

S. McAuliffe



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Bos'n Towing and Salvage Company
File: B-236027
Date: October 27, 1989

DIGEST

Protest of reopening of discussions with original offerors that remained in the competitive range is denied where agency terminated award to the protester under small business set-aside due to Small Business Administration's final determination that protester was other than small since conducting a new procurement in such circumstances is not required.

DECISION

Bos'n Towing and Salvage Company protests the Navy's reopening of discussions for the award of a contract under request for proposals (RFP) No. N68836-88-R-0129, a small business set-aside to provide tug and towing services in the Port Canaveral, Florida area. The Navy's earlier award to Bos'n under the RFP was terminated due to the Small Business Administration's (SBA) final determination that the firm was other than small. Bos'n contends that the Navy should have resolicited the requirement instead of reopening discussions with the original offerors under the RFP.

We deny the protest.

The solicitation was issued on July 28, 1988, and called for offers for a requirements type contract for a base period of 9 months and 4 option years. The prior contract for these services, which had been in effect since December 1, 1986, expired on April 30, 1989.^{1/}

^{1/} The Navy reports that in light of the numerous protests that have been filed under this RFP, the agency has been using Navy tugs for these services since the prior contract expired.

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Bos'n, which states that it was formed solely for providing the services required under the RFP, submitted an offer and was awarded a contract on March 28, 1989, with an effective date of May 1. Shortly after the award was made, Petchem, Inc., the incumbent contractor for these services, filed a protest with the contracting officer challenging the size status of Bos'n. That protest was subsequently forwarded to the regional office of the SBA which on May 9 determined Bos'n to be other than a small business. The SBA's determination was based upon the firm's close affiliation with and undue reliance upon Commodore Towing and Barge Company and Great Lakes Towing Company, both large businesses. Bos'n filed a May 17 appeal with the SBA Office of Hearings and Appeals which was denied on June 8, 1989. Based upon the final determination of the SBA that Bos'n was other than a small business for this procurement, the Navy terminated Bos'n's contract for the convenience of the government on June 28. (As a result of a previous stop-work order, Bos'n had performed no work under the contract.)

The contracting officer, rather than resoliciting the requirement, and because adequate small business competition had been achieved, reopened discussions with those original offerors which had remained in the competitive range under the RFP. This protest followed. Although best and final offers have been received by the agency, the Navy reports that due to the pending protest no award has been made to date.

Bos'n challenges the Navy's decision to reopen discussions with the small business offerors remaining in the competitive range.^{2/} The protester essentially argues that the Navy is required to resolicit the procurement since with the passage of time involved in the prior protests, the actual duration of performance of the contract is less than originally stated.

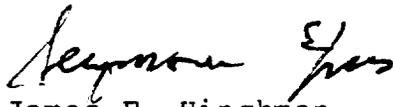
The Navy maintains that reopening discussions without resolicitation was reasonable here (especially in light of the "laborious and litigious" history of this procurement),

^{2/} In its June 29 protest letter, Bos'n also requested that the Navy be precluded from proceeding under the procurement until the final outcome of its motion to reopen the proceeding at the SBA Office of Hearings and Appeals. Bos'n therein argued that the SBA mistakenly decided the protester's large business affiliations. We note, however, that on September 15, the SBA denied that motion and affirmed its final determination that Bos'n was other than a small business.

and since more than one small business offeror remained in the competitive range. The Navy reasoned that since Bos'n had not yet performed any part of the contract, and since only a relatively short period of time had passed since the termination of Bos'n's contract, the government's best interest would be better served by reopening discussions rather than unnecessarily duplicating the acquisition process to date.

Here, after a timely size status protest, Bos'n was determined to be other than a small business and ineligible to compete in this procurement, which led the agency to terminate the award to Bos'n. We have recognized that an agency's termination of an improper award to other than a small business and the subsequent reopening of discussions under the original solicitation is an appropriate remedy in such circumstances. See Maximus, Inc., 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467. Moreover, contrary to the protester's position, a change in the proposed duration of a contract since the original solicitation was issued is not necessarily a compelling reason to cancel and resolicit a procurement where, as here, all that is required is a revised statement of performance which can be accomplished by a simple solicitation amendment. Cf. id.

Accordingly, the protest is denied.



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General Counsel