Westfall | McGrail

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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Automation Management Consultants Inc.

File: B-243805

Date: August 29, 1991

Philip N. Postelle for the protester.
Lonnie D. Dixon for Analytical & Research Technology, Inc., an interested party.
Donald F. Hassell, Esq., and Brian T. Kildee, Esq., United States Nuclear Regulatory Commission, for the agency.
Jennifer Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester whose proposal did not receive the second highest combined technical/cost score is an interested party to protest agency's failure to notify unsuccessful offerors under a small business set-aside of the identity of the successful offeror prior to award, as required by Federal Acquisition Regulation § 15.1001(b)(2), since agency evaluators rejected all proposals other than the successful offeror's as technically unacceptable; thus, if the protest were sustained, the appropriate remedy would be termination of the awardee's contract and resolicitation of the services, and the protester would be entitled to compete under the resolicitation.

2. Protest objecting to agency's failure to notify unsuccessful offerors under a small business set-aside of the successful offeror's identity prior to award is denied where agency reasonably determined that the urgency of the requirement necessitates award without delay.

DECISION

Automation Management Consultants Inc. (AMCI) protests the award of a contract to Analytical & Research Technology, Inc. (ART) under request for proposals (RFP) No. RS-IRM-91-183, issued as a total small business set-aside by the United States Nuclear Regulatory Commission (NRC) for microcomputer support services. The protester asserts that, contrary to the

requirements of the Federal Acquisition Regulation (FAR), the agency made the award without first informing unsuccessful offerors of the name and location of the apparent successful offeror, thereby precluding other offerors from filing a timely protest of the prospective awardee's size status.

We deny the protest.

The RFP, which contemplated the award of a cost-plus-fixed-fee contract, sought a contractor to provide advice and assistance to NRC personnel in the Washington, D.C. area who use microcomputers and local area networks.1/ Twenty-five firms submitted proposals prior to the December 19, 1990, closing date. The agency source evaluation panel recommended that 5 proposals, with technical scores ranging from 82 to 92, be included in the competitive range; the other 20 proposals were judged by the evaluators to be unacceptable as submitted and incapable of being made acceptable through discussions. The agency conducted oral and written discussions with the five firms in the competitive range and those offerors submitted best and final offers on April 10, 1991. The evaluation panel reviewed the revised proposals and determined that four of the five, including the protester's, were not acceptable as submitted and could not be made acceptable for award even by discussions.2/ In the evaluators' judgment, only the remaining firm, ART, had demonstrated the ability to maintain a qualified support team within the contractual cost ceiling. The evaluators thus recommended ART, which had certified as part of its offer that it was a small business concern, for award. The contracting officer approved the panel's recommendation and awarded a 2-year contract to ART on April 19. The unsuccessful offerors were not notified of the selection of ART prior to execution of the award.

On April 22, the agency notified AMCI by telephone of the award to ART, and by letter dated April 23, the contracting officer confirmed this notice in writing. On April 26, AMCI protested to our Office. On the same date, the AMCI protested ART's size status to the contracting officer. On April 30,

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1/ Prior to award of the protested contract, AMCI provided these services pursuant to a contract awarded to it on June 29, 1988. This contract was originally due to expire on July 5, 1990, but was extended five times to maintain continuing performance of these services during the recompetition.

2/ The four firms, which had received technical scores ranging between 82 and 92 on their initial proposals, received scores ranging between 71 and 78 on their revised proposals.

the contracting officer referred the size protest to the Philadelphia Regional Office of the Small Business Administration (SBA). The same day, the acting head of the agency's Division of Contracts and Property Management, Office of Administration, approved the contracting officer's determination that due to urgent and compelling circumstances significantly affecting interests of the United States, contract performance should not be suspended pending our decision.

On July 23, the SBA regional office determined that ART was other than a small business concern for purposes of this procurement3/ since its proposed subcontractor, Meridian Corp., was affiliated with it as a joint venturer. ART appealed the regional office decision to SBA's Office of Hearings and Appeals on August 2, within 5 days of its receipt of the regional office determination.4/ On August 21, the Office of Hearings and Appeals dismissed ART's appeal as moot, finding that the regional office's determination had no present impact since the contract had already been awarded to the appellant, and no future impact because a finding of affiliation predicated upon a joint venture is limited to the procurement at issue; thus, the Office of Hearings and Appeals reasoned, the appellant could suffer no harm from the determination appealed.

As a preliminary matter, the agency argues that AMCI is not an interested party to protest to our Office since it would not be in line for award even if its protest were sustained. In this regard, the agency notes that there were other firms in the competitive range whose final technical scores were substantially superior to AMCI's technical score and whose final proposed costs were roughly comparable to AMCI's.

3/ The regional office found that AMCI's size status protest was timely since it was delivered to the contracting officer within 5 days of the first notification to the protester that ART had been awarded the contract. See 13 C.F.R. 121.1603(a)(2) (1991) (a protest filed within 5 days after receipt from the contracting officer of notification of the identity of the awardee shall apply to the procurement in question even though the contracting officer may have awarded the contract prior to receipt of the protest).

4/ 13 C.F.R. § 121.1705(a)(2) provides that unless an appeal is filed within 5 days after receipt of the regional office determination, the appellant will be deemed to have waived all rights of appeal regarding size insofar as the pending procurement is concerned.

Although there were, as the agency observes, offerors in the competitive range whose technical scores were higher than AMCI's, the agency evaluators ultimately determined that these proposals--like AMCI's--were technically unacceptable. Thus, if AMCI's protest were sustained and the award to ART terminated, there would be no other offerors in line for award and the agency would be required to resolicit for the computer support services. Where, if a protest were sustained, the appropriate remedy would be termination of the awardee's contract and a resolicitation under which the protester could compete, the protester is an interested party to protest to our Office. See Star Technologies, Inc., B-233489; B-243489.2, Mar. 16, 1989, 89-1 CPD ¶ 279.

With regard to the merits of AMCI's protest, the agency contends that the contracting officer was not required to notify unsuccessful offerors under the RFP of the identity of the apparent successful offeror prior to award since FAR § 15.1001(b)(2), which sets forth the requirement for pre-award notification, also provides that notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay. Here, the agency maintains, the contracting officer properly determined that the computer support services were urgently required and that the contract should be awarded without delay.

The protester argues in response that there was sufficient time between the date on which ART was selected for award (April 17) and the date on which services under the contract were scheduled to commence (April 26) for the contracting officer to notify unsuccessful offerors of the awardee's identity and to wait 5 days to see whether any of the disappointed offerors intended to challenge the prospective awardee's size status.5/ In addition, the protester contends that award of a new contract for the computer support services was not urgently required because the services could have been obtained by extending the incumbent's (i.e., its own) contract. AMCI also objects to the fact that the contracting officer did not sign the urgency determination until April 25, several days after she had awarded the contract.

5/ FAR § 19.302(d) provides that to affect a specific solicitation, a protest must be timely, and that to be timely, a protest must be received by the contracting officer by the close of business of the 5th business day after bid opening (in sealed bid acquisitions) or receipt of the special notification from the contracting officer provided for in FAR § 15.1001(b)(2) that identifies the apparently successful offeror (in negotiated acquisitions).

Where an agency elects to waive pre-award notification of the unsuccessful offerors under an RFP based on its determination that the urgency of the requirement necessitates award without delay, we will review the urgency determination for reasonableness. United Power Corp., 69 Comp. Gen. 476 (1990), 90-1 CPD ¶ 494. In addition, where such a determination is not executed in writing until after award, we will consider whether the record suggests that the decision to waive pre-award notification was in fact made prior to award. Maximus, Inc., 68 Comp. Gen. 69 (1988), 88-2 CPD ¶ 467.

Here, the record reflects both that the contracting officer's determination to waive the pre-award notification requirement was reasonable and that she reached this decision prior to award. The agency reports that the contracting officer concluded at the time ART was selected that insufficient time remained to notify other offerors of its identity prior to award since the new contractor would need approximately a week to assemble its work force, participate in an entrance briefing and otherwise prepare for award. Thus, although services under the contract were not scheduled to commence until April 26, award approximately a week prior to that date (i.e., around April 19) was required to assure that ART would be prepared to begin performance on the 26th. Given these circumstances, we think that it was reasonable for the contracting officer to conclude that sufficient time was not available to notify the other offerors and then to wait 5 days to see whether any of the disappointed offerors intended to challenge ART's size status. It is also apparent from the record, which includes affidavits from both the contracting officer and the contract negotiator, that this determination was made prior to award although the memorandum memorializing the decision was not signed by the contracting officer until after award.

With regard to the protester's argument that award of a new contract was not urgently required because the services could have been obtained by extending the incumbent's contract, we agree with the protester that extension of its contract until any questions concerning ART's size status had been resolved was an option available to the agency. However, we are aware of no requirement that would oblige a procuring agency to extend an incumbent's contract on a sole-source basis rather than to award a new contract to alleviate an urgent situation. Superior Eng'g and Elecs. Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698. Further, it in fact appears that the agency considered the option of extending the protester's contract

but decided that award to ART was preferable to a sixth noncompetitive extension of the contract. We see nothing unreasonable in such a determination.

The protest is denied.

Ronald Berger
for James F. Hinchman
General Counsel