



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: JTC Environmental Consultants, Inc.
File: B-229882; B-229882.2
Date: May 2, 1988

DIGEST

1. Failure to give notice to unsuccessful offeror of an impending small business set-aside award does not invalidate the award where the protester filed a timely size status protest but the Small Business Administration's subsequent determination that the awardee was not a small business was issued more than 10 days after receipt of that protest, since a contracting agency is permitted to award a contract after that 10-day period in any event.
2. Where an agency led an offeror into the areas of its cost proposal that the agency considered high but not unreasonable, and afforded the offeror an opportunity to submit a revised proposal, meaningful discussions were conducted.

DECISION

JTC Environmental Consultants, Inc., protests the award of a contract to Johnson, Bassin & Shaw, Inc., under request for proposals (RFP) No. DAA-87-25, a small business set-aside issued by the Employment and Training Administration, Department of Labor, for health support services for the Job Corps program. JTC alleges that it was prejudiced by Labor's failure to give preaward notice of the award; that Johnson's proposal did not meet material terms of the RFP; and that Labor failed to conduct meaningful discussions with JTC.

We deny the protest.

Labor issued the RFP on July 22, 1987. In their responses, Johnson and JTC certified that they were small business concerns under the size standard applicable to this procurement. After evaluating the offers, the contracting officer made the award of the cost-plus-fixed-fee contract to Johnson on December 16. He then notified JTC of the award. Within 5 days after being notified of the award, JTC filed a timely written size protest challenging Johnson's small business status with the contracting officer. See

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Federal Acquisition Regulation (FAR) § 19.302 (FAC 84-12). The contracting officer forwarded the protest to the Small Business Administration (SBA), which ultimately determined, on April 7, 1988, that Johnson was not a small business for the purpose of this procurement. Johnson currently is appealing the matter to the SBA's Office of Hearings and Appeals.

In the meantime, JTC filed a protest with our Office, on December 23, charging that the contracting officer failed to comply with FAR § 15.1001(b)(2) (FAC 84-13), which requires the contracting officer to inform each unsuccessful offeror of an intended award in order to allow for a pre-award size status protest to the SBA, unless the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. JTC argues that this failure materially prejudiced JTC because Johnson is not a small business eligible for award. JTC also alleges that Labor has not presented sufficient grounds for claiming an urgency exception to the preaward notice requirement.

Where, as in this case, the contracting officer receives a timely size protest, the applicable regulations provide that he shall not award the contract until the SBA has made a size determination or 10 business days have expired since the SBA's receipt of the protest, whichever occurs first, unless the contracting officer determines in writing that an award must be made to protect the public interest. FAR § 19.302(h)(1).

Here, Labor asserts that the contracting officer made an unwritten urgency determination based on the fact that the prior contract had expired on December 15 and an interruption in the health services involved was unacceptable, and he thus was not required to inform JTC before award of the agency's selection decision. Also, after JTC's protest to our Office, Labor made a written determination, on December 30, to proceed with contract performance notwithstanding the protest to our Office, because of urgent and compelling circumstances. The December 30 determination cites findings that the contract involves daily health screening of Job Corps applicants, processing of AIDS statistical data, development of AIDS training for Job Corps centers, and technical assistance to center health units, as reasons for the decision to proceed with performance.

Labor confirmed its December 15 urgency determination in writing on January 28, 1988, citing the findings of the determination to proceed with contract performance, and stating that although the incumbent's contract had been extended until January 15, 1988, the extension was for

transitional purposes only because the incumbent had lost its small business status and a further extension would require a sole-source award. Labor further notes that FAR § 15.1001(b)(2) does not require that the writing justifying an urgency precede award, but only that a written determination be made at some point that an urgency did in fact exist.

We find that JTC was not materially prejudiced by the Labor's alleged lack of compliance with FAR § 15.1001(b)(2). Pursuant to FAR § 19.302(h)(1), the contracting officer could have made award to Johnson on January 6, 1988, 10 working days after the SBA's receipt of the protest, whether or not an urgency determination had been made. Further, as noted above, the SBA did not make its determination that Johnson was not a small business until April 7, 1988. Therefore, the contracting officer's failure to inform JTC of the intended award to Johnson would not compromise the validity of that award, whether or not an urgency determination was warranted.

JTC next alleges that Johnson's proposal did not meet the material terms of the RFP for detailed information concerning subcontractors and consultants, which, JTC asserts, was orally interpreted by the contracting officer to require letters or commitment from consultants to the offeror and resumes of subcontractors.

We find this contention to be without merit. The RFP requested detailed information concerning the identity, cost, experience, availability and services to be performed by subcontractors and consultants. The criteria for award section of the RFP provided that offerors should present sufficient information to allow Labor to judge the quality and competence of proposed personnel. Whether or not the contracting officer ever orally amended the solicitation by telling JTC that letters of commitment were the only documents that would meet the RFP requirements, the record confirms that Johnson did in fact timely submit letters of commitment, dated August 10 and addressed to Johnson, from proposed consultants, and resumes from proposed subcontractors, with its initial proposal submitted on August 21, the closing date for receipt of offers.

JTC's last allegation concerns Labor's failure to inform JTC during discussions that JTC's proposed level of effort of approximately 22 person-years exceeded the government estimate of approximately 19 person-years and that the firm's price therefore was considered to be unrealistically high. JTC also argues that Labor misled JTC into believing that its proposed level of effort of approximately 22 person-years was required by the RFP and reasonable, because

at the debriefing Labor informed JTC that the government estimate for the procurement had been based on a level of effort of approximately 19 person-years. JTC states that although the RFP gave the estimated level of effort as 18 to 24 person-years, the total estimated person-days broken down by task totaled 26 person-years. JTC argues that it thus reasonably assumed that the RFP required a level of effort in the upper range of the 18-24 person-year estimate.

We think that Labor conducted adequate discussions with JTC concerning JTC's level-of-effort and its price. The requirement for discussions with all responsible offerors whose proposals are in the competitive range includes advising them of deficiencies in their proposals and affording them the opportunity to satisfy the government's needs through submission of revised proposals. FAR §§ 15.610(c)(2) and (5); Furuno U.S.A., Inc., B-221814, Apr. 24, 1986, 86-1 CPD ¶ 400. This does not mean that agencies are obligated to afford offerors all-encompassing discussions, Training and Management Resources, Inc., B-220965, Mar. 12, 1986, 86-1 CPD ¶ 244, or to discuss every element of a technically acceptable proposal that has received less than the maximum possible score. Bauer of America Corp. & Raymond International Builders, Inc., A Joint Venture, B-219343.3, Oct. 4, 1985, 85-2 CPD ¶ 380. The extent and content of these discussions are matters within the judgment of the agency and are not subject to question by our Office unless clearly unreasonable. Individual Development Associates, Inc., B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.

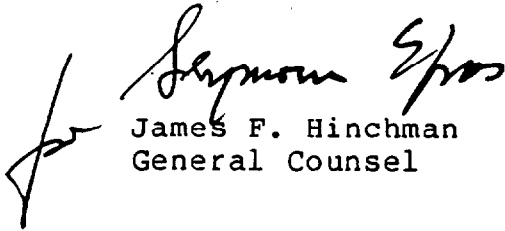
The solicitation stated that the level of effort for the project was estimated as 18 to 24 person-years; JTC's initial offer proposed 22.61 person-years; its best and final offer proposed 22.49 person-years. The government estimate for the procurement is \$1,700,000. The record confirms that Labor did not raise the level of effort issue with JTC, but did tell JTC to reconsider the amount charged per person-year and did recommend that JTC revise downward its projected salary increases, its travel, reproduction, and property acquisition costs, its allocation of accounting expenses, and its overhead and general and administration rates. As a result, JTC reduced its price from \$2,034,276 to \$1,916,557 in its best and final offer. Labor did discuss with JTC, in detail, specific cost elements in JTC's proposal that were identified in the Defense Contract Audit Agency's Field Pricing Report as being too high; as stated above, JTC did in fact reduce its price following those discussions.

JTC is wrong in its reading of the person-year estimate included in the RFP. The statement of work includes a

detailed breakdown of the estimated person-days per RFP task divided into staff estimates and consultant estimates. The sum total of the estimated person-years in the statement of work is approximately 18.5. The RFP schedule also includes a chart summarizing the estimated person-days listed in the statement of work. The sum total of person-years in that chart is also approximately 18.5. JTC was therefore on notice that Labor estimated the level-of-effort for this procurement as 18.5 person-years, but that a level-of-effort between 18 and 24 person-years would be acceptable. In these circumstances, we do not think Labor was obliged to tell JTC during discussions that the firm's decision to assign 22 person-years to the contract was unreasonable. For the same reason, we do not think Labor had to remind JTC of the cost ramifications of that decision, since JTC's total proposed cost itself was not considered unrealistically high given the firm's approach to the job.

In sum, we think JTC's cost reflected the firm's business decision that it would need 22 person-years to perform the required work. The fact that Labor itself thought an offeror could do that job with 3 fewer employees does not mean the agency, already having advised offerors of an estimated level-of-effort of 18-24 person-years, had a further legal obligation with respect to level-of-effort and price discussions with JTC.

The protest is denied.


James F. Hinchman
General Counsel