



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Systems Research and Applications Corporation; Infotec Development, Incorporated

File: B-270708; B-270708.2; B-270708.3

Date: April 15, 1996

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William A. Roberts III, Esq., Lee P. Curtis, Esq., Brian A. Darst, Esq., and Gayle R. Girod, Esq., Howrey & Simon, for Cordant, Inc., an intervenor.

Richard P. Castiglia, Jr., Esq., Department of the Air Force, and John Klein, Esq., Small Business Administration, for the agencies.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting officer properly awarded a contract more than 10 working days after the Small Business Administration (SBA) received a size status protest against the prospective awardee where the SBA did not issue a decision on the protest within the 10-day time period prescribed in the Federal Acquisition Regulation and in the SBA's regulations, even though a government furlough that affected SBA personnel contributed to the delay.

DECISION

Systems Research and Applications Corporation (SRA) and Infotec Development, Inc. protest the award of a contract to Cordant, Inc., pursuant to request for proposals (RFP) No. F19628-94-R-0016, which was set aside for exclusive small business participation. The protesters contend that Cordant was ineligible for contract award because the Small Business Administration (SBA) determined that Cordant was other than a small business offeror for purposes of this procurement.

We deny the protests.

Issued on November 14, 1994, the RFP sought proposals for providing the Defense intelligence community with the capability to accomplish requirements analysis, engineering design, and integration services for off-the-shelf commercial hardware

and software in support of the Air Force's Integration for Command, Control, Communication, Computers, and Intelligence (IC4I) Program. The RFP contemplated award of two indefinite delivery/indefinite quantity contracts to two different offerors; each contract would be for a base period of 2 years with options for 3 additional years.¹ The RFP was intended to provide the systems for intercommunication among the different IC4I functions and their underlying information systems to handle, process, share, and disseminate intelligence data. Among other things, the RFP contemplated that delivery orders would be issued to the contractors for various engineering services and is intended to provide the intelligence community with new systems and upgrades as new technologies become available.

Initial proposals were received in January 1995 and, after evaluation, four were included in the competitive range.² After discussions were held and best and final offers received and evaluated, the Air Force notified offerors on October 31 that it had selected BTG and Cordant for award.

On November 7, Infotec, the incumbent contractor, filed a protest with the contracting officer asserting that Cordant was other than a small business for purposes of this procurement and therefore ineligible for award.³ The contracting officer referred the matter to the SBA for a size status determination. On December 1, before receiving the SBA's written determination on Cordant's size, the Air Force awarded a contract to Cordant. On December 5, the SBA issued a written determination that Cordant was other than small for purposes of this procurement. SRA was debriefed by the Air Force on December 7. Shortly thereafter, SRA and Infotec filed protests in our Office. Performance under the contract has been held in abeyance pending resolution of the protests.

The crux of the protests is that Cordant was ineligible for award because Cordant was not a small business for purposes of this procurement. The protesters allege that the contracting officer awarded the contract to Cordant after the SBA decided, and notified the contracting officer, that Cordant was not an eligible small business offeror. Therefore, the protesters argue that the Air Force should terminate

¹Each contract has a ceiling price of \$929 million.

²The competitive range included proposals submitted by SRA, Infotec, Cordant, and BTG, Inc.

³Infotec filed size status protests regarding both BTG and Cordant. However, the protests filed in our Office concern only the award to Cordant, and, therefore, our discussion of events will be limited to those associated with the Cordant size determination.

Cordant's contract. Infotec requests that our Office recommend that the Air Force conduct a new evaluation to determine whether Infotec or SRA should be awarded the contract based upon its offer representing the best value to the government, while SRA requests that we recommend that the Air Force award the contract to it under the original evaluation.

The Air Force's position is relatively simple. The agency states that the contracting officer was willing to abide by the SBA's ruling concerning Cordant's eligibility for award; however, the SBA's determination that Cordant was other than small was issued late (*i.e.*, more than 10 business days after the SBA received the protest) and was received by the contracting officer after he had already awarded the contract to Cordant. Thus, it is the Air Force's opinion that the contract properly was awarded to Cordant.

The SBA's has a contrary opinion.⁴ The SBA states that its Area 2 Size Program Manager determined that Cordant was other than small within the 10-day period allowed by applicable regulations and verbally informed the contracting officer of her determination prior to the contracting officer's awarding the contract to Cordant. In this regard, the SBA contends that the 10-day period was extended to account for 4 days during which all nonessential SBA employees, including the Area 2 Size Program Manager, were furloughed when SBA's appropriations lapsed during November 1995. The SBA contends that the Air Force was bound by the SBA's timely verbal notification that Cordant was other than small and ineligible for award.

The Air Force and the SBA have submitted a number of declarations, affidavits, notes of telephone conversations, memoranda, and other documents from which the following chronology emerged.⁵

On November 8, the contracting officer telephoned the Area 2 Size Program Manager to notify her of the size protest and to ascertain what documentation he should forward to her with the protest. Later that day, the contracting officer

⁴At our request, the SBA submitted comments on the Air Force's report on the protest including, among other things, its version of the facts, a legal opinion on the merits of the protests, and affidavits from cognizant SBA representatives.

⁵The protesters, agencies, and the awardee have pointed out many facts that each of them believes are significant to resolution of the protests and have made numerous arguments in support of their various positions. We have reviewed the entire record and considered all of the arguments, but will recount here only those facts and arguments that we believe both are significant and relevant to resolving the protests in this decision.

telecopied the protest and other required information to the Area 2 Size Program Manager.⁶ Thus, allowing for federal holidays (*i.e.*, Veterans Day and Thanksgiving Day), the 10th business day following SBA's receipt of the protest was November 24. On November 9, the contracting officer spoke with the Area 2 Size Program Manager who confirmed receipt of the protest and accompanying documentation; the Area 2 Size Program Manager declined to give her opinion to the merits of the protest, explaining that a final determination, signed by the SBA Area Director, would be sent him via certified mail.

From November 14 to November 17, all nonessential SBA employees, including the Area 2 Size Program Manager, were furloughed. On November 20, the first workday following the furlough, the contracting officer called the SBA regarding the status of the protest and spoke to a subordinate of the Area 2 Size Program Manager who explained the Area 2 Size Program Manager was on annual leave from November 20 through November 27 (the week including Thanksgiving). The SBA representative also explained that, because of the furlough and because the Area 2 Size Program Manager was on leave, the SBA would not be able to issue a size determination on Cordant by the November 24 deadline. The contracting officer objected to extending the time limit because the Air Force had been open for business during the November 14 to 17 furlough period. Nonetheless, the SBA representative told the contracting officer that a final decision would be made by November 29 or 30, at the latest. Upon the Area 2 Size Program Manager's return from leave (on November 27), the contracting officer again spoke with the Area 2 Size Program Manager who stated that she was just beginning to review the voluminous material and, therefore, no decision would be made until the end of the week (approximately November 30).⁷

On November 30, the contracting officer and the Area 2 Size Program Manager had yet another telephone conversation. The contracting officer's and the Area 2 Size Program Manager's recollections of that conversation differ greatly.⁸

⁶As the RFP was too voluminous, it was sent by regular mail as directed by the Area 2 Size Program Manager.

⁷According to the contracting officer, this telephone conversation occurred on November 28, and the Area 2 Size Program Manager told him that the Cordant decision would not be made until December 1.

⁸The contracting officer and the Area 2 Size Program Manager each submitted affidavits and notes to support their versions of the large number of telephone calls (including some that have not been discussed in this decision) between them.

The Area 2 Size Program Manager recalls telling the contracting officer:

"I told him we had grave concerns over Cordant's proposed distribution of work as the firm appeared to be unduly reliant upon its subcontractors for performance of the primary and vital portions of the effort. Additionally, I stated that, based on its Cost Proposal, Cordant would be responsible for only 21 percent of the 'cost incurred for personnel' for the two-year base contract period. Thus, Cordant was in violation of 15 U.S.C. 644(o)(1) [FAR 19.508 and FAR 52.219-14], commonly referred to as the '50% rule.'"

The Area 2 Size Program Manager also recollects that she and the contracting officer discussed whether the base period only or the base period plus the option periods should be used to determine whether Cordant met the 50-percent requirement, and that the contracting officer asked her to refrain from issuing a decision until after he discussed the matter with someone on the proposal review committee and got back to her. The Area 2 Size Program Manager states that she told the contracting officer that "absent the submission of any additional data which would contradict the information I had reviewed, SBA would find Cordant to be ineligible as a small business for this procurement." The Area 2 Size Program Manager also recalls telling the contracting officer that it would take her "more than a day or so" to write the final decision.

The contracting officer's recollection of the November 30 conversation is substantially different from the Area 2 Size Program Manager's. He reports that the Area 2 Size Program Manager told him that the decision on Cordant's size was only 50 percent complete, would not be done by December 1, and would be completed by December 4 or 5 at the earliest. He also reports that the Area 2 Size Program Manager told him, among other things, that she was "on the fence" regarding Cordant's size and was concerned about Cordant's pooling of effort which could indicate unusual reliance on subcontractors. The contracting officer states that:

"I expressed to her my concern that the completion date continues to slip one or two days at a time with no concrete end date. I also mentioned to her that even if furlough days are not counted as business days, we were at the end of the 10 business day period. She did not disagree with my assessment, explaining that it was the Air Force's decision on how to proceed."

At approximately 6 p.m. on December 1, the contracting officer awarded the contract to Cordant.

On December 5, the SBA issued its determination that Cordant was not a small business and therefore was ineligible for award of a contract under this total small business set-aside procurement. Essentially, the SBA found that—even though Cordant is, in fact, a small business—Cordant would be unusually reliant upon its large business subcontractors to perform the required work. The SBA also found that Cordant would perform only 21 percent of the effort during the base contract period and would not achieve more than 50 percent of the work with its own employees until all option periods were completed; thus, the SBA concluded that Cordant would be in violation of 15 U.S.C. § 644(o)(1) (1994), which requires a small business set-aside contractor to perform work for at least 50 percent of the manufacturing costs. The SBA decision contained a footnote stating that the completion date for the size determination had been established as December 1, due in part to the 4-day government furlough in November; the footnote also stated that the Area 2 Size Program Manager had verbally notified the contracting officer of the SBA's adverse finding on Cordant's size in the November 30 telephone conversation. On December 8, the contracting officer received a telefaxed copy of the SBA's written determination.⁹

Under SBA regulations, the SBA is required to make a formal size determination within 10 working days after receipt of a size status protest. See 13 C.F.R. § 121.1606(a) (1995). The formal size determination is to be made by the SBA Regional Administrator or his delegate (13 C.F.R. § 121.1602(a)) and is to be in writing (13 C.F.R. § 121.1606(f)). When a size status protest has been filed and forwarded to the SBA, a contracting officer may not make an award until either the SBA resolves the matter or 10 business days elapse after the SBA's receipt of the protest without any decision having been made by the SBA, whichever occurs first. Federal Acquisition Regulation (FAR) § 19.302(h)(1); Priscidon Enters., Inc., B-230035, Mar. 18, 1988, 88-1 CPD ¶ 290.

Here, the SBA received the size status protest and all of the supporting documents it requested from the contracting officer (except for the RFP which was mailed as directed) on November 8. Therefore, allowing for the 2 federal holidays, the 10-day period within which a decision was to be issued expired on November 24,¹⁰ and absent the Air Force's agreement to wait for a longer period, the contracting officer was free to award Cordant the contract after that date. FAR § 19.302(h)(1).

⁹Cordant appealed the Area 2 Office's adverse size determination to the SBA's Office of Hearings and Appeals which, as of this date, has not reached a determination on the appeal.

¹⁰The contracting officer states that that he and the Area 2 Size Program Manager agreed that November 24 was the deadline for a decision; the Area 2 Size Program Manager states that they agreed upon November 27.

The SBA unilaterally tried to extend the size determination due date because of the furlough and because the Area 2 Size Program Manager was on annual leave for several other days during this period. However, the record clearly shows that the contracting officer never agreed, and in fact objected, to an extension of the deadline.

The SBA and the protesters argue that the deadline was automatically extended because of the 4-day furlough. Even if the time period for an SBA decision were extended 4 additional days (i.e., to November 30), the SBA's formal size determination would still have been issued in an untimely manner; the actual decision was not signed by the SBA's Acting Area 2 Director until December 5, and was not transmitted to the contracting officer until December 8--1 week after the contract was awarded. We recognize that there is a dispute regarding whether the Area 2 Size Program Manager told the contracting officer on November 30 that the SBA would issue a determination that Cordant was not small. However, the Area 2 Size Program Manager's statement to the contracting officer was not a formal size determination. The SBA's regulations specify that a size determination must be "in writing," 13 C.F.R. § 121.1606(f), and must be signed by the Regional Administrator or his delegate. 13 C.F.R. § 121.1602(a). The Area 2 Size Program Manager's November 30 statement was oral and it is unrefuted that the Area 2 Size Program Manager was not authorized to make the final size determination; the authority to make the formal determination apparently resided in the Acting Area Director.

In addition, the Area 2 Size Program Manager's declaration submitted to our Office states that she had "grave concerns" about Cordant's reliance upon its large business subcontractors and that, absent submission of additional data, SBA "would find Cordant ineligible." Moreover, the Area 2 Size Program Manager told the contracting officer at that time that she had not even begun to write the actual determination. In these circumstances, we can see how the contracting officer reasonably construed the Area 2 Size Program Manager's statement as a preliminary rather than a final determination. In other words, the Area 2 Size Program Manager's oral statement to the contracting officer was an indication that the Area 2 Size Program Manager was going to recommend to the Acting Area Director that he find Cordant to be other than small for purposes of this procurement. In any event, while we believe that the Area 2 Size Program Manager's oral advice reasonably could be construed as an indication that a negative determination would likely be made on Cordant's eligibility, the advice was not proper notice in accord with the SBA's own regulations, and, as the oral statement was subject to review

and agreement by the Acting Area Director, was not binding on the contracting officer. See Ken Com, Inc., 59 Comp. Gen. 417 (1980), 80-1 CPD ¶ 294. Because the 10-day size determination period had expired, the award to Cordant was proper. Priscidon Enters., Inc., supra.¹¹

The protest is denied.

Comptroller General
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¹¹Contrary to the protesters' assertions, although the contracting officer must make a finding that the award is necessary to protect the public interest in order to award a contract before the 10-day period expires, FAR § 19.302(h)(1), the contracting officer need not make such a finding once the 10 days have elapsed. See JRR Constr. Co., Inc., B-220592, Oct. 4, 1985, 85-2 CPD ¶ 383.