



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Gerard Company

File: B-274051

Date: November 8, 1996

Andrew Jackson Graham, Esq., for the protester.

Marie Adamson Collins, Esq., General Services Administration, for the agency.

John Van Schaik, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that agency was required to award contract to protester, without requesting best and final offers (BAFO), as soon as Small Business Administration (SBA) issued certificate of competency (COC) concerning the protester is denied. Although regulation states "the contracting officer shall award the contract to the concern in question if the SBA issues a COC after receiving the referral," the thrust of this provision is simply that the agency cannot deny award to the eligible firm on the basis of other responsibility or eligibility criteria; the regulation does not mandate an immediate award to the firm if the agency has legitimate reasons to amend the solicitation and request BAFOs.

DECISION

The Gerard Company protests the failure of the General Services Administration (GSA) to award it a contract under request for proposals (RFP) No. FCXA-S8-930004-N for marketing and advertising services for the Public Buildings Service.

We deny the protest.¹

GSA issued the RFP on August 29, 1994, and issued six solicitation amendments over the next several months. Proposals were submitted on November 16, 1994, but the evaluation of the proposals was not completed until January 22, 1996. During the evaluation, contracting officials requested that GSA's Credit and Finance Division perform pre-award surveys on several offerors, including Gerard, in order to determine the financial capacity of those firms. GSA explains that these requests

¹Since award has not been made, our discussion of the proposals and the evaluation is necessarily limited.

were premature and should not have occurred until the technical evaluation was completed.

After evaluating the proposals, the contracting officer established a competitive range, which included Gerard's proposal. The agency then conducted discussions with the competitive range offerors and requested revisions to their price proposals. Gerard responded to the discussions with a submission which included a revised price proposal labeled "Best and Final Marketing and Advertising Services."

On February 9, 1996, GSA's Credit and Finance Division issued a recommendation of "no award" concerning Gerard. The contracting officer concluded that Gerard was nonresponsive and, since the firm is a small business, in accordance with Federal Acquisition Regulation (FAR) § 19.602-1(a)(2) (FAC 90-40), referred the matter to the Small Business Administration (SBA) for review under its certificate of competency (COC) procedures. In a June 5 letter, the SBA issued a COC concerning Gerard and informed the agency: "You are obligated to award the contract to the certified concern without requiring it to meet any other condition of responsibility or eligibility."

At approximately the same time, the contracting officer reviewed the solicitation since 2 years had passed since it was issued. Based on that review, on August 1, 1996, the agency issued a seventh RFP amendment in order to conform the solicitation to provisions of the Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994), to clarify ambiguities in the solicitation and to address agency requirements not included in the RFP. The agency reports that it needed to make these changes to ensure satisfaction of the government's minimum needs. The seventh amendment also requested best and final offers (BAFO).²

Gerard objects to the request for BAFOs. According to Gerard, "[t]he contract was awarded to Gerard, if no other way, then by operation of law governing such an award." In support of this argument, Gerard refers to the SBA's June 5 letter issuing the COC concerning Gerard and stating: "You are obligated to award the contract to the certified concern without requiring it to meet any other condition of responsibility or eligibility." Gerard argues that its position also is supported by FAR § 19.602-4(b), which states:

"The contracting officer shall award the contract to the concern in question if the SBA issues a COC after receiving

²During the period when the evaluation process was delayed, the agency requested and received extensions of offers from Gerard and other offerors.

the referral. An SBA-certified concern shall not be required to meet any other requirements of responsibility. SBA COC's are conclusive with respect to all elements of responsibility of prospective small business contractors."

Apparently, Gerard's position is that, once the COC was issued, based on the operation of FAR § 19.602-4(b), Gerard was entitled to the award and it was improper for the agency to request BAFOs.

We do not agree. The language of the regulation quoted above (and the language in the letter from the SBA) simply states that once the SBA issues a COC, the small business firm is considered responsible and the firm cannot be denied award for responsibility reasons. However, this does not mandate an award to the firm if the agency cannot immediately make award for other legitimate reasons. See Go Leasing, Inc.; Sierra Pacific Airlines, B-209202; B-209202.2, Apr. 14, 1983, 83-1 CPD ¶ 405 (while the Small Business Act does require an award after issuance of a COC without a small business concern having to meet any other requirement of responsibility or eligibility, COC issuance does not compel the government to make an award under a defective solicitation).

Moreover, the fact that proposals had been received and evaluated does not mean that the solicitation could not be amended. It is well-settled that an RFP can be amended at any time prior to award. See, e.g., FAR § 15.606 (FAC 90-31); PI Constr. Corp., B-270576.2, Dec. 15, 1995, 95-2 CPD ¶ 270. In this case, among other things, the seventh amendment changed the procedure for issuing task orders under the contract, modified the procedure for changing the contractor's team leader, and clarified that the scope of the contract was to extend to all of GSA, not just the Public Buildings Service. Contracting officials determined that these and other changes in amendment seven were necessary to satisfy the agency's needs, they were not de minimus, and they could significantly affect the requirements and interpretation of the solicitation. Our review indicates that changes in the amendment clarified the rights and responsibilities of the parties to the contract and changed the apportionment of risk between GSA and the contractor. Other than its complaint that the amendment delayed the award, Gerard has not suggested any

way in which it was prejudiced by any of the changes in amendment seven. Under the circumstances, we have no basis to question the agency's decision to amend the solicitation.³

The protest is denied

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³Although Gerard also challenges GSA's assertion that the request for a determination of Gerard's responsibility was "premature," we see no reason to address this contention since we do not see how Gerard was prejudiced by the timing of the request.