



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Verify, Inc.
File: B-214401.2
Date: January 24, 1992

James H. Bradshaw, Esq., Parham & Associates, Inc., for the protester.
Sam Zalman Gdanski, Esq., for Management Assistance Corporation of America, an interested party.
Russell P. Spindler, Esq., and Douglas P. Larsen, Jr., Esq., Department of the Navy, for the agency.
John W. Klein, Esq., for the Small Business Administration.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting agency is not required to terminate 100 percent small business set-aside contract awarded after the Small Business Administration (SBA) regional office determined the awardee to be a small business concern, even though, on remand from SBA's Office of Hearings and Appeals, the regional office reversed itself and found the awardee to be other than a small business due to its affiliation with the incumbent large business; the agency was authorized to proceed to award based on the initial SBA size determination by Federal Acquisition Regulation § 19.302(g)(2).
2. Protest that contracting officials improperly influenced technical evaluation--resulting in the downgrading of the protester's initially high scored proposal to the point of technical equality with the awardee's proposal--is denied where the record does not establish bias, only that the agency reasonably evaluated the proposals in accordance with the evaluation criteria listed in the solicitation.

DECISION

Verify, Inc. protests the Department of the Navy's award of a contract to Management Assistance Corporation of America (MACA) under request for proposals (RFP) No. N60530-89-R-0289, issued for technical support services at the Naval Weapons Center, China Lake, California. The procurement, a 100-percent small business set-aside, called for a time-and-materials/labor-hour contract for a base year and 2 option years in support of the Weapons Survivability

Laboratory's research, development, testing and evaluation programs.¹ Verify contends that the award is irrational since it is based on the Navy's improper and undocumented evaluation of the technical proposals. Verify also protests the agency's refusal to terminate MACA's contract after the Small Business Administration (SBA) reversed its initial determination that MACA was a small business concern for this RFP.

We deny the protest.²

Issued on September 22, 1989, the RFP provided for award to the offeror submitting the proposal most advantageous to the government, with price worth more than the management and technical factors, which were stated to be of equal value. The RFP also stated that price would become the determining factor in making the award if the agency found the offerors' technical proposals substantially equal.

Four offerors submitted proposals. After eliminating one proposal from the competitive range in January 1990, the agency conducted several technical evaluations. The Navy opened discussions with the three remaining offerors in October 1990, identifying areas of their respective

¹The task order work requires a relatively small number of highly skilled and diversely experienced engineering and technical personnel to provide specialized technical services. The engineers and technicians test the effectiveness of Navy and foreign weapons against foreign and Navy aircraft using actual equipment and simulators. The weapons include assorted guns, missiles and bombs while the target aircraft include numerous types of airframes and aircraft engines that arrive at China Lake in all states of repair. The technical personnel plan tests using aircraft and military equipment that they have refurbished to a useable state, install sensors to measure weapon effectiveness, conduct tests, and evaluate and report on the results. They also perform aerodynamic studies of weapon systems and conduct live fire test programs. These activities require expertise in fabrication, maintenance, modification, repair, and testing of simulators and equipment. Since typical delivery orders are of short duration (months), the contractor must be able to provide short term expertise.

²The majority of the record in this case was subject to a protective order. We have accordingly refrained from disclosing protected information in this decision. We also conducted a video teleconference hearing between Arlington, Virginia, and China Lake, California. Since the video-tape of this hearing lacked reference points, no particular sections of the testimony are cited in this decision.

proposals that needed to be addressed in greater detail. The agency received best and final offers (BAFO) in early December 1990. The agency then found the technical and management proposals of Verify and MACA substantially equal, while the third offeror's proposal was minimally acceptable with a high risk factor. The Navy selected MACA for award because it had the lowest evaluated price of the three offerors. MACA's primary subcontractor was Planning Research Corporation (PRC), the incumbent large business, which has provided the contract services since 1983.

Verify filed a timely size protest, based primarily on MACA's relationship with PRC. On February 21, the SBA's Dallas regional office decided that, notwithstanding the PRC subcontract, MACA was a small business concern, and on February 26, the Navy awarded the contract to MACA. Upon review of Verify's timely appeal of the regional office determination, the SBA Office of Hearings and Appeals (OHA) remanded the case to the regional office for a new determination, after finding that the regional office's decision was based on consideration of the wrong factors. The OHA found that the regional office erroneously judged MACA's small business status as of the time of BAFOs and award selection, rather than as of the time MACA initially certified itself as a small business, as was required by the then applicable SBA regulations.³ See 13 C.F.R. part 121 (1989). On May 9, 1991, the regional office reversed itself and ruled that MACA was other than a small business concern because of the nature of its affiliation with PRC at the time of its self-certification as a small business.⁴ On May 15, Verify asked the Navy, in light of the new regional office determination, to terminate MACA's contract and make award to Verify. The Navy refused, citing Federal Acquisition Regulation (FAR) § 19.302(g)(2) (FAC 90-3),⁵ and the fact

³Current SBA regulations apply the standard initially utilized by the regional office. 13 C.F.R. part 121 (1991).

⁴The SBA viewed the relationship as involving a teaming agreement; that agreement was found to have expired by the time of BAFOs.

⁵FAR § 19.302(g)(2) states:

"The SBA Regional Administrator will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of the determination. Award may be made on the basis of that determination. This determination is final unless it is appealed . . . and the contracting officer is notified of

(continued...)

that the agency was not aware of any outstanding appeals when it awarded the contract to MACA. On May 20, MACA appealed the regional office's size determination to the OHA. The OHA dismissed MACA's appeal as moot because award had already been made and the size decision in this case would be applicable only to this contract award. On June 10, Verify protested to our Office.

Verify contends that the Navy's award to MACA should be terminated, notwithstanding FAR § 19.302, because (1) the results of Verify's timely appeal of the initial adverse regional office determination are applicable to the pending procurement; (2) MACA falsely self-certified its status to be a small business because it knew the questionable nature of its relationship with PRC;⁶ (3) Navy contracting personnel had reason to know that MACA's relationship with PRC may be suspect;⁷ and (4) a Navy contract specialist misled SBA into determining that MACA was a small business by her statement that MACA's offer would have been sufficient without PRC as subcontractor, even though she knew that PRC was furnishing the bulk of the key personnel.

Verify first argues that MACA's contract should be terminated because the results of Verify's appeal are applicable to the pending procurement. However, the SBA advised our Office that:

"SBA's regulations do not expressly address the authority of contracting officers to award contracts based on an SBA regional office decision alone (i.e., without waiting for decisions from the OHA on size appeals)."

⁵ (...continued)

the appeal before award. If an award was made before the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid."

⁶Verify points to aspects of the relationship that SBA's regional office considered in finding MACA and PRC to be affiliated; specifically, no specific tasks were defined for PRC's performance and no price was established in the firms' teaming agreement so there was no way to value PRC's true involvement. Verify also notes that PRC generally was responsible for providing the higher skilled personnel.

⁷The technical evaluators observed that the MACA proposal was similar to PRC's previous proposal and, despite PRC's proclaimed status as a subcontractor, consideration should be given to whether PRC was controlling the proposal.

In the SBA's view, SBA regulations do not require a contracting officer to wait for a decision from the OHA before awarding a contract, even if the size appeal is filed within the specified 5-day time frame for timely appeals. SBA states that its practice is "to allow a contracting officer to proceed with award once a regional office size determination is made," as is authorized by FAR § 19.302(g)(2).

FAR § 19.302(g)(2) expressly authorizes contracting officers to make awards based on SBA regional office size decisions. Although SBA regulations provide for an appeal from an initial SBA size determination by any concern that has been adversely affected, there is no requirement that the contracting officer withhold award during the appeal period. Ultra Tech, Corp., B-230309.6, Jan. 18, 1989, 89-1 CPD ¶ 42. Nor is there a requirement that an agency terminate an award made on the basis of an SBA regional office determination in circumstances where the OHA determines the regional office size determination was in error and the awardee is not a small business concern. See Valley Constr. Co., B-234292, Feb. 8, 1989, 89-1 CPD ¶ 130.

Verify argues that the contract should be terminated because it is based on the initial SBA regional office determination that in turn was based on an allegedly misleading conversation of February 21, 1991, between the Navy contract specialist and an SBA official. It is not clear on this record that the initial SBA determination that MACA was small was caused by the alleged misleading advice from the contracting specialist. Moreover, the record does not establish what the contracting specialist actually communicated to SBA, or whether this communication was either incorrect or misleading.⁸ Also, Verify had an opportunity to have this point considered by the OHA when it appealed the initial size determination; Verify, however, did not raise the matter.

Verify further contends that the contract award should be terminated because it resulted from MACA's intentionally false self-certification and the Navy's failure to independently detect that the MACA-PRC relationship made MACA a large business. SBA ultimately determined that MACA was not a small business concern because of the particular teaming arrangement it had with PRC. Determining whether a particular relationship with a large business on a specific contract renders a self-certified small business large can be a complex matter. SBA decisions addressing this issue have applied a variety of factors related to the particular

⁸The contracting specialist's testimony and the SBA official's affidavit are inconclusive on this point.

contract. Based on our review, we do not think that the MACA-PRC relationship was so clear cut under applicable SBA guidance that MACA's self-certification can be said to be intentionally false or that the Navy should have necessarily independently viewed MACA as other than small.

Verify also protests the reasonableness of the Navy's proposal evaluation. Verify notes that the agency conducted several evaluations⁹ before opening negotiations and calling for BAFOs, and asserts that this reflects bias and improper influence of the technical evaluators by the contracting officials.

The record shows that the technical evaluators and contracting personnel initially could not agree on how to describe and score the relative merits of Verify's and MACA's respective proposals. That is, while the technical evaluators felt Verify's technical proposal was much stronger than MACA's proposal,¹⁰ the contracting personnel were not persuaded that Verify's proposal actually reflected significantly greater technical merit. After the first two evaluations, the chief technical evaluator was replaced by one of the two other evaluators. Because contracting personnel were concerned that the technical evaluators' descriptive write-ups of proposal strengths and weaknesses had not been sufficiently detailed or tied to specific RFP evaluation criteria and actual differences among the proposals, the technical evaluators were pressed for further written backup rationalizing the perceived differences in

⁹There were 5 technical evaluations--3 completed before discussions (January 4, 1990, March 15, 1990, and May 11, 1990); and 2 completed after BAFOs, one by the technical evaluators, and one by the contracting officer. There are also documents at Tab 15 of the report for what appears to have been the beginnings of another uncompleted evaluation apparently initiated just before discussions. Although Verify makes many references to Tab 15 in its protest, we are not persuaded that this is relevant to the ultimate award decision.

¹⁰The technical evaluators were enthusiastic about Verify's ability to grasp the environment and needs of the agency, noting that "Verify consistently addressed minor details that could only be gleaned from a knowledgeable viewpoint." On the other hand, the same evaluators expressed concern both about PRC's role as MACA's subcontractor and what they perceived as a sense of complacency reflected in the lack of detail in MACA's technical proposal, details that MACA should have known since PRC's program manager was one of the two people primarily responsible for preparing MACA's proposal.

the proposals. This resulted in a third evaluation, after which all three offers were included in the competitive range.

Following discussions and the receipt of BAFOs, contracting personnel engaged the new chief technical evaluator in numerous conversations. The chief technical evaluator testified that he agreed with contracts personnel that the initial evaluations had been flawed and that he evaluated BAFOs with the understanding that he "had to use the same yardstick on both offerors" and that the narrative had to match the numbers. His documented evaluation of the BAFOs found Verify and MACA essentially technically equal, and recommended award to MACA as the lower-priced offeror.

Verify argues that its BAFO was arbitrarily downgraded from its initial proposal,¹¹ even though it did not modify the proposal. The chief technical evaluator testified that he gave the Verify proposal high marks initially because he felt that it was a very good proposal, considering that Verify was without the benefit of site experience; and the surprise of receiving such a good proposal from a relatively unknown source biased him to give overly high scores to Verify, even though, upon further review, he found Verify's proposal was not significantly different from MACA's under the RFP evaluation criteria. When asked why Verify's scores went down when its proposal did not change in the BAFO, he responded that this was a result of making "the words match the numbers."

In reviewing an agency's selection decision, we will examine the underlying evaluation to ensure that it was reasonable and consistent with the stated evaluation criteria. Contel Federal Sys., B-243624.2, Oct. 10, 1991, 91-2 CPD ¶ 325. It is important to recognize in a case like this one that the selection official is not bound by the recommendation of lower-level evaluators. Wyle Laboratories, Inc.; Latecoere Int'l Inc., 69 Comp. Gen. 648 (1990), 90-2 CPD ¶ 107. In determining whether the award decision was proper, it is the ultimate evaluation by the agency, which is governed by the tests of rationality and consistency with the RFP evaluation criteria, not the assessment by working-level evaluators, that will be primarily considered. Contel Federal Sys., supra.

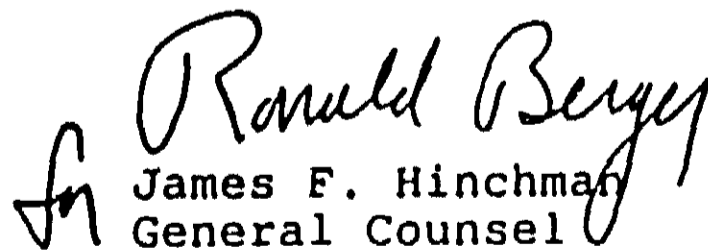
We find that the final evaluations performed by the technical evaluators and the contracting officer support a finding of technical equality. In her evaluation, on which the award decision was based, the contracting officer scored

¹¹Verify's BAFO was scored somewhat lower than its initial proposal.

each evaluation area and described the relative strengths and weaknesses of the proposals,¹² and concluded that the Verify and MACA proposals were technically equal. The contracting officer testified that before making the selection she personally reviewed the proposals, comparing them page by page, together with the respective technical evaluations. This was a "lengthy," "time consuming," and "wearisome" process, after which she was convinced that MACA and Verify were "essentially substantially technically equal" so that MACA, which submitted the low-priced offer, should receive the award. The chief technical evaluator testified that after the evaluation of BAFOs, he found that MACA and Verify were essentially equal technically and that he reviewed and agreed with the contracting officer's evaluation. Our exhaustive review of the record, including the proposals, provides no basis for challenging the conclusion that the proposals were essentially equal technically.

Moreover, we find no evidence of bias or other impropriety in the evaluation process. The fact that contracting officials reviewed the findings of the technical evaluators and discussed their feelings with them does not itself indicate bias, since it is the contracting officials that bear ultimate responsibility for the procurement. See Latecoere Int'l Inc.--Advisory Opinion, B-239113.3, Jan. 15, 1992, 92-1 CPD ¶ _____. Neither is bias indicated by the fact that there were multiple evaluations; subsequent evaluations at the behest of contracting officials are appropriate when necessary to correct errors, misconceptions or inconsistency with evaluation criteria. L&E Assocs., Inc., B-224448, Nov. 17, 1986, 86-2 CPD ¶ 568. In short, the record does not support the conclusion that the actions of the contracting personnel, the multiple evaluations, and the rescoring of proposals were motivated by bias or other improper considerations. It shows only that the finding of essential technical equality as between the proposals of MACA and Verify was both rational and consistent with the evaluation criteria.

The protest is denied.


James F. Hinchman
General Counsel

¹²The contracting officer's final evaluation scored Verify's technical proposal somewhat lower than the technical evaluators' final evaluation. The evaluators and the contracting officer agree that the proposals are technically equal.