

DeGeorge
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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: FEMCOR, Inc.
File: B-244400; B-244400.2
Date: October 15, 1991

Timothy B. Harris, Esq., and L. James D'Agostino, Esq., Wickwire Gavin, P.C., for the protester.
Lynda Troutman O'Sullivan, Esq., Perkins Coie, for Ferguson-Williams, Inc., an interested party.
David W. LaCroix, Esq., Department of the Navy, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that agency improperly disclosed protester's price proposal or relative price standing to awardee is denied where record does not substantiate allegation.
2. Protest against agency's failure to provide preaward notification to unsuccessful offeror in small business set-aside procurement is sustained where protester was thereby deprived of an opportunity to challenge before the Small Business Administration the awardee's compliance with the "50 percent rule."

DECISION

FEMCOR, Inc. protests the award of a contract to Ferguson-Williams, Inc. under request for proposals (RFP) No. N62467-89-R-0503, issued by the Department of the Navy, for multi-function facility support services at the Naval Station, Ingleside, Texas. FEMCOR contends that Ferguson had access to, or was improperly made aware of, FEMCOR's price proposal or its relative price standing. Additionally, FEMCOR argues that it was prejudiced by the contracting officer's failure to provide notification of the agency's intent to award to Ferguson, before the award was made, as required under small business set-aside procurements.

While we deny FEMCOR's protest concerning Ferguson's alleged access to information concerning the protester's proposed prices, we sustain its protest of the agency's failure to provide the requisite small business preaward notification.

The RFP was issued on December 18, 1989, as a total small business set-aside. The RFP contemplated the award of a fixed-price, indefinite quantity-type contract with award to be made to the lowest priced, technically acceptable offeror. Following several amendments to the solicitation, five proposals were received by the closing date of March 12, 1990. Based upon the agency's evaluation of these proposals, three firms, including FEMCOR and Ferguson, were included in the competitive range, each having been found technically acceptable. On June 20, best and final offers (BAFOs) were thereafter received from FEMCOR and Ferguson, the remaining offeror having withdrawn its proposal.

On the basis of the initial BAFOs, FEMCOR was determined the low-priced acceptable offeror at \$11,382,581.69. However, due to funding constraints within the agency, no award was made at that time. Shortly thereafter, the agency amended the solicitation in order to increase the scope of work and to add an award fee provision. Based upon this amendment, revised proposals were received from FEMCOR and Ferguson on January 28, 1991. Both vendors' proposals were again found technically acceptable and a second round of BAFOs was requested and received. Ferguson submitted the low evaluated BAFO of \$15,303,368 and was recommended for award. However, due to concerns regarding pending and potential Naval base closures, and a corresponding belief that the RFP no longer reflected the level of work to be required at Ingleside, no award was made and the RFP was instead amended again. On May 1, both offerors submitted revised proposals in response to the latest RFP amendments. Although FEMCOR's revised proposal was determined technically unacceptable, the agency decided to hold discussions with both firms in order to address deficiencies. BAFOs were subsequently requested and FEMCOR this time was found the lowest priced of the two offerors. However, based upon its price proposal, as well as some indications made in its technical proposal, the agency doubted that FEMCOR fully understood the scope of work as amended. Therefore, additional discussions were held with both offerors and a final BAFO was requested and received from each on May 20. On the basis of these BAFOs, both of which were considered technically acceptable, Ferguson was lowest in price at \$12,335,450 and award was made to that firm on May 31. The agency verbally notified FEMCOR of the award on that same date.

We first address FEMCOR's contention that its proposed pricing was disclosed improperly to Ferguson by the agency. In support of this allegation, FEMCOR has submitted the affidavit of Robert C. Coleman, owner of Coleman Landscaping Company, a prospective subcontractor to both offerors for the procurement. Mr. Coleman's affidavit summarizes a number of telephone conversations between himself and Mr. Bill Cochran of Ferguson which took place during the evaluation of proposals. According to the affidavit, in these conversations, Mr. Cochran made remarks such as "the old girl low-balled the job" and "they had to cut a lot to get this one." The protester argues that these statements evidence improper communications between Ferguson and the Navy whereby information in its pricing proposal was allegedly disclosed thus, providing Ferguson the opportunity to submit a lower price.

The Navy categorically denies that any information contained in or concerning FEMCOR's price proposal was disclosed to or made available to Ferguson over the course of the procurement. The Navy reports that every agency employee involved in the source selection phase of the procurement executed a non-disclosure statement acknowledging that no source selection information was to be revealed. Additionally, the agency has submitted to our Office affidavits by every agency employee who was involved in the procurement attesting that he or she did not disclose proprietary, confidential or source selection information.^{1/} The record also includes the affidavit of Mr. Cochran in which he specifically refutes FEMCOR's allegations and denies that he had communications with anyone, either in or out of the government, regarding the price aspects of FEMCOR's proposal. He indicated that his remarks to Mr. Coleman were not based upon actual knowledge of FEMCOR's proposal but were made to motivate Mr. Coleman, a potential subcontractor, to lower his price.

We do not believe that the record supports FEMCOR's allegation. FEMCOR expresses general disagreement with the agency's response and questions the credibility of Mr. Cochran's affidavit. Nevertheless, in the face of affidavits from all relevant government personnel denying disclosure, and a reasonable explanation by Mr. Cochran for his remarks along with a sworn affidavit that he possessed no cost information, we are faced with little more than a bald allegation rooted in suspicion and speculation. On the record, the protester has simply failed to provide any specific and convincing support

^{1/} The agency has submitted affidavits from a total of 22 individuals.

for this aspect of its protest. See Advanced Support Sys. Mgmt., Inc., B-241528; B-241528.2, Feb. 14, 1991, 70 Comp. Gen. _____, 91-1 CPD ¶ 170.

FEMCOR next argues that it was prejudiced by the agency's failure to provide the preaward notification called for in small business set-aside procurements. Pursuant to Federal Acquisition Regulation (FAR) § 15.1001(b)(2), absent urgency, a contracting officer is required to inform each unsuccessful offeror in writing, prior to award, of the apparent successful offeror in a small business set-aside procurement. The purpose of this preaward notice is to give unsuccessful offerors the opportunity to timely challenge the small business status of the proposed awardee. United Power Corp., 69 Comp. Gen. 476 (1990), 90-1 CPD ¶ 494.

In this case, after the May 31 award to Ferguson, FEMCOR did file a size protest with the contracting officer on June 6, alleging that Ferguson was affiliated with a large business concern, and that Ferguson's personnel costs did not constitute at least 50 percent of the total personnel costs under the awarded contract.^{2/} In accordance with required practice, the size protest was referred to the cognizant Small Business Administration (SBA) Regional Office for a decision. On July 2, the size protest was denied. SBA determined that there was no improper affiliation by Ferguson with a large business. Additionally, the SBA declined to consider the allegation of a violation of the "50 percent rule" on the basis that it was a matter of contract administration. SBA's decision expressly noted, however, that "Prior to contract award, the SBA may determine the eligibility of the concern under the 50 percent rule." FEMCOR appealed the decision of the regional office to the SBA Office of Hearings and Appeals (OHA) on July 11. This appeal was dismissed as moot on August 13, with OHA concluding that Ferguson's compliance with the "50 percent rule" was applicable only to the specific contract at issue and, therefore, that any protest challenging such compliance was required to have been filed prior to the award.

FEMCOR argues that the Navy's failure to provide it with the required preaward notification deprived it of the opportunity to obtain a decision of the SBA on Ferguson's compliance with the "50 percent rule." In its response to the protest, the Navy admits that it did not comply with the requirement to give the small business preaward notification, but argues that FEMCOR suffered no resulting harm since the firm was able to file a timely size protest with the SBA which resulted in a

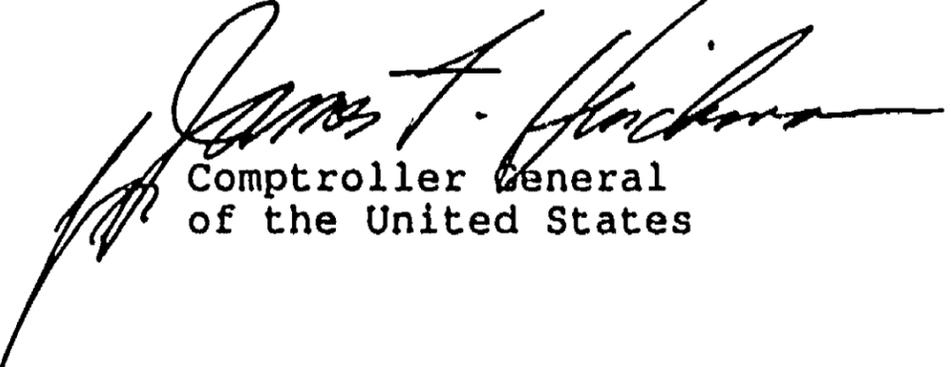
^{2/} The so-called "50 percent rule" is contained in 15 U.S.C. § 644(o)(1)(A) and implemented by FAR § 52.219-14(b)(1).

decision that Ferguson was indeed small. The agency maintains that a failure to provide the preaward notice is prejudicial only if a protest to the SBA results in a determination that the awardee is not small. See Science Sys. and Applications, Inc., B-240311; B-240311.2, Nov. 9, 1990, 90-2 CPD ¶ 381.

In our view, FEMCOR was in fact prejudiced by the Navy's violation of FAR § 15.1001(b)(2). While the Navy's violation may not have prevented FEMCOR from filing a timely protest with the SBA, the firm was prevented from having one of its two grounds for protest considered: the alleged failure of Ferguson to comply with the "50 percent rule." We believe that this is distinguishable from the kind of case relied upon by the Navy in which prejudice existed only where the SBA made size determinations favorable to the protester, since in such cases consideration of the protester's grounds was not foreclosed by lack of a preaward notice. See Science Sys. and Applications, Inc., B-240311; B-240311.2, supra. The plain fact here, however, is that FEMCOR was deprived of the right to have all aspects of Ferguson's size status reviewed by the SBA; a right meant to be preserved by the regulation which the Navy admits it violated. See Appeal of Alaska Cargo Transport, Inc., No. 3437 (1991). Regardless of what the ultimate outcome may have been, FEMCOR was at a minimum entitled to seek timely relief from the SBA, an entitlement which was improperly denied in this case by the Navy's failure to comply with an applicable procurement regulation.

The protest is sustained in part on this basis only.

We recommend that the agency examine Ferguson's current compliance with the "50 percent" requirement included in the contract. In the event it is determined that the contractor does not comply, the agency should terminate the contract and resolicit the requirement. We also find the protester entitled to its proposal preparation costs and the costs of pursuing this protest, including reasonable attorneys' fees. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1991). Since the issues raised in this protest are clearly severable, it is our view that the protester is entitled only to its protest costs which relate to the issue of the agency's failure to provide the proper preaward notice. See Interface Flooring, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106.


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