



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Delta Systems, Incorporated

File: B-232235

Date: August 18, 1988

DIGEST

Offeror on a services procurement set aside for small business, who was found ineligible for award by the Small Business Administration (SBA) because of its extensive use of a large business subcontractor, is not prejudiced by the procuring agency's failure to include in the solicitation the proper clause limiting large business subcontracting, where the SBA size decision states that the offeror is ineligible for award, whether or not the proper clause was applicable, because the large business subcontractor was an "ostensible subcontractor" and "joint venturer" with the offeror.

DECISION

Delta Systems, Incorporated protests any award under request for proposals (RFP) No. N00039-87-R-0317, issued by the Space and Naval Warfare Systems Command, United States Department of the Navy for technical support services.

We dismiss the protest.

The RFP, set aside for small business, as amended, includes a clause entitled "Performance of Work by the Large Business Subcontractors," which, among other things, prohibits large business subcontractors from performing work in excess of 50 percent of the total amount of work under the contract.

Proposals were submitted under the RFP on November 4, 1987, and Delta was selected for award in April 1988. Delta's proposal indicated that a substantial amount of work would be performed by Syscon Corporation, a large business. Prior to award, Logistics Engineering, Inc., protested to the Small Business Administration (SBA) that Delta was not a small business concern.

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On May 11, 1988, the SBA regional office found Delta to be other than small for purpose of this procurement because of Delta's extensive use of Syscon. Delta appealed this determination to SBA's Office of Hearings and Appeals (OHA) on May 23, 1988. On July 21, 1988, the SBA OHA also found Delta was other than a small business concern because of its use of Syscon, and thus was ineligible to participate in this small business set-aside.

Delta alleges that the OHA decision was based upon the application of Federal Acquisition Regulation (FAR) § 52.219-14 (FAC 84-31), a provision required to be included in solicitations for services that are set aside for small business concerns. See 15 U.S.C. § 644(o) (Supp. IV 1986). Delta points out, however, that this provision was not included in the RFP and that it has limitations on sub-contracting with large businesses which differ from the "Performance of Work by the Large Business Subcontractors" clause which did appear in the RFP.^{1/}

Upon receipt of the SBA OHA decision, Delta contacted the Navy and suggested that the RFP should be canceled and resolicited because the wrong limitation on subcontracting with large businesses had been included in the RFP. Delta claims that it had carefully prepared its proposal to be compliant with the specific criteria in the RFP rather than FAR § 52.219-14, and that it would have structured its subcontractor relationships to comply with FAR § 52.219-14 if that clause had been included in the RFP.

We find that Delta's complaint has no merit. Although it is true the SBA OHA decision was based in part upon an application of FAR § 52.219-14, which was not included in the RFP, the decision also states that Delta's use of Syscon rendered it other than a small business, even assuming that clause did not apply to this procurement. In this regard, the OHA found Delta was "unduly" and "unusually" reliant upon Syscon for contract performance, such that Syscon was found to be an "ostensible subcontractor" and "joint venturer" with the prime contractor under 13 C.F.R. § 121.3(a)(vii)(C). That SBA regulation states in pertinent part:


"An ostensible subcontractor which is to perform primary or vital requirements of a contract may

^{1/} The FAR clause refers to "50 percent of the cost of contract performance incurred for personnel;" the RFP clause refers to "fifty percent (50%) of the total amount of work to be performed under the contract."

have controlling role such to be considered a joint venturer affiliated on the contract with prime contractor."

According to SBA, this relationship rendered Delta ineligible for award on this small business set-aside.

Inasmuch as the OHA decision, which is final and conclusive, found Delta other than a small business, whether or not FAR § 52.219-14 was applicable, Delta was neither prejudiced by the Navy's failure to include this provision in the RFP nor the Navy's inclusion in the RFP of the "Performance of Work by the Large Business subcontractors" clause. Accordingly, the protest is dismissed.



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