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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-215999 **DATE:** December 10, 1984

MATTER OF: Pacer Systems, Inc.

DIGEST:

Where under federal regulation two small business size standards stated in a request for proposals cannot both be applicable to the standard industrial classification designated for the procurement, the contracting officer is not estopped from amending the RFP after receipt of proposals to clarify which size standard is applicable, even though the contract negotiator earlier told offeror the size standard was correct.

Pacer Systems, Inc. (Pacer), protests the National Aeronautics and Space Administration's (NASA's) decision to extend the proposal due date and clarify the small business size standard listed in the solicitation after proposals were received under request for proposals (RFP) No. W-10-32577 issued by NASA Headquarters. We deny the protest.

The RFP, issued June 22, 1984, requested proposals by July 23, 1984, under a small business set-aside to provide technical, administrative, and general support services to the NASA Advisory Council, the NASA Small Business Innovation Research program, and the NASA Office of Aeronautics and Space Technology. Section L.19 of the RFP provided that:

"This standard industrial classification (SIC) code for this procurement is 7392, Management, Consulting, and Public Relations Services. The small business size standard for this procurement is based on a concern, including its affiliates having 500 employees and/or $3.5 million annual receipts."

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The small business size standard was incorrectly stated; it should have been "$3.5 million annual receipts" only, with no reference to the number of employees. Apparently, the NASA negotiator, when drafting the mandatory clause, referred to a memo from the NASA small business specialist and to Procurement Notice 84-4, which lists size standards (in number of employees or millions of dollars) by SIC industry. The negotiator correctly copied the SIC code of 7392 and dollar amount of annual receipts from the memo, but erroneously added the standard of 500 employees listed next to SIC code 7391 in Procurement Notice 84-4. He was unaware at the time that the small business size standard could not refer to both $3.5 million in annual receipts and 500 employees. The size standard for service concerns is based on annual receipts only.

At the end of June, when Pacer discovered the ambiguity in the SIC/size provision of the RFP, Pacer called the NASA negotiator and asked whether a firm with 500 employees and/or $3.5 million annual receipts would be eligible to propose. (Pacer could not meet the $3.5 million standard.) The negotiator, unaware that use of "500 employees" as a standard was an error, advised Pacer that the size standard was correctly stated, and no further discussion ensued. On or shortly after June 28, 1984, the negotiator asked the NASA small business specialist what the proper size standard was and was informed of the error in the RFP. The negotiator told the small business specialist about the program office's concern that Pacer would be excluded from competing for this procurement. Pacer was doing work for the program office under SIC code 8311. On July 11, NASA officials considered changing SIC categories, but determined that the originally selected SIC code of 7392 was still the most appropriate. The classification was again reviewed on July 16 and once again SIC code 7392 was determined to be appropriate.

Proposals were received on July 23, 1984 from eight companies, including Pacer. Pacer's proposal contained a certification that it was a small business. Because the contracting officer felt Pacer could not qualify under the size standard of $3.5 million, he met with officials of NASA's Office of General Counsel, who advised that

the RFP should be corrected to delete the error. Amendment No. 1, issued July 24, 1984, corrected the SIC code/size provision by deleting the 500-employee standard and leaving in place SIC code 7392 and the $3.5 million annual receipts standard; it also extended the due date to August 6, 1984.

Pacer met with NASA officials to discuss the SIC code/size provision on July 26 and July 30 and was told both times that the SIC code would remain 7392 and the proper size standard was $3.5 million annual receipts. At the July 26 meeting, NASA admitted that it was mistaken when it told Pacer during a June telephone conversation that it could qualify if it had 500 employees or less--that telephone conversation had been forgotten. NASA alleges that at the meeting, Pacer admitted that it knew that the 500-employee standard was not applicable for that SIC code.

Pacer first contends that the contracting officer could not amend the request for proposals after the proposal closing date, citing Federal Acquisition Regulation (FAR), § 15.410, 48 Fed. Reg. 42,102, 42,196 (1983) (to be codified at 48 C.F.R. § 15.410). Section 15.410 states that:

> ". . . After issuance of a solicitation, but before the date set for receipt of proposals, it may be necessary to (1) make changes to the solicitation, including, but not limited to, significant changes in quantity, specifications, or delivery schedules, (2) correct defects or ambiguities, or (3) change the closing date for receipt of proposals . . ."

Pacer interprets this language to mean that amendments are permitted only before the closing date. Section 15.410, however, does not instruct the contracting officer to limit amendments to the period before the date set for receipt of proposals. Rather, it gives examples of appropriate circumstances for issuing an amendment and instructs the contracting officer to determine if the closing date needs to be changed when amending the solicitation. Another

section of the FAR gives examples of when the contracting officer should issue a written amendment to the solicitation:

> "When, either before or after receipt of proposals, the Government changes, relaxes, increases, or otherwise modifies its requirements, the contracting officer shall issue a written amendment to the solicitation." FAR, § 15.606, 48 Fed. Reg. 42,102.

Our Office has held that the contracting officer can amend the RFP after the proposal closing date. For example, reopening competition following the closing date and receipt of "best and final offers" is appropriate when an ambiguity in the solicitation is apparent. Macro Systems, Inc., B-208540.2, Jan. 24, 1983, 83-1 C.P.D. ¶ 79. As noted in Macro, solicitations must be drafted to inform all offerors in clear and unambiguous terms what is required of them. In Pacer's case, the solicitation's inclusion of two size standards for one SIC code created an obvious ambiguity, since only one size standard can be applicable for each classification.

Pacer next contends that the contracting officer cannot change a stated SIC code or a small business size standard after receipt of proposals. It bases its argument on 49 Fed. Reg. 5040 (1984) (to be codified at 13 C.F.R. § 121.5(d)) and FAR, § 19.303, 48 Fed. Reg. 42,247. These sections provide that the contracting officer shall determine the appropriate SIC classification and include it in solicitations. The determination shall be final unless appealed to the Small Business Administration 10 days before the proposal submission date, when the solicitation period is longer than 30 days. An untimely appeal from a product or service classification will be dismissed.

Pacer argues that under these sections, because no party appealed the size standard, the standard as stated in section L.19 of the RFP became final and the contracting officer could not change it. Pacer cites a previous decision of this Office, International Limousine Service, Inc., B-207136, Aug. 26, 1982, 82-2 C.P.D. ¶ 180, to

support its position. In that case, we did not object to an award based on an incorrect size standard when no firm timely appealed the size standard. The standard limited a concern's average annual receipts for the preceding 3 fiscal years to $2 million, when the proper size standard should have been that which limited a concern's number of employees to 500 persons.

Pacer also cites Empire Moving and Storage Co., B-210139, May 20, 1983, 83-1 C.P.D. ¶ 543. In that case, a $7 million standard should have been applicable to the procurement, but the solicitation listed a $2 million standard. We held that since no party appealed the $2 million standard, the standard was final with respect to the solicitation and the contracting officer could not ignore it. Rather, he could either have canceled the solicitation, which he elected not to do, or could have awarded a contract to the low responsive, responsible bidder which qualified as a small business under that $2 million size standard. By awarding to a bidder that could meet the $7 million standard, but not the $2 million standard, the contracting officer acted improperly by changing one of the ground rules of the procurement for the benefit of one bidder.

We think the circumstances in Pacer's case are distinguishable from those in the above two cases. In Pacer's case, the solicitation listed two size standards. The contracting officer, when amending the solicitation, did not change the SIC code and its applicable standard. Rather, he kept the same SIC code and the standard applicable to that industrial classification and merely deleted reference to a second standard which did not apply to that classification.

NASA argues that Pacer incorrectly characterizes the contracting officer's action of amending the RFP and extending the due date as an appeal of the size standard. NASA believes that action was not in the nature of an appeal from a product or service classification, but rather was equivalent to a cancellation and readvertisement of the procurement. When the contracting officer discovered that the size standard included incorrect information and realized he could not solicit proposals

under a standard that did not exist, he corrected the standard and extended the due date for proposals. NASA views this action as consistent with our decision in Empire Moving and Storage Co., B-210139, supra, 83-1 C.P.D. ¶ 543 at 3.

We agree. The RFP amendment correcting the standard and extending the proposal due date was tantamount to a cancellation and readvertisement. It provided an opportunity for all offerors to withdraw their proposals, or to make any changes to their proposals by the new due date. Further, NASA sent the amendment not only to those who initially submitted proposals, but also to all those who received a copy of the RFP but did not submit a proposal. This provided those firms which did not initially submit a proposal with an opportunity to submit one.

Pacer argues that such cancellation and readvertisement is only to be undertaken for "compelling" reasons and cites FAR, § 14.401-1, 48 Fed. Reg. 42,179. However, the language of FAR, § 14.401-1, is directed only at cancellations of solicitations in formally advertised procurements. There is no requirement that an agency have a "compelling" reason for issuing an amendment to an RFP. The compelling reason standard is used when an agency seeks to cancel an invitation for bids after bid opening; because of the obvious detrimental effect on the competitive bid system of a cancellation and resolicitation after exposure of bid prices, there must be a cogent and compelling reason for such a cancellation. In negotiated procurements, there is no public bid opening and no exposure of pricing. Our cases indicate that the standard to be applied in negotiated procurements is the "reasonableness" standard--that is, does the agency have a reasonable basis for amending or canceling an RFP after receipt of proposals. See Gill Marketing Co., Inc., B-194414.3, Mar. 24, 1980, 80-1 C.P.D. ¶ 213; United States District Court for the District of Columbia, 58 Comp. Gen. 451 (1979). Here, it was reasonable for the contracting officer to amend the solicitation to clarify the ambiguous small business size standard.

Finally, Pacer argues that after the proposal closing date, the contracting officer is estopped to change the size standard as to Pacer. According to Pacer, based on

the NASA negotiator's advice that a firm with fewer than 500 employees and/or $3.5 million in average annual receipts would be eligible to compete for the procurement, Pacer was encouraged to its detriment to spend time and money to propose on this procurement. Pacer asserts that all the elements of estoppel are present and cites Community Health Services of Crawford County v. Califano, 698 F.2d 615 (3d Cir. 1983), to support its position.

Pacer's estoppel argument is without merit. The case upon which it relies for support was reversed by the Supreme Court on May 21, 1984. Heckler v. Community Health Services, 104 S. Ct. 2218 (1984), reversing and remanding 698 F.2d 615. In that case, under an incorrect interpretation of complex federal regulations, the respondent received federal fund to provide health care services to which it was not entitled. The Supreme Court held that the government was not estopped from recovering those funds from the respondent, who relied on the express authorization of a responsible government agent in making the expenditures. The Court pointed out that the respondent had not lost any legal right or suffered any adverse change in its status because of its inability to retain money it should never have received in the first place.

Pacer is similarly situated. Small Business Administration regulations state that a concern which is bidding on a contract for a procurement in a SIC industry cited in the regulations must meet the size standard designated for that industry. 49 Fed. Reg. 5040 (1984) (to be codified at 13 C.F.R. § 121.5). Once the contracting officer designated the 7392 SIC code for this procurement, Pacer could not qualify as a small business under that code's applicable size standard. Pacer was, in effect, disqualified from the outset of the procurement. If Pacer objected to the use of SIC 7392, it could have appealed in accordance with FAR, § 19.303, 48 Fed. Reg. 42,247.

The protest is denied.

for Milton J. Socolar
Comptroller General
of the United States