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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Vantex Service Corporation

File: B-251102

Date: March 10, 1993

D.J. Brown for the protester.
Gerald P. Kohns, Esq., Department of the Army, for the agency.
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where contractor properly self-certified as a small business in its offer, was awarded a contract and later was acquired by a large business, agency is not required to re-examine contractor's size status in order to exercise option under the contract, since the size status at time of self-certification controls.

DECISION

Vantex Service Corporation protests the Department of the Army's decision to exercise an option under contract No. F41800-89-D0028, which is held by Waste Management of Texas, Inc. (WMTI), as successor-in-interest to the original awardee, O'Boy Service Company.

In 1989, the Army issued a small business set-aside solicitation for furnishing and servicing portable toilets in specified locations in Texas. The contract, which included a base year and four 1-year options, was awarded to O'Boy, a small business concern. The Army exercised the first three options under the contract. In April 1992, during the third option period, O'Boy sold all of its assets to WMTI, a large business. At the time, O'Boy held three contracts with the Department of the Air Force as well as the Army contract that is at issue here. O'Boy presented documentation of the sale of its assets and asked the Air Force and the Army to enter novation agreements, recognizing WMTI as O'Boy's successor in interest. The Air Force contract administrator and contracting officer prepared a determination and findings concluding that it would be in the government's best interest to novate the Air Force

contracts, and the Army concurred with regard to its own contract. Near the end of the third option period under the Army contract, the Army notified WMTI of its intention to exercise the final 1-year option. This protest followed.

Vantex argues that the agency should not have accepted WMTI, a large business concern, as successor in interest under a contract that had been awarded to a small business under an exclusive small business set-aside procurement and that the exercise of the option is invalid for the same reason.[1] Vantex contends that the contract could not have been awarded directly to WMTI, and that the Army's actions violate the spirit of the Small Business Act, 15 U.S.C. § 637 and the public policies that the Act reflects.

While we generally consider a procuring agency's decision to exercise or not to exercise a contract option to be a matter of contract administration, and thus not for our review (as discussed above), we will consider protests against the exercise of contract options when the protester contends that such action is or would be contrary to the regulatory provisions governing the exercise of options. See AAA Eng'g & Drafting, Inc., B-236034.2, Mar. 26, 1992, 92-2 CPD ¶ 307; Bristol Elecs., Inc., B-193591, June 7, 1979, 79-1 CPD ¶ 403. Here, the essence of Vantex's argument is that the Army's exercise of the option is inconsistent with the Small Business Act.

We know of no regulatory or statutory requirement that a small business offeror must retain throughout contract performance its small business status after it has legitimately self-certified that it is small, and the award was proper when made. See 41 Comp. Gen. 124, 131 (1961). See also Acumenics Research and Technology, Inc.--Contract Extension, B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128, citing Gallegos Research Corp.--Recon., B-209992.2, B-209992.3, Nov. 21, 1983, 83-2 CPD ¶ 597, in which we held that it is proper to exercise, in accordance with the Federal Acquisition Regulation (FAR), existing options in 8(a) contracts after an 8(a) firm has lost its status as an 8(a) firm. Under FAR § 19.301(a), the size status of a firm is to be determined when it self-certifies at the time its bid or offer is submitted. See also 13 C.F.R. § 121.904 (1992). The SBA regulations generally provide that the size status of a concern is determined as of the date of its written self-certification as a small business. The regulations

[1]We note that the propriety of the novation is a matter of contract administration and therefore not for consideration by our Office. See 4 C.F.R. § 21.3(m)(1) (1992); Specialty Plastics Prods., Inc., B-237545, Feb. 26, 1990, 90-1 CPD ¶ 228.

state only that agreements to merge and other business arrangements affecting possible affiliation or control of the concern are considered executed as of the date of the written self-certification. 13 C.F.R. § 121.904(b). Nothing in the regulations requires a redetermination of size status during performance of the contract. The initial size status certification controls. See 13 C.F.R. § 121.904.

While Vantex acknowledges that the regulations do not require that a small business remain small during the course of the performance of the contract, the protester argues that this policy only reflects the purpose of the Small Business Administration "to nurture and assist small businesses and help them grow into big ones." The protester sees a distinction, however, when the small business is taken over by a large business during the contract period. Nonetheless, as the protester admits, the regulations do not make such a distinction. We therefore find no legal basis to support Vantex's argument.

Regarding the exercise of the last option year, there is no regulatory provision that deals explicitly with this situation. However, the general provisions of FAR § 17.207 do require the contracting officer to determine whether the exercise of a particular option is the most advantageous method of fulfilling the government's need, price and other factors (referring to paragraphs (d) and (e) of the regulation) considered. The only guidance included in the regulation for considering "other factors," in paragraphs (d) and (e), refers to methods of determining whether the option price is the most advantageous price available, and consideration of the government's need for continuity of operations. There is no reference to other considerations or any requirement that the contracting officer take other factors, such as socio-economic policies, into account. See AAA Eng'g & Drafting, Inc., supra.

Here, there is no allegation that the applicable regulations were not followed. In the absence of any violation of regulation or statute, we have no legal basis to object to the exercise of the option.

We deny the protest.

Robert P. Murphy

for James F. Hinchman
General Counsel