



Comptroller General
of the United States

Washington, D.C. 20548

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Decision

Matter of: Ward Corporation

File: B-253591.2

Date: November 23, 1993

William M. Rosen, Esq., Dickstein, Shapiro & Morin, for the protester.

Bruce I. Selfon, Esq., Cotten & Selfon, for Verbal Corporation, an interested party.

William T. K. Dolan, Esq., General Services Administration, for the agency.

Linda S. Lebowitz, Esq., and Linda C. Glass, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In light of the exigent circumstances of the procurement, the contracting officer did not abuse her discretion in not referring a size status question to the Small Business Administration where a large business, after being found nonresponsible, asserted that it was actually a small business.

DECISION

Ward Corporation protests the award of a lease to Verbal Corporation under solicitation for offers (SFO) No. 92-087, issued by the General Services Administration (GSA) for 150,000 net usable square feet of warehouse and related space for the National Institutes of Health (NIH). Ward, which prior to award certified that it was a small business, concern, argues that the contracting officer improperly failed to refer her nonresponsibility determination concerning Ward to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC) in accordance with the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988).

We deny the protest.

The SFO, issued on an unrestricted basis, provided that a lease for 10 years plus two 5-year options would be awarded to the offeror whose offer was deemed most advantageous to the government for the 20-year lease term. The SFO stated that price was the most important evaluation factor. The

SFO required that the warehouse, either built-to-suit or already existing, be available for occupancy no later than 7 months after award. Paragraph 23 of the SFO required offerors to submit "evidence of capability to perform," including satisfactory evidence of at least a conditional commitment of funds in an amount necessary to prepare the space and evidence of funds (earnings statements and a current balance sheet) in an amount sufficient to perform the contract. The SFO contained no termination for convenience clause.

Three firms, including Ward and Verbal, submitted initial offers which were included in the competitive range. In its initial offer for a build-to-suit warehouse, submitted on May 29, 1992, Ward certified on GSA Form 3518 that it was not a small business concern. Following successive rounds of discussions and the submission of revised offers, by letter dated March 2, 1993, the contracting officer requested the submission of best and final offers (BAFO) by March 10. In her letter to Ward, among other items, the contracting officer requested updated evidence of Ward's capability to perform in accordance with paragraph 23 of the SFO.

On March 10, Ward submitted its BAFO on Form 1364.¹ The contracting officer requested a second round of BAFOs by March 26, and then extended the due date until March 30. The contracting officer also requested that Ward submit a recent balance sheet, income statement, and sources and uses of funds statement, all prepared in accordance with generally accepted accounting principles, which would accurately reflect Ward's financial status.

Ward resubmitted its Form 1364 on March 30, providing a balance sheet, an income statement, and a sources and uses of funds statement, all of which were unaudited, and a statement addressing its bankruptcy reorganization status. On March 31, Ward submitted a reformatted Form 1364. The contracting officer evaluated this Form 1364 and determined that Ward was the low offeror.

On May 24, the contracting officer notified Ward that it was not the successful offeror because Ward "[was] not responsible." The contracting officer stated that "[i]mportant criteria in the evaluation of responsibility were the critical delivery date for the space needed and the overall financial situation of Ward." The contracting officer's justification for her finding of nonresponsibility states that "Ward is incapable of complying with the

¹The SFO required that offers be submitted on this form, captioned "Proposal to Lease Space."

deadlines and other responsibility requirements of [the SFO]. Therefore, Ward no longer has a reasonable chance of being selected for contract award."

After receiving the contracting officer's letter advising Ward of the nonresponsibility determination, Ward telefaxed a letter to the contracting officer stating that it had inadvertently miscertified its size status. Ward stated that it was not a large business concern as it originally certified, but rather a small business concern. In this letter, Ward protested to the agency the contracting officer's nonresponsibility determination and her intent to make an award to another offeror without referring the nonresponsibility determination to the SBA for the possible issuance of a COC. On May 26, Ward recertified on Form 3518 that it was a small business concern, and on May 28, protested to our Office, raising the same allegations as it had in its agency-level protest.² On the same day, the contracting officer awarded the lease to Verbal as the low, technically acceptable, responsible offeror.

Ward challenges the contracting officer's decision to award the lease without referring her nonresponsibility determination to the SBA for review under its COC procedures. Ward maintains that if the contracting officer had concerns about its size in light of its changed certification, she should have filed a size status protest with the SBA.

Under the Small Business Act, 15 U.S.C. § 637(b)(6), the SBA has conclusive authority to determine matters of small business size status for federal procurements. Thus, when a bidder asserts after bid opening that it erroneously certified itself as a large business and seeks to change its certification, "there is enough doubt as to the bidder's actual status to warrant referral . . . to the SBA" Jimmy's Appliance, 61 Comp. Gen. 444 (1982), 82-1 CPD ¶ 542. However, in the absence of a size status protest from an offeror, there is no absolute requirement that the contracting officer refer size status questions to the SBA. Rather, this is a matter of discretion, the exercise of which "must be measured against a standard of reasonableness in the particular case." Putnam Mills Corp., 61 Comp. Gen. 667 (1982), 82-2 CPD ¶ 301. Since both the Federal

²Ward subsequently withdrew its allegation challenging the contracting officer's underlying nonresponsibility determination and abandoned an allegation concerning the agency's failure to consider build-to-suit space.

Acquisition Regulation (FAR)³ and the SBA's own regulations⁴ recognize that an SBA size status determination need not precede contract award in every case in which size status is questioned, we think the exigencies of the procurement must be taken into account in determining the reasonableness of a failure to refer.

GSA's submissions to our Office as part of the agency report, including NIH's request for space, show that at the time of the award, NIH urgently needed new warehouse storage space based on the need to streamline its storage operations and to avoid on-going health and safety violations. NIH was leasing three separate warehouse facilities in two different geographic locations. NIH reported that at one facility, hazardous chemicals were stored in an inadequately ventilated area in violation of federal health and safety regulations and local building codes. As a result, those working at the facility were exposed to health and safety risks that would be alleviated by relocation to new, properly ventilated space. NIH also sought to consolidate facilities as soon as possible in order to eliminate duplication of services and extra personnel to oversee and maintain the separate facilities. In addition, NIH was concerned about incurring extra costs if the existing leases had to be extended at their expiration dates if new space was not available by then. GSA believed that in light of the lead time necessary to have the required space available, any submission to the SBA likely would jeopardize that availability with serious consequences to NIH.

In light of these circumstances, the facts of which are not challenged by the protester,⁵ we conclude that the

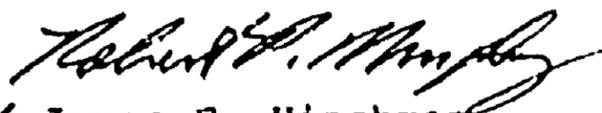
³A contracting officer is not required to wait for the SBA's size determination prior to making an award if the contracting officer determines that an award is necessary "to protect the public interest." FAR § 19.302(h)(1).

⁴See 13 C.F.R. § 121.1605(b) (1993).

⁵These facts provided the basis for GSA's determination to permit contract performance to proceed notwithstanding Ward's protest.

contracting officer did not abuse her discretion in not referring the question of Ward's size status to the SBA.

Accordingly, the protest is denied.


for James F. Hinchman
General Counsel