



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: United Power Corporation

File: B-239330

Date: May 22, 1990

Wayne A. Keup, Esq., Dyer, Ellis, Joseph & Mills, for the protester.

Edward J. Obloy, Esq., and Andrew H. Deranger, Esq., Office of the General Counsel, Defense Mapping Agency, for the agency.

C. Douglas McArthur, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest is sustained where agency, without notice to unsuccessful offerors, awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, based on agency's desire to make immediate award in order to avoid the administrative inconvenience of applying for an exception from a rumored funding freeze.

2. Contracting officer may not ignore prior procurement history, government estimate, and other relevant evidence in determining whether small business price received was in fact fair and reasonable.

DECISION

United Power Corporation protests the award of a contract to EPE Technologies, Inc., under request for proposals (RFP) No. DMA600-90-R-0032, issued as a total small business set-aside by the Defense Mapping Agency for power conditioning systems to be used in computer rooms. The protester contends that the agency improperly awarded a contract to a large business without providing the notice required by Federal Acquisition Regulation (FAR) § 15.1001(b)(2) (FAC 84-13). The protester has also filed suit in the United States District Court for the District of Columbia, United Power Corp. v. United States, Civil Action No. 90-0931, seeking injunctive relief. The court has stayed performance of the contract pending our decision. We have

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invoked the express option provided for in our Bid Protest Regulations. 4 C.F.R. § 21.8 (1989).

We sustain the protest.

On February 13, 1990, the agency issued the solicitation for a firm, fixed-price contract for a base requirement of 39 75-kVA power conditioning and distribution systems, plus related start-up services, training and data, with an option for an additional 26 systems to be provided as government-furnished equipment to contractors conducting site preparation for a portion of the agency's digital production system which is under construction at the aerospace center complex in St. Louis, Missouri.

The power systems will protect equipment and data from power anomalies, both by controlling the flow of current and by providing power in the event of temporary outages in the special electrical feeder lines that are to service the facility. The digital production system is an integral part of the agency's modernization effort which will allow the agency to move from a predominantly manual effort to a system which will produce maps, charts, and geodetic products using computer-assisted and digital production techniques.

The solicitation provided for evaluation of option prices and for award to that offeror which, as the result of price and technical evaluations, obtained the highest total weighted score, termed the "greatest value score" (GVS). The solicitation set forth six technical evaluation factors and provided that for the purposes of award, the total value of the technical factors would be significantly more important than price.

The agency received six proposals from five contractors on March 12 and completed its technical evaluation on March 15. As a result of this evaluation, the agency found that only two offerors, the awardee and the protester, were in the competitive range. Although the protester received a higher technical score, the awardee's price was substantially lower, resulting in a slightly higher total GVS score.^{1/}

^{1/} The awardee's evaluated GVS score was 92.4 points, while the protester's was 89 points. The awardee's price for the base requirement was \$906,438, and the protester's was \$1,213,697. The awardee's total evaluated price, including options, was \$1,510,730, and the protester's was \$2,061,248. The independent government estimate, including options, was \$2,232,672.

Although at the time the RFP was issued the agency did not contemplate awarding a contract until on or about May 1, 1990, the contracting officer, on March 15, "was informed by senior management that it appeared all [Department of Defense] funds for obligation under contract would be frozen on or about Monday, 19 March 1990." She was requested by senior management "to make every effort to award [the] contract prior to imposition of the freeze." The agency thereupon decided that award on the basis of initial proposals would be advantageous to the government. Prior to such an award, the protester orally advised the agency that the proposed awardee had merged with a large, foreign-owned business and was no longer a small business. However, the agency states that its quick check of various electronic commercial databases indicated that the awardee met the 500-employee size requirement.^{2/} The agency awarded the contract to EPE Technologies on March 16, without written notice to unsuccessful offerors, based on the contracting officer's unwritten determination that the urgency of the procurement necessitated award without delay.^{3/}

On March 20, the protester submitted a protest of the awardee's size status. The protester submitted evidence that in February the awardee had entered into a merger agreement with a large, foreign-owned business. (The awardee had submitted its proposal, in which it had certified itself as a small business, on March 8, 4 days prior to the date set for receipt of initial proposals and 1 day prior to the final transfer of stock.) The protester produced a copy of an internal memorandum dated February 8 advising EPE Technologies' employees of the impending

^{2/} The protester has presented evidence to refute this finding by the agency. Further, the parties stipulated in court that the agency representative participating in the search was under the belief that the acquisition of a small business by a large business "did not necessarily mean that [the small business] would no longer be small," if it retained a separate board of trustees with no direct control by the parent company.

^{3/} On March 19, the contracting officer states that she completed a written draft of a memorandum detailing the rationale for waiving the pre-award notice based on urgency. Our copy of this draft memorandum in the record is undated and unsigned. The final version was executed on April 13, 1990.

merger, a February 12 news story concerning the merger, and a Dun & Bradstreet report dated March 16, which contained details of the new ownership arrangement. On March 23, the contracting officer sent the size protest to the Small Business Administration (SBA).

On April 5, the SBA issued a determination in response to the protester's "timely size protest" that the awardee was other than small for the purposes of the procurement.^{4/} The SBA noted that its regulations clearly provide that for the purpose of determining size status, merger agreements and other arrangements affecting a concern's affiliation with another firm or a change of control are considered executed as of the date upon which the firm certifies its status. 54 Fed. Reg. 52,634 (1989) (to be codified at 13 C.F.R. § 121.904). On April 13, the agency advised the protester that despite the SBA decision, it would not terminate the contract. This protest followed on April 17.^{5/}

^{4/} Under new SBA regulations, a size protest received within 5 days after receipt from the contracting officer of notification of the identity of the awardee is timely and applies to the procurement in question even though the contracting officer may have awarded the contract prior to receipt of the protest. See 54 Fed. Reg. 52,634 (1989) (to be codified at 13 C.F.R. § 121.1603).

^{5/} The agency argues that the protest is untimely since continued performance of EPE Technologies' contract served as constructive notice that the agency had denied United Power's agency-level size protest of March 20. A size protest, however, is different from a bid protest. Further, we find that the protest is timely since it was not until the SBA determined that EPE Technologies was other than small and that the protester was advised that the agency would ignore the SBA determination that the protest ground arose, that is, on April 13. The agency also argues that our Office should dismiss the protest because the protester failed to deliver a copy of the protest to the offices that the RFP designated for service of protests. The agency had been previously aware of the protester's principal allegations, and our Office provided the agency with a copy of the protest within 2 days of the filing. Our Bid Protest Regulations, 4 C.F.R. § 21.1(f), state that our Office will not dismiss a protest where no prejudice has been shown, and we find none here.

Under FAR § 15.1001(b)(2), the contracting agency is required to inform unsuccessful offerors in writing, prior to award, of the name and location of the apparent successful offeror, in order to permit challenges to the successful offeror's small business size status. Generally, 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) (FAC 84-56). The award of a contract without notice to unsuccessful offerors is subject to a timely size protest in the absence of a valid urgency determination. Superior Eng'g and Elecs. Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698. The contracting officer need not provide notice where she determines in writing that the urgency of the procurement necessitates award without delay. Where the agency awards a contract pursuant to a proper urgency determination, the notice requirements concerning size status are waived and a subsequent SBA determination that the awardee is other than small is prospective and termination of the contract is not required. Id. We review such determinations for reasonableness, and where they are executed after award, we will consider whether the determination suggests deliberation at the time of award. See Science Sys. and Applications, Inc., B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558. We conclude that, in the instant case, the determination was unreasonable and that there was more than sufficient time to complete the size protest prior to any award.^{6/}

^{6/} We also find that EPE Technologies failed to self-certify its small business status in good faith. The standard of good faith when applied to a certification as a small business is not limited to an incident of intentional misrepresentation; since self-certifications are usually not questioned, offerors must be held to a higher than usual degree of care in determining whether they are or are not a small business. 51 Comp. Gen. 595 (1972). The record here discloses that on February 9, 5 weeks prior to award, the awardee widely circulated among its employees and the media the news of its acquisition; the awardee sponsored meetings for its sales representatives to discuss the details and implications of the acquisition. During the period preceding the submission of offers for the current solicitation, the finalization of the acquisition awaited only the approval of the Secretary of State of California for the formal transfer of stock, which was placed in a trusteeship controlled by the purchaser. The awardee executed the self-certification 1 day prior to the formal

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The final written determination executed by the contracting officer on April 13 concerns the role of the digital production system to the agency's mission. The contracting officer notes that the RFP delivery schedule is extremely optimistic, based on the delivery schedule supplied by the awardee, that any slippage of the delivery schedule "could" result in day-to-day slippage of the digital production system's full operational capability, and that such slippage could expose the agency to large delay claims by construction contractors.

We note, however, that in arguing the importance of the agency's mission and the importance of the digital production system to that mission, the contracting officer presents no basis for concluding that a delay in award would have delayed construction of the digital production system. As noted by the District Court in the protester's suit (order granting preliminary injunction), the contracting officer's determination contains no basis for presuming that a delay in award, to allow the protester to pursue its size status protest, would have prevented timely delivery of the power systems to the construction contractors.

While the determination states that the awardee considered the schedule optimistic, the record shows that the awardee had already offered to make early deliveries in return for an increase in the contract price. The protester, for its part, avers that it could make timely deliveries if a contract were awarded as late as May. Indeed, the record contains an affidavit from the agency's technical representative, expressing his opinion that award by mid-May probably would not have delayed delivery of the power systems. We conclude that at the time the notice was waived (mid-March), the agency had ample time to refer the size status protest to SBA and to process an award without delaying delivery of the power systems.

The only other factor that could have delayed delivery would have been the necessity of obtaining an exemption if the rumored funding freeze had become reality. The agency's senior procurement executive confirms that several sources had reported the pending freeze and that, in a telephone call, the Office of the Secretary of Defense refused to

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transfer. We believe that a reasonably prudent offeror would therefore have been on notice that there was a serious question as to its size status. See Bancroft Cap Co., Inc. et al., 55 Comp. Gen. 469 (1975), 75-2 CPD ¶ 321.

confirm or deny that it planned to impose such a freeze. He therefore directed contracting personnel to expedite awards and to take every action to award certain procurements. A request for exemption from an earlier freeze had taken 2 months to process, and the contracting officer was directed by senior management at the agency to expedite the procurement. The contracting officer's determination must be read in this context, and we find that neither the funding freeze nor the agency's desire to avoid the inconvenience and delay attendant to seeking an exemption from the funding freeze, under guidelines duly promulgated by the Secretary of Defense, provided a valid basis for a finding of urgency. Cf. Maximus, Inc., 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467.

In sum, we find that the agency's primary motive for waiving the pre-award notice was its fear that funds might be frozen and its desire to avoid the inconvenience of applying for an exemption from the rumored funding freeze that never materialized. We find that the contracting officer's determination was unreasonable and the written determination of urgency prepared after award does not reflect a product of reasoned deliberation; the SBA's determination that EPE Technologies is other than small is therefore applicable to the current procurement and its contract must be terminated.

The agency also argues that the protester is not an interested party for the purposes of filing a protest under our Bid Protest Regulations, 4 C.F.R. § 21.0(a), since it would not receive award even if its protest were sustained. In support of this assertion, the agency notes that the protester's proposal did not comply with the RFP requirements, since the protester did not provide a firm price for the evaluated option quantities.^{7/} The contracting officer also argues that if EPE Technologies is eliminated from the competition, she cannot make award to the protester, because, based on EPE Technologies' price, she has in fact determined that the protester's price is not fair and reasonable. She advises our Office that in such circumstances, she will therefore simply dissolve the small business set-aside.

^{7/} The protester's cost proposal noted the possibility of a price increase for option units shipped after March 31, 1991. However, the protester states that it is willing to provide all the option quantities at the firm, fixed-price contained in its proposal. We merely note that the protester's proposal would easily be susceptible to correction through discussions. See Cajar Defense Support Co., B-237522, Feb. 23, 1990, 90-1 CPD ¶ 213.

A determination of price reasonableness for a small business set-aside is within the discretion of the procuring agency, and we will not disturb such a determination unless it is clearly unreasonable. Flagg Integrated Sys. Technology, B-214153, Aug. 24, 1984, 84-2 CPD ¶ 221. We believe that the contracting officer's determination in this case is clearly unreasonable.

According to FAR § 19.501(j) (FAC 84-48), a contract may not be awarded under a small business set-aside if the cost to the agency exceeds the item's fair market price. FAR § 19.001 (FAC 84-56) defines fair market price as a price based on reasonable costs under normal competitive conditions, and not on the lowest possible cost. FAR § 19.202-6 (FAC 84-56) directs agencies to determine fair market price in accordance with FAR § 15.805-2 (FAC 84-51), which permits a contracting officer to use the price analysis techniques that will ensure a fair and reasonable price, including a comparison of proposed prices received in response to the solicitation, a comparison of prior proposed or contract prices with current proposed prices, and a comparison with independent government cost estimates.

Here, the parties stipulated in the court proceedings that the contracting officer relied solely on the large business price in determining that the protester's price was not fair and reasonable, ignoring all other evidence. We believe that it is unreasonable to rely solely on the large business price, where all other evidence indicates that the price submitted by the small business was in fact fair and reasonable. See Victronics, Inc., B-237249, Jan. 16, 1990, 69 Comp. Gen. ____, 90-1 CPD ¶ 57.

We find no basis whatsoever for finding the protester's price to be unreasonable. The record shows that the price submitted by the protester is entirely in line with the prior procurement history for the item and is below the government estimate. Indeed, shortly before this protest was filed, the agency approved a contract modification for the construction contractor to procure the item at a price 25 percent higher than that here offered by the protester; furthermore, the price offered by the protester is less than that appearing on the General Services Administration schedule price lists of both the protester and EPE Technologies. The record also suggests that the awardee's price may have been below-cost since the price was two-thirds that which it had previously offered for similar systems and two-thirds of the government estimate. Moreover, we believe that having given primacy to technical factors and thereby inducing the protester to submit a

higher price, higher quality proposal, the agency cannot, under the circumstances here, declare that price to be other than fair and reasonable. To do otherwise would be contrary to the congressional policy favoring small businesses, which allows awards to small businesses at premium prices, so long as those prices are not unreasonable. See APAC-Tenn., Inc., B-229710 et al., Feb. 8, 1988, 88-1 CPD ¶ 124.

We therefore conclude that the agency has not justified the need to waive notice of award to unsuccessful offerors, that the contracting officer abused her discretion, and that the protester was prejudiced thereby. As we have stated, the SBA determination that EPE Technologies is other than small therefore applies to the current procurement, and we are therefore by letter of today to the Director, Defense Mapping Agency, recommending that the agency terminate EPE Technologies' contract for the convenience of the government and award the contract under the solicitation to the protester after affording the protester an opportunity to cure the reference in its cost proposal to a possible price increase for the option quantities. We award the protester its costs of pursuing this protest, including attorneys' fees; the protester should submit its claim for costs directly to the agency. 4 C.F.R. § 21.6(d).

The protest is sustained.

Milton J. Acosta
for Comptroller General
of the United States