



The Comptroller General
of the United States

Washington, D.C. 20548

Woods

Decision

Matter of: National General Supply, Inc.

File: B-225675

Date: May 22, 1987

DIGEST

There is no merit to protester's contention that the contracting agency did not comply with the regulatory requirements for awarding a contract after a challenge to the awardee's status as a regular dealer under the Walsh-Healey Act had been referred to the Small Business Administration where the record shows that the contracting agency substantially complied with the regulatory requirements.

DECISION

National General Supply, Inc. protests the award of a contract for operation of a Contractor Operated Civil Engineers Supply Store (COCESS) to National Supply Systems, Inc. (NSSI) by Norton Air Force Base, California, under request for proposals (RFP) No. F04607-85-R-0053. We deny the protest.

The RFP provided that award would be made to the responsible offeror submitting the lowest evaluated proposal. The proposal of NSSI was determined to be the lowest; that of the protester was second low. The solicitation contained the Walsh-Healey Public Contracts Act representation prescribed by Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.222-19 (1985), which required each offeror to represent that it was either a regular dealer in or a manufacturer of the supplies offered. NSSI represented that it was a regular dealer.

By letter dated December 24, 1986, National General Supply filed a protest with the Air Force alleging that NSSI in fact was not a regular dealer and requesting that the agency withhold award of a contract to that firm. The protester included a copy of an August 20 determination by Grissom Air Force Base, Indiana, that NSSI was not a regular dealer in connection with a COCESS procurement there. On December 30, the agency asked the protester to provide

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additional information in support of its protest, pointing out that a recent determination by the Defense Contract Administration Service (DCAS) was in conflict with that made by Grissom. The contracting officer advised both the protester and NSSI that award would be withheld until all requested information had been received, or for 10 days, at which time a determination would be made. Both the protester and NSSI responded with additional information.

By letter dated January 14, 1987, the contracting officer informed the protester of the agency's determination to award the COCESS contract to NSSI. The contracting officer stated that this determination was based on a preaward survey conducted by DCAS on December 10, 1986, which indicated that NSSI qualified as a regular dealer under the Walsh-Healey Act. By letter of January 15, 1987, the protester advised the contracting officer that it was appealing his determination and added that any delay in making the award pending a final determination would not cause hardship to the government since the protester would agree to an extension of its current COCESS contract, which was due to expire on January 23. The agency awarded a contract to NSSI on January 22. On January 27, the contracting officer requested a decision from the Small Business Administration (SBA) as to whether NSSI qualified as a regular dealer. The agency informs us that it has not received a decision from SBA on this issue.

The basis for National General Supply's protest to this Office is that the Air Force allegedly failed to comply with the procedural requirements of FAR, 48 C.F.R. §§ 22.608-3 and 22.608-4 in awarding the contract to NSSI. Basically, the cited regulations provide that if a party disagrees with a contracting officer's determination in response to a protest challenging the Walsh-Healey eligibility of a particular offeror, the contracting officer must forward the determination to the Department of Labor or, if the offeror is a small business concern, to SBA. FAR, 48 C.F.R. § 22.608-3(b). The regulations provide further that after forwarding the case for review, the contracting officer may not award a contract unless the contracting officer certifies in writing that the items to be acquired are urgently needed or that failure to make award will delay delivery or performance and result in substantial hardship to the government. FAR, 48 C.F.R. § 22.608-4(a). Such a certification must be approved as required by agency regulations and the contracting officer must document the contract file to explain the need for making the award prior to completion of the review by DOL or SBA. Finally, written notice of award must be given to DOL and, as applicable, SBA, the protester, and other concerned parties. FAR, 48 C.F.R. § 22.608-4(b).

National General Supply contends that the contracting officer failed to make the required certification or to document the contract file concerning the need to award the contract to NSSI and failed to obtain the required approval. The protester bases these contentions on the fact that it did not receive copies of any such certification, documentation or approval. The protester also contends that any certification of urgency or substantial hardship the contracting officer may have made did not take proper account of the protester's offer to continue to operate its COCESS pending SBA's ruling on NSSI's Walsh-Healey eligibility. In addition, because its copy of the notice of award did not indicate that the Air Force had sent copies of the notice to either DOL or SBA, the protester contends that the Air Force failed promptly to notify these other agencies of the award, as required.1/

We find no merit to this protest. The agency's report to this Office2/ demonstrates that in awarding the contract to NSSI pending SBA's consideration of the firm's Walsh-Healey status, the Air Force substantially complied with the regulatory requirements cited by the protester. The record shows that the contracting officer awarded the contract to NSSI on January 22. On January 23, the contracting officer signed a certification stating that failure to award a COCESS contract would have an adverse effect on the government. (The Base Civil Engineering Squadron would be immobilized and the mission of the 63rd Military Airlift Wing would be adversely affected.) The Base Contracting Officer approved the certification on January 27. Although the regulations appear to contemplate that the certification

1/ In its comments on the agency's report, the protester also complains that the agency awarded the contract without prior notification to this Office. At the time of award on January 22, however, the protester had not yet filed a protest with this Office. Thus, there was no requirement for the Air Force to notify us of the award.

2/National General Supply complains that the Air Force did not provide it with all of the exhibits attached to the report submitted to this Office. We called this to the agency's attention, and the agency agreed to provide the protester with copies of those exhibits that were not already in the protester's possession. Based on the protester's comments on the report, it appears the protester ultimately received copies of all material exhibits.

and approval occur prior to award, the regulations do not expressly so require and we fail to see any prejudice to the protester by the sequence of these events in this case. The agency provided the protester with notice of the award by letter dated January 23; the regulations do not require that a protester receive copies of other documents or correspondence. The agency informed DOL and SBA of the award on February 6.

The protester also argues that if the Air Force had a critical need for continued operation of a COCESS, the contracting officer should not have ignored the protester's offer to continue its COCESS operation. We considered a similar argument in Superior Engineering and Electronics Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698, and said that there is no requirement that an agency fulfill an urgent need by extending the services of an incumbent contractor on a sole-source basis.

In its comments on the agency's report, the protester notes that the Air Force apparently did not send to SBA a copy of the protester's letter to the Air Force of January 7 in which it provided additional argument on NSSI's status as a regular dealer. We agree with the protester that the agency thus failed to comply with FAR, 48 C.F.R. § 22.608-3(b), which requires the agency to forward the entire record to the appropriate reviewing agency, in this case SBA. We assume the protester has since provided SBA with a copy of its January 7 letter, but in any event, the Air Force should take the necessary steps to ensure that SBA indeed has the entire record in this matter.

Even though we deny the protest, we note that there was an apparent delay between the agency's receipt of the protester's letter of January 15 appealing the contracting officer's Walsh-Healey determination and the agency's referral to SBA. The record indicates that the agency received the protester's letter on January 15, yet did not forward the record to SBA until January 27. Although this did not prejudice the protester, we think the regulations contemplate a more expeditious referral.

The protest is denied.

for Seymour Ebs
Harry R. Van Cleve
General Counsel