

M. Casey



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Science Systems and Applications, Inc.
File: B-236477
Date: December 15, 1989

DIGEST

Protest is sustained where, contrary to Federal Acquisition Regulation, agency awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, without executing a determination of urgency prior to award or giving prior notice of the proposed award to unsuccessful offerors which prevented protester from challenging awardee's size status prior to award.

DECISION

Science Systems and Applications, Inc. (SSAI), protests the award of a contract to S. M. Systems and Research Corporation (SMSRC), under request for proposals (RFP) No. 52-DDNE-9-0004, issued as a total small business set-aside by the National Oceanic and Atmospheric Administration (NOAA), Department of Commerce, for software maintenance and development support in connection with satellite data processing. SSAI asserts that, contrary to the requirements of the Federal Acquisition Regulation (FAR), the agency issued the award without providing notice of the proposed award to SSAI, an unsuccessful offeror, thus effectively precluding the firm from filing a size status protest in time to prevent the agency from making the award. According to the protester, in light of the ultimate determination by the Small Business Administration (SBA) that the awardee was not a small business, SSAI was prejudiced by the agency's failure to issue the preaward notice.

We sustain the protest.

BACKGROUND

The RFP was issued to consolidate under one contract work that was being performed under separate procurements by three contractors, including the awardee and the protester.

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Of four proposals submitted in response to the solicitation, NOAA determined that two, SMSRC's and SSAI's, were in the competitive range. In evaluating final BAFOs from the two firms, both of which self-certified as small businesses, the agency determined that SSAI's proposal was technically superior to SMSRC's by about 2 percent, but that SMSRC's probable cost was approximately 7 percent lower than SSAI's. In accordance with the stated evaluation criteria, under which probable cost was to be given relatively greater significance in the case of close technical ratings, NOAA awarded the contract to SMSRC on July 28, 1989, with a starting date of July 31. On July 28, SSAI received oral notification from the contracting officer that the award had been made; NOAA's written notification of the award, dated August 7, was not received by SSAI until August 9.

On August 8, SSAI filed a size status protest of the award with the contracting officer, arguing both that the agency had failed to issue the required written preaward notice, and that SMSRC was engaged in a joint venture with its subcontractor, ST Systems Corporation, allegedly a large business, thus rendering SMSRC ineligible for the award. As required by FAR § 19.302(c), NOAA forwarded the protest to the SBA for consideration of the awardee's size status. On September 15, the SBA's Philadelphia regional office issued a decision in which it found that SMSRC in fact was not a small business concern for purposes of this procurement, and thus was ineligible for award under the small business set-aside.

ANALYSIS

SSAI asserts in its protest here that NOAA's failure to provide it prior written notice of the award clearly was improper, and resulted in circumvention of the small business size status procedures by precluding the firm from obtaining the remedy contemplated under those procedures, namely, prohibition of award of a contract to a business that is ineligible for award under a small business set-aside. Accordingly, SSAI states that the appropriate remedy is termination of SMSRC's contract and award to SSAI.

Under FAR § 15.1001(b)(2), in a small business set-aside, except where the contracting officer determines in writing that the urgency of the requirement necessitates award without delay, the contracting agency is required to inform each unsuccessful offeror in writing, prior to award, of the name and location of the apparent successful offeror, in order to permit challenges of the small business size status of that offeror. Generally, small business size status protests may be filed by an offeror within 5 days of

receipt of the written notification. FAR § 19.302(d); 13 C.F.R. § 121.9 (1989). After receiving a timely size protest, the contracting officer must withhold award of the contract until the SBA has made a size determination, or until 10 business days have elapsed since the SBA's receipt of the size protest, whichever occurs first. FAR § 19.302(h)(1).

Here, NOAA's failure to notify SSAI of the award until after it had been made clearly was contrary to the FAR requirements, and clearly defeated the purpose of the preaward notice requirement by precluding SSAI from delaying the award pending an SBA size status review. We previously have sustained protests under similar circumstances. See Maximus, Inc., 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467 (protest sustained where, contrary to FAR, agency made award under small business set-aside without giving preaward notice or executing written determination of urgency).^{1/}

NOAA argues that its failure to give preaward notice was justified since, although it failed to execute a written urgency determination, the circumstances of the procurement were such that a determination of urgency was appropriate. Specifically, NOAA argues that since the contract with the incumbent, SSAI, expired September 30, the source selection was not completed until July 24, and the RFP specified a 60-day transition period between the old and successor contracts, unless performance commenced prior to July 31, NOAA would have had no choice but to extend the contract with SSAI; NOAA asserts this would have amounted to an improper sole-source award. NOAA concludes that this constituted urgent circumstances warranting award prior to the notice.

We find NOAA's position unpersuasive. A definite determination of urgency is required to support a waiver of preaward notification. In Maximus, Inc., 68 Comp. Gen. 69, supra, for example, the agency purported to have made a "verbal determination" that urgent circumstances necessitated award before notice was given. We found, however, that the contracting officer's post-award statement that "it was determined that immediate award of a contract was

^{1/} We affirmed the decision on its merits in Department of Health and Human Services--Request for Reconsideration, B-231885.2, June 2, 1989, 89-1 CPD ¶ 521. However, we modified our recommendation of corrective action to allow the agency to reopen competition for the replacement contract to include firms in addition to those in the original competitive range.

critical and of an urgent and compelling nature," did not suggest deliberation at the time of award, and thus was inadequate to support the waiver of notice. In JTC Env'tl. Consultants, Inc., B-229882, B-229882.2, May 2, 1988, 88-1 CPD ¶ 420, cited by NOAA, we did not reach the question of whether a contemporaneous unwritten determination of urgent and compelling circumstances, based on the need for uninterrupted health care services, was sufficient to support a waiver where it later was followed by a written determination; rather, we found that the protester had not been prejudiced by the lack of preaward notice (see discussion below).

As in Maximus, here we find that the agency's after-the-fact explanation of why an urgency determination would have been appropriate, even if we found it persuasive (in fact, NOAA states that its failure to give the required preaward notice was due to "an unintentional oversight," not because of some contemporaneous urgency consideration), would not be sufficient to constitute the determination required by regulation. This explanation thus would not justify waiver of the notification requirement which, again, is aimed at preventing circumvention of the size status protest procedures.

NOAA further argues that, even if its failure to provide preaward notice was improper, it resulted in no prejudice to SSAI. According to the agency, since it promptly mailed SSAI's size protest to the SBA on August 10 (received by the SBA August 17), the SBA's September 15 decision clearly was issued more than 10 business days after the SBA's receipt of the protest; since, under FAR § 19.302(h)(1), it would have been required to withhold award only for 10 business days after the SBA's receipt of the protest, it would have been permitted to proceed with the award to SMSRC notwithstanding the size protest, and SSAI thus was not prejudiced by any failure to comply with the preaward notification requirements; in support of this position, NOAA cites JTC Env'tl. Consultants, Inc., B-229882, B-229882.2, supra.

We reject NOAA's argument. It is based on speculation that the SBA's decision would have been issued in the same amount of time whether or not the agency complied with the preaward notice requirement. We are not willing to speculate that this would have been the case. Rather, we think it is reasonable to assume--given that the 10-day period for SBA decisions on size protests under the regulations is premised on agency compliance with the preaward notice requirement--that the SBA may have proceeded more promptly here had the agency been delaying award pending the SBA's decision (and had the agency specifically advised the SBA of this fact).

We find no reason to assume that the SBA would not have issued its decision within 10 days under such circumstances. Indeed, it is impossible to conclude at this juncture that NOAA would not have waited beyond the 10-day period for an SBA decision had the protester been able to file a timely preaward size protest.^{2/}

NOAA is correct that in JTC we found that the agency's failure to furnish preaward notice to JTC resulted in no prejudice where the SBA ultimately issued a size protest decision more than 3 months beyond the 10-day period. In that case, we were persuaded that the SBA action would have taken longer than 10 days even had preaward notice been given. However, in the absence of clear evidence like that in JTC that a bidder has not been prejudiced by an agency's failure to give it the required preaward notice, we will assume that prejudice has resulted. To the extent that JTC suggests otherwise, we clarify it accordingly.

NOAA also asserts that preaward notice would not have benefited SSAI in any event, because such a notice would not have provided any information bearing on the awardee's size status, but would only have advised SSAI of the awardee's name and location. In support of this position, NOAA cites Automation Management Consultants, Inc., B-231540, Aug. 12, 1988, 88-2 CPD ¶ 145, and Strategica, Inc., B-227921, Oct. 27, 1987, 87-2 CPD ¶ 399, in which we denied protests based on agencies' failure to provide preaward notice where the protester did not allege that it had any preaward basis to challenge the size status of the awardee. In those cases, however, the SBA never made a finding that the awardee was not a small business; thus, unlike the situation here, there was no reason for us to conclude that the protester was prejudiced by the absence of proper notice. Here, SSAI was able to launch a successful challenge to the awardee's size status once it learned the awardee's identity; as above, we will not speculate that SSAI would not have challenged the awardee's size status before award had NOAA advised it of the awardee's identity before award, as required.

Finally, NOAA argues that SSAI was not prejudiced by its failure to issue a preaward notice because the firm could

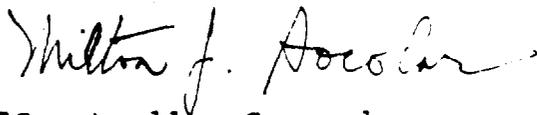
^{2/} Although SSAI did not raise its size protest until 7 working days after being advised award had been made, not within the 5-day period specified in the regulations, at that juncture SSAI already had been denied the opportunity to file a timely preaward size protest as contemplated by the regulations.

have obtained a stay of performance, under the Competition in Contracting Act (CICA), 31 U.S.C. § 3553(d) (Supp. IV 1986), by protesting more promptly the agency's failure to provide preaward notice. Had SSAI protested to our Office on this ground as soon as it knew of the failure (i.e., when it was advised of the award), NOAA argues, it would have obtained an automatic stay of performance under CICA during which it could have pursued the size protest.

NOAA's position is without merit. SSAI protested in a timely manner--on the seventh working day after receiving notice of the award, well within the 10 working days allowed by our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1989). We will not deny such a timely protest on the basis that the protester might have overcome the agency's improper action by protesting even more quickly.

We conclude that NOAA improperly failed to give SSAI the required prior notice of award, and that this failure prevented SSAI from filing a preaward size protest, to SSAI's prejudice. Although the record indicates SSAI, the only other offeror, was found technically acceptable, NOAA states in its report that, if it is determined that the award to SMSRC should be rescinded, it would consider resoliciting the requirement as a non-small business set-aside, in view of the fact that only one small business offer was received (SSAI's). Given these circumstances, by letter to the Secretary we are recommending that SMSRC's contract be terminated for the convenience of the government and that a contract be awarded to SSAI or, alternatively, if the requirement is resolicited on an unrestricted basis, that SMSRC's contract be terminated if that firm is not in line for award based on the resolicitation. Further, we find that SSAI is entitled to the costs of filing and pursuing its bid protest, including attorneys' fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.



Acting Comptroller General
of the United States