



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

5102510

Schatz
152829

Decision

Matter of: Diagnostic Imaging Technical Education
Center, Inc.

File: B-257590

Date: October 21, 1994

Manny Roman for the protester.
William E. Thomas, Jr., Esq., Department of Veterans
Affairs, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the
decision.

DIGEST

Where a timely size protest was filed after small business-small purchase set-aside award, and the awardee was found by the Small Business Administration to be other than a small business, the agency, in the absence of legitimate countervailing reasons, should have terminated the contract and made award to the protester--the only eligible small business.

DECISION

Diagnostic Imaging Technical Education Center, Inc. (DITEC), protests the award of a purchase order to Radiological Service Training Institute (RSTI) under request for quotations (RFQ) No. 598-94-2-330-0192, issued by the Department of Veterans Affairs (VA) for the preparation of course materials and the teaching of two 10-day diagnostic imaging, glassware, and calibration courses.

We sustain the protest.

Two quotations were received by the February 11 due date; RSTI's was low at \$17,600, and DITEC's was second low at \$22,252. Both firms certified that they were small business concerns. On the same day, VA awarded the purchase order to RSTI. On February 25, DITEC inquired about the status of the award and was notified that award had been made to

RSTI.¹ On March 2, DITEC timely protested the size status of RSTI to the contracting officer, who referred the matter to the SBA.² On May 16, the SBA found RSTI to be other than a small business. RSTI did not appeal this adverse determination.

Notwithstanding SBA's determination, VA did not terminate RSTI's contract. VA concedes that it could have terminated for this reason because RSTI was not a small business, but states that it determined that doing so would not be in the government's best interest because the contract was substantially performed. In this regard, VA explains that RSTI had completed preparation of a substantial amount of the course materials; the courses were scheduled to take place relatively soon--on July 18 and September 19--and VA had purchased nonrefundable airline tickets for its personnel to attend the courses. VA instead proposes to reimburse DITEC's protest costs.

In our view, VA should not have permitted RSTI's award to stand when it was apprised by the SBA that RSTI was not a small business. In American Mobilphone Paging, Inc., 69 Comp. Gen. 392 (1990), 90-1 CPD ¶ 366, we addressed facts very similar to those here, and concluded that two circumstances--the size protest was timely filed and the awardee did not appeal the SBA's determination--militated in favor of termination of the awardee's contract and award to the small business protester. Both circumstances are present here. First, RSTI's undisputably timely protest could not have been filed prior to award as it received only post-award notification. While FAR § 19.302(j) treats post-award size protests as having no applicability to the current contract, awards under set-aside procurements to other than small businesses should be terminated if possible, and SBA's regulations provide that such timely-filed size protests "shall apply to the procurement in question even though the contracting officer may have

¹Under the small purchase procedures which govern this procurement, there is no requirement that the agency issue a pre-award notice to unsuccessful vendors. See Federal Acquisition Regulation (FAR) § 13.106(b)(9).

²DITEC's protest was timely since it was filed within 5 business days of when DITEC received notice of the award to RSTI. 13 C.F.R. § 121.1603(a)(2) (1994); see also FAR § 19.302(d)(1)(ii).

awarded the contract prior to receipt of the protest,"³ 13 C.F.R. § 121.1603(a)(2); see also FAR § 19.302(d)(1)(ii). Further, RSTI did not defend its adverse size certification by appealing SBA's determination. Thus, in the absence of countervailing reasons, it would be inconsistent with the integrity of the competitive procurement system, and the intent of the Small Business Act, to permit a large business, which under the terms of the solicitation was ineligible for award, to continue to perform the contract. American Mobilphone Paging, Inc., supra.

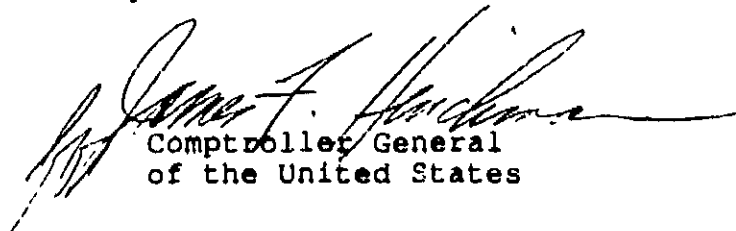
We generally agree with VA that it was appropriate to take the best interest of the government into account in deciding whether termination was appropriate. However, we do not find support in the record for VA's determination that allowing RSTI's award to stand was in the government's best interest. There is no evidence that RSTI had already substantially performed the contract at the time of SBA's May 16 size determination. As noted above, the courses were scheduled on July 18 and September 19. Although RSTI's course materials show that they were prepared prior to May 16, there is no indication that any of the materials were prepared for the current procurement. In this regard, the course manual contains a 1987 copyright date and does not appear to include any specific references to the current VA solicitation. VA's purchase of the airline tickets for its employees was not relevant to the decision to continue RSTI's contract, since VA made the airline reservations and purchased the tickets on June 15 and July 25, that is, after being informed by SBA that RSTI was other than a small business.

We conclude that VA's determination to allow RSTI's award to stand upon receiving the SBA's determination that RSTI is other than small was improper, and sustain the protest on this basis. As the courses already have been conducted by RSTI, our agreement with the protester's position at this juncture obviously cannot result in termination of RSTI's contract and award to DITEC, the remedy DITEC seeks. DITEC is, however, entitled to reimbursement of its protest and proposal preparation costs. 4 C.F.R. § 21.6(d). In

³The agency also references FAR § 19.302(i) as allowing post-award SBA rulings to be ignored for the protested acquisition. However, that section, by its terms, only applies to appeals of SBA size determination.

accordance with 4 C.F.R. § 21.6(f), DITEC's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to VA within 60 days after receipt of this decision.

The protest is sustained.



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