



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dawkins General Contractors & Supply, Inc.

File: B-243613.11

Date: September 21, 1992

William S. Dawkins for the protester.
Darcy V. Hennessy, Esq., Moore, Bucher & Morrison, for DGR Associates, Inc., an interested party.
John Pettit, Esq., and Sandra G. Zimmerle, Esq., Department of the Air Force, for the agency.
Daniel I. Gordon, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where agency properly determines to waive preaward notice to unsuccessful offerors in small disadvantaged business (SDB) set-aside, post-award determination that the awardee does not qualify as an SDB applies prospectively only; therefore, agency was not required to terminate the awarded contract.

DECISION

Dawkins General Contractors & Supply, Inc. protests the Department of the Air Force's refusal to terminate a contract for housing maintenance services at Wright-Patterson Air Force Base, awarded to DGR Associates, Inc., under request for proposals (RFP) No. F33601-91-R-9001, a 100 percent small disadvantaged business (SDB) set-aside. Dawkins contends that the contract must be terminated because DGR is not an SDB.

We deny the protest.

Although the somewhat convoluted history of this procurement has been punctuated by nearly a dozen protests, the facts relevant to this protest can be briefly summarized. The Air Force issued the RFP, which covers military family housing maintenance, on March 29, 1991. Initially an unrestricted solicitation, the RFP was later converted into a 100 percent SDB set-aside.

On February 21, 1992, shortly before best and final offers (BAFO) were received, the contracting officer made a determination that compelling circumstances necessitated award without delay, thus precluding the possibility of issuing unsuccessful offerors preaward notice. The contracting officer's written memorandum states that there was a compelling need to grant the new contractor sufficient time to prepare for performance, which was required to begin on April 1, 1992. The memorandum explained that the contractor would be responsible for handling approximately 400 emergency maintenance orders each month. The emergency calls include non-functioning heating or air-conditioning systems, stopped-up or overflowing plumbing fixtures, broken stoves, and refrigerators. According to the agency, even a brief interruption in service would quickly make the homes uninhabitable and would threaten the health, welfare, and morale of hundreds of Air Force personnel.

Accordingly, award was made on March 25, 1992, without issuance of a preaward notice to the unsuccessful offerors. After several protests were filed with our Office, the agency determined that continued performance notwithstanding the protests was in the best interests of the government.¹

Dawkins challenged DGR's SDB status, and the Small Business Administration found, on May 8, 1992, that DGR did not qualify as an SDB. That determination was upheld on June 1, 1992, by SBA's Associate Administrator for Minority Small Business and Capital Ownership Development.

On the basis of that determination, Dawkins urges that our Office should recommend that the Air Force terminate DGR's contract. The Air Force responds that, where an agency first learns of an SBA determination that a firm is not an SDB after award to that firm, the SBA determination applies prospectively only and not to the procurement for which award has already been made. The agency further contends that, for various reasons related to the agency's urgent need for the services being procured, termination of DGR's contract is not practicable here.

A concern must qualify as an SDB on the date of its offer and at contract award to be eligible for award under an SDB set-aside. Defense Federal Acquisition Regulation Supplement (DFARS) § 219.301. Challenges to an offeror's SDB status are heard and decided by the SBA pursuant to 15 U.S.C. § 636(j)(11)(F)(vii) (1988) and 13 C.F.R. part 124 subpart B (1992). DFARS subpart 219.3 envisions that for a negotiated SDB set-aside the contracting officer will

¹All of the other protests were either withdrawn or dismissed.

provide unsuccessful offerors with preaward notice of the successful offeror.² The purpose of that notice is to permit a protest of the successful offeror's SDB status "in a time frame which will permit relief in the event that the challenge is found meritorious by the SBA," Fidelity Technologies Corp., 68 Comp. Gen. 499 (1989), 89-1 CPD ¶ 565, just as that same kind of notice in small business set-asides provides unsuccessful offerors with an opportunity to protest the winning offeror's size status. See Hamilton Enterprises, Inc., B-230736.6, Dec. 20, 1988, 88-2 CPD ¶ 604. When an agency does not provide that preaward notice in a small business set-aside because it determines that urgent circumstances prevent it from doing so, we examine the record to ascertain the reasonableness of that determination; if the determination is reasonable, any subsequent SBA determination that the awardee is not a small business applies only prospectively and does not require termination of the contract. See United Power Corp., 69 Comp. Gen. 476 (1990), 90-1 CPD ¶ 494 (in which our Office found the determination to be unreasonable). We think it appropriate to use that same approach in the SDB set-aside situation.

Here we find the Air Force's determination had a reasonable basis. In contrast to United Power Corp., supra, where the alleged urgency appeared to arise primarily from a concern about a possible spending freeze, here the record evidences that the agency was genuinely motivated by concern about the potential threat to the health and welfare of Air Force personnel posed by a failure to provide the maintenance services at issue. Although there was an incumbent providing those services, the record does not establish that the incumbent was able to continue to perform, and the record reflects the Air Force's concern that the incumbent would lack the capability to provide the services after April 1. In making the determination, the contracting

²Subpart 219.3 in the current edition of the DFARS does not explicitly require a contracting officer to provide the preaward notice as did the comparable provision in the prior edition. Compare DFARS § 219.302(2) (S-70) (1988 ed.) with DFARS § 219.302-70 (1991 ed.). However, the current edition represents an effort to simplify the DFARS and eliminate unnecessary language; no change in policy or procedure was intended in the absence of a specifically identified change. See 56 Fed. Reg. 36280 (1991) and 55 Fed. Reg. 33218 (1990). No change was identified regarding this requirement, and it appears that the DFARS treats an SDB set-aside, at least for this purpose, as one type of small business set-aside subject to the Federal Acquisition Regulation § 15.1001(b)(2) requirement for the preaward notice in negotiated small business set-asides.

officer thus properly took into consideration the nature of the services being procured and the urgency of the need for continuity in the provision of those services.

Moreover, unlike the post-award determination in United Power Corp., supra, here the determination was drafted and signed well before award. At the time the determination was made, on February 21, the agency had not yet received BAFOs. Yet at that time, because of the previous protests in this procurement, only 5 weeks remained until April 1, the date when a new contractor would be required to begin providing the emergency and other housing maintenance services at issue. The agency concluded that it could not complete the review and evaluation of BAFOs, provide preaward notice, withhold uphold award pending the SBA's resolution of a challenge to the awardee's SDB status (which could then be followed by a similar challenge to the status of the next-in-line offeror), and still allow the start-up time necessary to ensure that the health and welfare of Air Force personnel were adequately protected after April 1, 1992. In fact, only 6 days remained between the date that award was finally made and the beginning of performance.

In these circumstances, we find that the contracting officer reasonably concluded that the urgency of the requirement necessitated award without delay. Accordingly, the waiver of the preaward notice was proper. That being so, since the SBA determination finding that DGR did not qualify as an SDB was not received until after award, that determination did not apply to this procurement. Jimenez, Inc., B-242663, May 6, 1991, 91-1 CPD ¶ 441. Consequently, the Air Force is not required to terminate DGR's contract.

The protest is denied.


for James F. Hinchman
General Counsel