



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: McCaffery & Whitener, Inc.

File: B-250843

Date: February 23, 1993

Thomas F. McCaffery for the protester,
P.E. Zanfagna, Jr., Assistant Deputy Chief of Staff for
Installations & Logistics, and George N. Brezna, Esq., U.S.
Marine Corps, for the agency.
Jan B. Montgomery, Esq., and Lynn H. Gibson, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

1. The General Accounting Office cannot address the issue of whether the awardee meets the small business size standard in the request for proposals. The Small Business Administration has the exclusive authority to determine matters of small business size status for federal procurements.
2. Protest that contracting agency "improperly failed to provide notice of contract award prior to award is denied where the agency properly waived the prior notice requirement by determining in writing that the urgency of the requirement necessitated the award without delay.
3. GAO will not review a contracting officer's affirmative determination of responsibility unless the protester shows bad faith or fraud on the part of the procurement officials or that the solicitation contains definitive responsibility criteria that have not been met. An agency is not required to conduct a preaward survey if the information readily available to the agency is sufficient to allow the contracting officer to make a determination of responsibility.

DECISION

McCaffery & Whitener, Inc., protests the U.S. Marine Corps' award of a contract to D&T Associates, Inc., under request for proposals (RFP) No. M00027-92-R-0009, issued for contractor support of the Maritime Prepositioning Ships Program, Norway Prepositioning Ships Program, and Aviation Logistics Support Ships Program. The procurement, a 100 percent small business set-aside, called for a cost reimbursement contract, with fee, for a base year and two

option years. McCaffery & Whitener contends that the awardee of the contract does not meet the small business size standard in the RFP; that the government, by failing to properly perform the preaward survey, awarded the contract without fully determining whether the offeror was a responsible contractor; and that the government improperly rejected the McCaffery & Whitener offer based on its failure to meet "ambiguous or unstated requirements or evaluation factors."

We deny the protest.

BACKGROUND

The RFP, issued on May 19, 1992, stated that the contract would be awarded to that responsible offeror whose offer conformed to the solicitation and would be most advantageous to the government, cost and other factors considered. The RFP advised offerors that the rating for technical evaluation factors would be weighted substantially more than the price rating. In addition, the solicitation contemplated that the contract would be awarded based on the initial offers received without discussion of such offers. Therefore, it was made clear that each initial offer should be submitted on the most favorable terms from a cost and technical standpoint.

Two amendments were issued to the RFP. The first amendment, issued on June 30, 1992, extended the proposal submission deadline to July 15, 1992. The second amendment, issued on July 9, 1992, changed the Standard Industrial Classification (SIC) for the RFP and the small business size standard (maximum annual average receipts) from SIC 8711/\$13,500,000 to SIC 8741/\$3,500,000, and extended the deadline to July 20, 1992. Four offers were received, and each of the offers was evaluated and ranked.

The technical proposal submitted by D&T was found to be sufficiently superior to those submitted by the other three, such that: (1) the slight cost advantage represented by one offer was outweighed, and (2) the other two, higher cost, offers (including that of McCaffery & Whitener) were clearly less advantageous to the government. Given that D&T's proposal was found to be significantly superior to the other offers, and since the RFP stated the government's intent to award without discussions, a recommendation was made by the contracting officer to award the contract to D&T based upon the initial proposals that were submitted. This recommendation was approved by the Headquarters Marine Corps Contracts Division Review Board, and the contract was awarded to D&T on September 30, 1992. There was no prior notification to offerors, since, as allowed under Federal Acquisition Regulation (FAR) § 15.1001, the agency made a

determination in writing that the urgency of the requirement necessitated award without delay. McCaffery & Whitener and the other unsuccessful offerors were notified of the award telephonically and in writing on October 1, 1992.

McCaffery & Whitener filed protests of the award with the contracting officer and GAO on October 7, 1992. Since McCaffery & Whitener's protest to the agency involved the small business size status of the awardee, the contracting officer requested that the Small Business Administration (SBA) perform an independent assessment of the size status of D&T. At that point, a stop work order was issued by the contracting officer based on both of the ongoing protests. On November 10, 1992, the Marine Corps made a determination that performance on the contract should be continued, as allowed under FAR § 33.104(c), finding that urgent and compelling circumstances that significantly affect the interests of the United States would not permit waiting for GAO's decision. With regard to the SBA protest, the agency was not specifically required to suspend performance of the contract since an award had already been made. See FAR § 19.302(j).

On December 10, 1992, the Philadelphia Regional Office of the SBA ruled that D&T was a small business concern meeting the size standard in the protested RFP. McCaffery & Whitener appealed that decision to the SBA Office of Hearings and Appeals (OHA), and on January 12, 1993, OHA remanded the case to the regional office for further investigation. On February 8, 1993, the SBA regional office ruled that D&T is not a small business concern for the purpose of the procurement at issue because of its affiliation with a larger business.

SMALL BUSINESS SIZE STATUS DETERMINATION

The protester claims that the government improperly awarded the contract to a business concern affiliated with another concern having average annual receipts in excess of the small business size standard stated in the RFP. The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the SBA, not our Office, the exclusive and conclusive authority to determine matters of small business size status for federal procurement. 4 C.F.R. § 21.3(m)(2) (1992); Isidor Stern Enterprises Corp., B-243265, July 17, 1991, 91-2 CPD ¶ 65. Therefore, our role in cases involving disputed size determinations is limited to considering whether the contracting agency has met its regulatory procedural responsibilities. See Superior Eng'g and Elecs. Co. Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698.

The protester's first procedural claim is that the Marine Corps violated FAR § 19.302(b) by failing to question the

small business representation of D&T through the filing of a contracting officer's protest to SBA. This claim is without merit, because the protester was not prejudiced by the lack of a contracting officer's protest. The contracting officer's basis for a protest would have been the same as that of McCaffery & Whitener in its SBA size status protest. Therefore, as allowed under FAR § 19.302(g)(2), the contracting officer would still have awarded the contract to D&T, based on the initial SBA Regional Office determination that D&T was a small business for the subject procurement.

McCaffery & Whitener also contends that the agency violated the FAR by failing to provide it with notice of contract award prior to award. In a small business set-aside, as here, upon completion of negotiations and determinations of responsibility, but prior to award, the contracting officer is required to inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror. FAR § 15.1001(b)(2). Notice is not required, however, when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. Id. The contracting officer made such a determination in this case, concluding that any delay in awarding the contract would result in unacceptable disruptions to the repositioning programs.

When an agency does not provide preaward notice in a small business set-aside because it determines that urgent circumstances prevent it from doing so, we examine the record to ascertain the reasonableness of the determination. If the determination is reasonable, any subsequent SBA determination that the awardee is not a small business applies only prospectively and does not require termination of the contract. See Dawkins General Contractors and Supply, Inc., B-243613.11, Sept. 21, 1992, 92-2 CPD ¶ 190. The urgency of a requirement is primarily for determination by the contracting agency which is intimately familiar with the criticality of its needs. See Superior Eng'g and Elec. Co., Inc., supra. In addition, we have recognized that a military agency's assertion that there is a critical need for certain supplies and services carries considerable weight, and the protester's burden of showing unreasonableness is particularly heavy. Id.

Here, the Marine Corps identified contractor support of the repositioning programs as being urgently required for its operational needs. The protester does not dispute the legitimacy or immediacy of the Marine Corps' needs, but instead argues that no urgency existed because the Marine Corps could have extended its contract with the incumbent pending the outcome of the protests. Even if extension of the prior contract was an option for the Marine Corps--and the contracting officer determined it was not--we have held

that there is no requirement for a procuring agency to extend an incumbent's contract on a sole-source basis rather than to award a new contract to alleviate an urgent situation. Automation Management Consultants, Inc., B-243805, Aug. 29, 1991, 91-2 CPD ¶ 213. Accordingly, we find no basis for questioning the reasonableness of the urgency determination made by the Marine Corps. In any event, McCaffery & Whitener clearly was not prejudiced by the fact that it did not receive preaward notice of the contract award, since it filed a timely size protest with the SBA, which was initially denied by the regional office.¹ Although the case was remanded back to the regional office by OHA, the agency was not required by SBA regulations to withhold performance on the contract while waiting for the appeal process to be completed. See Verify, Inc., supra.

Finally, the SBA's reversal of its earlier determination does not require termination of the contract with D&T.² Under the FAR, there is no requirement that an agency terminate an award made on the basis of an SBA regional office size determination in circumstances where it is later determined that the regional office was in error and the awardee is not a small business concern. See Valley Constr. Co., B-234292, Feb. 8, 1989, 89-1 CPD ¶ 130. Despite the fact that in this case the award was made before the size determination, the result is the same and termination of the contract is not required.

AGENCY'S RESPONSIBILITY DETERMINATION

McCaffery & Whitener contends that the government, by failing to properly perform a preaward survey as required by FAR § 9.106-1(a), awarded the contract resulting from the RFP without fully determining whether or not the apparent successful offeror was a responsible prospective contractor. The protester asserts that the only conceivable inference to be drawn from the contracting officer's decision not to conduct a preaward survey is that the contracting officer believed D&T would rely on the facilities and support of its affiliated larger business to perform the contract.

The provision of the FAR relied on by the protester clearly states that a preaward survey is required only when the

¹It should be noted that the Marine Corps voluntarily suspended performance on the contract for more than the ten days that is required under FAR § 19.302(h)(1) when there is a preaward size protest to the SBA.

²The agency has informally advised us that the Marine Corps does not plan to exercise the options on the contract.

information on hand or readily available to the contracting officer is not sufficient to make a determination regarding responsibility. The nature and extent of the preaward survey represents a matter of discretion committed to the contracting officer. See Jack Roach Cadillac - Request for Recon., B-200847.3, Aug. 28, 1981, 81-2 CPD ¶ 183. In this case, as noted above, the Marine Corps has indicated that the contracting officer was not aware of any connection between D&T and the larger business. Furthermore, it states that the contracting officer did not request a preaward survey because the information available to him in D&T's proposal provided a sufficient basis upon which to determine the offeror's responsibility. Based on the agency's statements and the record in this case we see no reason for questioning the contracting officer's judgment.

A determination that an offeror is capable of performing a contract is based, in large measure, on subjective judgments, which generally are not susceptible of reasoned review. Advanced Support Systems Management, Inc., 70 Comp. Gen. 255 (1991), 91-1 CPD ¶ 170. Thus, an agency's affirmative determination of a contractor's responsibility will not be reviewed by our Office absent a showing that such determination was made fraudulently or in bad faith on the part of procurement officials, or that definitive responsibility criteria in the solicitation were not met. 4 C.F.R. § 21.3(m) (5) (1992); Hard Bottom Inflatables, B-245961.2, Jan. 22, 1992, 92-1 CPD ¶ 103.

Although the protester argues that the Marine Corps acted in bad faith, it has not offered any persuasive evidence of bad faith or fraud in this procurement. In addition, the protester has not presented any credible evidence that definitive responsibility criteria in the solicitation have not been met. As outlined in the RFP, the proposals were evaluated primarily on the basis of the offeror's knowledge and experience regarding the programs at issue, and on contractor qualifications, focusing on ability and prior performance for executing similar projects. Upon review of the record, we find the Marine Corp's evaluation to be reasonable and consistent with the solicitation's evaluation criteria.³

³The majority of the record in this case was protected. We have accordingly refrained from disclosing protected information in this decision.

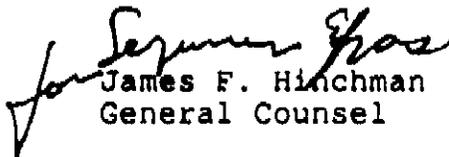
EVALUATION OF MCCAFFERY & WHITENER'S PROPOSAL

The protester claims that its offer was improperly rejected based on its failure to meet ambiguous⁴ or unstated requirements or evaluation factors. In the latter regard, McCaffery & Whitener contends that two unstated evaluation factors considered by the Marine Corps were: (1) minimal contract turnover time or "time to get up to speed," and (2) the services of two particular individuals included in the D&T proposal as key personnel, who had worked for the incumbent on the contract.

With regard to the first unstated factor, the protester contends that it "would only be natural" for the technical evaluation panel to have given D&T extra points for minimal contract turnover time because the key personnel it proposed had worked for the incumbent contractor. However, the protester has not produced any evidence to support this contention. Rather, the protester merely refers to the contracting officer's explanation of the change in the SIC codes for the RFP, in which he noted that the change in codes would eliminate the incumbent from competition and thus would have the undesirable but unavoidable effect of interrupting contract performance. Furthermore, our review of the report prepared by the technical evaluation panel did not disclose any evidence that the panel evaluated proposals based on the ability of the offerors to minimize contract turnover time.

With regard to the second factor identified by the protester, the services of two key employees proposed by D&T, it appears that the evaluators properly considered, in accordance with the RFP's evaluation criteria, the employees' knowledge and experience in performing the required work. Again, there is nothing in the report of the technical evaluation panel to show that the evaluators favored D&T because of the particular individuals it proposed as key employees or that McCaffery and Whitener was penalized for not proposing the services of these individuals. Thus, in our view, the record does not show that there were any unstated criteria in the RFP.

The protest is denied.


James F. Hinchman
General Counsel

⁴To the extent that McCaffery & Whitener is now protesting the RFP's instructions to offerors, its protest is untimely. See 4 C.F.R. § 21.2 (1992).