GAO

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Landmark Construction Corporation

File: B-281957.3

Date: October 22, 1999

Brian A. Darst, Esq., and Paralee White, Esq., Gadsby & Hannah, for the protester.
William M. Simmons, Esq., Perkins, Smith & Cohen, for Master Builder International Corporation, an intervenor.
John E. Lariccia, Esq., Sharon A. Jenks, Esq., and Gregory H. Petkoff, Esq., Department of the Air Force, for the agency.
Andrew T. Pogany, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where award of indefinite-delivery, indefinite-quantity contract improperly was made to large business, proposed corrective action is reasonable, and warrants dismissing protest as academic, where agency will (1) allow improperly awarded contract to expire, (2) place no new delivery orders under the contract, but allow delivery orders already issued to be performed pending recompetition and new award, and (3) promptly conduct recompetition, with award to be made within 6 months.

DECISION

Landmark Construction Corporation protests the Department of the Air Force's proposed corrective action in connection with Landmark's challenge to the award of an indefinite-delivery, indefinite-quantity (IDIQ) contract to Master Builder International Corporation (MBI) under request for proposals (RFP) No. F05604-97-R7019, a section 8(a) set-aside for simplified acquisition of base engineering requirements (SABER) at various locations in the Midwest.

We dismiss the protest.

The RFP contemplated multiple awards for a base year and 4 option years. RFP § F-32. Thirteen offerors submitted proposals by the June 2, 1998 date for receipt of initial proposals. On January 14, 1999, the Air Force made awards to MBI and another offeror, Martinez Construction and Development Company. Contracting

Officer's Statement at 1-2. Landmark, one of the unsuccessful offerors, filed a size protest challenging MBI's status as a small business on January 19, which the Air Force contracting officer forwarded to the Small Business Administration's (SBA) Area V Office on January 21. The contracting officer issued a stop work order suspending MBI's contract on February 4. The Area V Office issued a determination on February 17 that MBI was other than small and thus ineligible for award on the basis that MBI was unusually reliant upon, and thus affiliated as a joint venture with, its ostensible subcontractor. Agency Report, Tab 19, Size Determination Memorandum. MBI appealed the size determination to SBA's Office of Hearings and Appeals (OHA) on March 5. On May 5, OHA vacated the Area V Office size determination because, under SBA's regulations applicable at that time, Landmark did not have standing to file a size protest.[1] Agency Report, Tab 22, OHA Decision. On May 12, the contracting officer lifted the stop work order on MBI's contract.

On May 18, at the urging of Landmark, the SBA District Office filed a size protest with the Area V Office (the contracting officer and SBA have the right to file protests at any time without the filing being considered untimely, 13 C.F.R. § 121.1004(b) (1999)). On May 28, the contracting officer informed SBA that he would allow MBI's performance under the contract to continue in the face of the protest. On June 30, the Area V Office issued a size determination finding that MBI was other than small for purposes of this procurement. Agency Report, Tab 26, Size Determination Memorandum. MBI appealed that determination to OHA on July 21. On September 9, OHA dismissed MBI's appeal as untimely filed. Protester's Comments attach. 1.

In the meantime, on July 16, after the second size determination by SBA's Area V Office, but before OHA's dismissal of the second appeal, Landmark filed this protest seeking termination of MBI's contract on the basis that SBA had determined that it was not a small business. In a letter to our Office dated September 24, after the final OHA ruling, the Air Force stated that it had decided to take corrective action that it believed rendered the protest academic. In particular, the Air Force stated that it will (1) stop issuing delivery orders to MBI under its contract; (2) allow the contract to expire; and (3) promptly conduct a new competition by issuing a new solicitation seeking a replacement contractor for these services based upon requirements that mirror those found in the RFP-R7019 to the extent that they remain valid.

Landmark objects to the proposed corrective action, maintaining that immediate termination of the SABER contract and all uncompleted delivery orders is required

---

[1]On June 30, 1998, SBA issued regulations that significantly changed the 8(a) program. 63 Fed. Reg. 35726, 35767 (1998). The new regulations stated that they would apply to solicitations issued on or after June 30, 1998; the solicitation here was issued before that date. The previous regulations did not give unsuccessful 8(a) offerors standing to file size protests. Under the new regulations, Landmark would have standing to file a size protest. 13 C.F.R. § 121.1001(a)(2)(i) (1999).

since MBI is not an eligible 8(a) concern. Protester's Comments at 2. In support of its argument, Landmark cites Adams Indus. Servs., Inc., B-280186, Aug. 28, 1998, 98-2 CPD ¶ 56. In that case, we stated that, in the absence of countervailing reasons, we viewed it as inconsistent with the integrity of the competitive procurement system and the intent of the Small Business Act, 15 U.S.C. §§ 631-657a (1994), for an agency to permit a firm to continue to perform a contract where the firm was determined after award to be a large business. We recommended that the contract be terminated and that a purchase order be issued to the small business protester--which was in line for the award--for completion of the work. Landmark concludes that, unless there is a demonstrated urgency, MBI's contract and outstanding delivery orders should be terminated immediately.

We disagree. In Adams, the protester was next in line for award, so that it could step in and perform when the improperly awarded contract was terminated; immediate termination of the contract thus was practicable. Here, in contrast, Landmark is not next in line for award and there thus would be no contractor in a position to step in and perform MBI's contract if it were immediately terminated.[2] In decisions sustaining protests such as Landmark's--that is, where it is alleged that the award was improper, but award to the protester is not the appropriate remedy--as part of our recommendation to the agency, we ordinarily will allow the contract to remain in place to meet the agency's ongoing requirements until the recompetition is completed and a new contract awarded. See, e.g., Technology Servs. Int'l, Inc., B-276506, May 21, 1997, 97-2 CPD ¶ 113; H.J. Group Ventures, Inc., B-246139, Feb. 19, 1992, 92-1 CPD ¶ 203 (SABER contract). The agency's proposal to allow MBI's contract to expire, issue no new delivery orders under MBI's contract, but allow MBI to complete performance of the delivery orders already issued pending a recompetition and new award, is consistent with our prior decisions, and thus constitutes appropriate corrective action.

Landmark further objects that the proposed March 15, 2000 deadline for a new award is not sufficiently prompt, and that, instead of a recompetition, the original solicitation should be reopened. These arguments are unpersuasive. First, there simply is no basis to conclude that allowing 6 months to conduct a new competition for a $55 million procurement is other than prompt. (We note that the initial procurement took about 9 months to complete.) Further, conducting the recompetition under the original solicitation would have the effect of precluding both new offerors and MBI--which could become small by shedding its relationship with its subcontractor--from competing. There is no basis for restricting the competition in this manner. See The Hygenic Corp., May 24, 1984, 84-1 CPD ¶ 571 at 2.

[2]Award was made without discussions, so the agency never constituted a competitive range, conducted discussions or requested revised proposals.

We conclude that the corrective action proposed by the Air Force is reasonable under the circumstances of this case, and that it renders the protest academic.

The protest is dismissed.

Comptroller General
of the United States