. For this reason, HHS explains, it assigned only a few federal employees to the program and was dependent on this support services contract for the performance of many tasks. In this connection, HHS reports that the states' applications for funding were due by July 15 and that the agency needed adequate lead time to bring a contractor up to speed to assist in the review of these applications. We think, however, that if HHS had acted promptly, it could have given the unsuccessful offerors the notification required by FAR § 15.1001(b)(2), allowed for the time provided by regulation for a size status protest, and still have made an award by early July, which would have been only 2 weeks after the actual date of award, June 20.

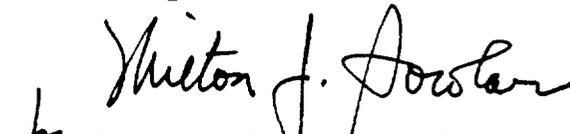
We are particularly concerned with this award to a large business under a small business set-aside since the contract is for a period of 4 years and the awardee's self-certification as a small business concern was made without regard to its most recent fiscal year's receipts. As the SBA's Office of Hearings and Appeals observed, Meridian's reason for not considering its latest fiscal year's receipts in certifying its size status was unpersuasive and not supported by the size regulations. Under these circumstances, aside from our concern about the agency's reliance on urgency in this case, we think a long-term contract based on an erroneous self-certification would defeat a primary

purpose of the Small Business Act. We therefore sustain the protest.

We are mindful of the contracting agency's position that to disrupt Meridian's contract would be seriously detrimental to this program and that some of the work that has been performed is not readily transferable to another contractor. We note, however, that some of the concerns expressed by the agency appear to have been obviated by the ending of the fiscal year. Had this procurement been awarded as a 1-year contract with options to extend for three additional 1-year periods, as the RFP provided, we could have given consideration to a recommendation that Meridian's contract be terminated at the end of the first year and that no options be exercised. Since the contract was awarded for a 4-year period, however, that alternative is not available. Not to terminate Meridian's contract, on the other hand, would harm the competitive procurement system in that for a 4-year period, a contract intended for small business concerns would be performed by a large business which certified itself as a small business without taking into account its latest applicable annual receipts.

After considering all these circumstances, we recommend that HHS promptly implement an orderly phase-out of all tasks being performed by Meridian to the extent that is possible consistent with the agency's meeting of its obligations under the SLIAG program, while it concurrently prepares a revised statement of work for those tasks which can be transferred to another contractor, and that it obtain revised proposals based on the revised statement of work from the three offerors who remained in the competitive range under this procurement. Upon selection of a new awardee, HHS should terminate Meridian's contract for convenience. Regardless of the outcome of that competition, Maximus is entitled to its cost of filing and pursuing its bid protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.


for Comptroller General
of the United States