



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Department of Health and Human Services--
Reconsideration

File: B-231885.2

Date: June 2, 1989

DIGEST

Prior recommendation that contracting agency resolicit its remaining need from the offerors in the competitive range is modified on reconsideration where agency now establishes that limiting the resolicitation to those offerors is not in the best interest of the government.

DECISION

This decision is in response to a request from the Department of Health and Human Services (HHS) to modify our recommended corrective action in Maximus, Inc., B-231885, Nov. 10, 1988, 68 Comp. Gen. ____, 88-2 CPD ¶ 467, where we sustained Maximus, Inc.'s protest of an award of a contract under request for proposals No. 282-88-0014, by HHS to Meridian Corporation. For the reasons set forth herein, we modify our prior decision.

The protested procurement is for services in support of HHS' administration of the State Legalization Impact Assistance Grants (SLIAG) program under which, following states' applications therefor, federal grant funds are distributed to assist states that incur certain costs as a result of the immigration law reform.

We sustained Maximus' protest against an award to Meridian, a large business, under a small business set-aside on the basis that HHS failed to give notice of the apparent successful offeror to the unsuccessful offerors for the purpose of size protests or to execute a written determination of urgency prior to award. We further held that the award of a 4-year contract based on an erroneous self-certification of size status would defeat a primary purpose of the Small Business Act. Consequently, we recommended that HHS "promptly implement an orderly phase-out of all tasks being performed by Meridian . . . while it concurrently prepares a revised statement of work for those

045608/138792

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." Id. at 7. We further recommended that, upon selection of a new contractor, Meridian's contract be terminated. In addition, we found that regardless of the outcome of that competition, Maximus was entitled to its cost of filing and pursuing its bid protest, including attorneys' fees.^{1/}

HHS does not contest the merits of our prior decision. However, it advises that because of intervening circumstances and the time-critical nature of certain tasks, it is now impracticable to terminate Meridian's contract prior to the end of fiscal year (FY) 89. The agency anticipates that award of a replacement contract will not occur until November-December 1989 at which time the current contract with Meridian would be terminated. According to the agency, it is not feasible to phase out Meridian's contract prior to that time because its services are needed to complete two time-critical tasks: conducting data analysis for HHS' report to Congress on the FY 89 SLIAG program and reviewing state grant applications for FY 90.

Additionally, HHS requests that we reconsider our recommendation that HHS limit the competition for the replacement contract to the three remaining offerors in the original competitive range. The agency informs us that it is not in the government's interest to restrict the competition to those three firms because all automated data processing (ADP) tasks associated with the implementation of the SLIAG program have been substantially completed and the remaining tasks are essentially management related services.

Maximus contends that the agency's proposed schedule for phasing out Meridian's contract does not constitute prompt implementation of our recommendation. In its view, HHS should be able to accomplish the steps outlined in our recommendation and make an award by July 1989, thereby reserving the task of reviewing FY 90 grant applications to the new awardee. HHS disputes this contention, asserting that it could not make a new award by July and that "a period of some months would be required for orientation of a new contractor before it could successfully assist . . . in . . . reviewing grant applications."

^{1/} HHS advises that these costs were paid on March 29, 1989.

We find, after auditing and reviewing HHS' planned implementation of our recommendation, that HHS' proposed implementation is not objectionable in view of the imminent need for these services as outlined below. With regard to the annual report for FY 89, Meridian is required to extract and analyze data from states' reports which were to be submitted by December 31, 1988. HHS states that in order to timely submit its statutorily required annual report to Congress the contractor must complete its data analysis by June 30, 1989. Our review indicates that this work is well underway and contracting this portion of the work anew would delay completion of the report.

As to HHS' decision to allow Meridian to continue the task of reviewing grant applications for FY 90, states are required under HHS' regulations to submit applications for funding by July 15, 1989, and these applications must be approved by HHS no later than October 1, 1989, or the states will not receive any funding. Moreover, these state applications must be timely reviewed as they provide cost data needed to determine the formula allocation of funds to the respective states. HHS states that the contractor must be "fully operational" so as to be in the position to promptly commence reviewing state applications, which are required to be submitted no later than July 15, 1989, and that HHS does not now have the resources or time to provide sufficient orientation. Also, as discussed below, HHS has to completely revise the scope of work because automated data processing tasks have been substantially completed. Our review confirms that HHS has no practicable way to successfully and timely review the FY 90 applications except through Meridian's contract.

With regard to HHS' request that we modify our recommendation to allow opening the competition beyond the three firms in the competitive range, the agency asserts that the original competitive range determination was based in large part on the corporate qualifications in ADP programming that the firms possessed. Since HHS indicates the remaining tasks are non-computer related, a different group of competitors should be solicited to assure that the government's best interests are served.

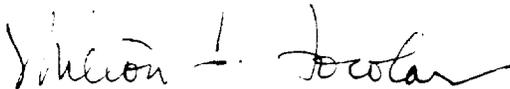
Maximus is of the view that a resolicitation not limited to the three offerors will allow Meridian to use its incumbency to win the resolicitation, and thereby continue to benefit from its erroneous self-certification as small to the detriment of the small business concerns that responded to the original set-aside. HHS indicates that this

procurement will still be set aside for small business although the standard industrial classification code will be revised.

We are not persuaded that opening up the recompetition to firms other than the three in the original competitive range gives Meridian any special competitive advantage. To the contrary, increased competition would seem to impair Meridian's ability to be successful on the resolicitation, even assuming it qualified as a small business. Given the new scope of work, we see no reason to disagree with HHS' position that opening up the competition will best serve the government's interests. Accordingly, we modify our previous recommendation in accordance with HHS' request.

Finally, we note that HHS has permitted a large business, which improperly certified itself as small, to perform this contract for 18 months. By these actions, HHS prevented Maximus from effectively competing for the award. Since no other corrective action is appropriate, Maximus is entitled to recover its proposal preparation costs, as well as the costs of pursuing its protest, which were previously awarded. 4 C.F.R. § 21.6(d) (1988); see also Rotair Industries, B-232702, Dec. 29, 1988, 88-2 CPD ¶ 636. Our prior decision is further modified in this regard.

The prior decision, as modified, is affirmed.



Acting Comptroller General
of the United States