



Decision

Matter of: United Native American Telecommunications,
Inc.

File: B-260366; B-260465

Date: May 30, 1995

James L. Bradley for the protester.
J. Randolph McPherson, Esq., Sullivan & Worcester, for LDDS
Communications Corporation, an interested party.
H. Jack Shearer, Esq., and Clifton M. Hasegawa, Esq.,
Defense Information Systems Agency, for the agency.
Robert Arsenoff, Esq., and John Van Schaik, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protests against agency decision not to refer questions concerning protester's small business size status to the Small Business Administration are denied where agency reasonably determined that immediate awards were required to protect the public interest.

DECISION

United Native American Telecommunications, Inc. (UNAT) protests the award of a contract to LDDS Communications Corporation under solicitation No. A017JAN950005 (-0005), issued by the Defense Information Technology Office (DITCO), Defense Information Systems Agency, for the provision, installation, and maintenance of a telecommunications circuit between Fort Bliss, Texas and Kirtland Air Force Base (AFB), New Mexico. UNAT also protests DITCO's award of a contract to Electra Ltd. under a similar solicitation, No. AF05DEC945439A (-5439A), for the installation and maintenance of a telecommunications circuit between Limestone, Maine and Boston, Massachusetts.

In each case, UNAT principally alleges that DITCO improperly refused to apply a 10-percent evaluation preference for small disadvantaged businesses (SDB) without first referring the agency's questions concerning the protester's self-certification as a small business to the Small Business Administration (SBA) for a conclusive determination as to UNAT's small business "size status."

We deny the protests.

063940/154577

BACKGROUND

Solicitation -0005; Fort Bliss to Kirtland AFB Circuit.

Solicitation -0005 was issued on an unrestricted basis on January 20, 1995, and closed on January 27. The solicitation provided that the required operational service date for the circuit was February 28 or sooner if possible. Further, it incorporated a clause providing that SDBs were entitled to a 10-percent price evaluation preference when in competition with non-SDBs. Offerors were required to certify themselves as small businesses in order to qualify for any claimed SDB preference.

Four timely offers were received and two firms, including UNAT, certified themselves as small businesses and claimed the SDB preference. With application of the preference, UNAT's offer contained the low price; without application of the preference, LDDS's offer was low.

As of the time offers were received, the contracting officer was aware of approximately 40 SBA decisions within the year preceding the protested procurement finding UNAT to be other than a small business on telecommunications procurements. The rationale of these decisions was that UNAT was proposing to subcontract with non-SDB telecommunications carriers to perform the "primary or vital requirements" of the contract and, therefore, did not qualify as a small business under what SBA terms its "ostensible subcontractor rule." The contracting officer also was aware of at least one decision by the SBA's highest appellate authority--the Office of Hearings and Appeals (OHA) upholding this rationale for finding UNAT to be other than a small business. In addition, the contracting officer was aware of a January 25 decision of the SBA's San Francisco regional office finding UNAT to be a small business based on a theory that the firm was entering into a lessor-lessee (rather than a contractor-subcontractor) relationship with a non-SDB telecommunications carrier so that the "ostensible subcontractor rule" did not apply.

On January 30, the contracting officer contacted the SBA's San Francisco regional office to discuss the latest decision involving UNAT and was unconvinced by the rationale used. She was further informed by SBA that the decision was limited in application to the case that had been before the San Francisco office. DITCO reports that, in light of the 40 consistent SBA findings and the fact that OHA had upheld the application of the "ostensible subcontractor rule" with regard to UNAT, the contracting officer concluded that she had a reasonable basis to question UNAT's self-certification.

Although the self-certification was questioned, the matter was not referred to SBA because, on January 30, pursuant to Federal Acquisition Regulation (FAR) § 19.302(h)(1), the contracting officer found that an award without waiting for an SBA determination was necessary to protect the "public interest" in light of the required February 28 service date for the telecommunications line which was to support a large-scale military training exercise involving the deployment of personnel both within and outside the United States. She further found that the exercise was required for the "national security of U.S. Ground Forces." Award was made to LDDS on January 30.

Solicitation -5439A; Limestone to Boston Circuit.

Solicitation -5439A was issued on an unrestricted basis on January 24 and closed on February 1. It provided for an operational service date of March 8 or sooner if possible. Like the previously discussed solicitation, it provided for a 10-percent SDB evaluation preference and required self-certification as a small business to qualify for the preference.

Four timely offers were received and again two offerors, including UNAT, claimed the SDB preference. With application of the preference, UNAT would have been the low offeror; without it, Electra submitted the low offer.

As of the closing date, the same contracting officer was again aware of the 40 SBA decisions adverse to UNAT and two additional San Francisco regional office decisions decided after January 25 which were favorable to the protester on the basis of the lessor-lessee rationale described above. DITCO reports that, in light of the 40 decisions based on the "ostensible subcontractor rule"--a rationale which had been upheld by OHA--the contracting officer again concluded that she had a reasonable basis to question UNAT's self-certification.

On February 8, the contracting officer issued a written "public interest" determination in support of an immediate award without referral to the SBA. The determination was based on the need for a communications link to Limestone, Maine in support of a congressionally mandated effort to reorganize and consolidate 21 Defense Finance and Accounting Service (DFAS) offices; a part of this effort was the activation of 12 new operating locations--including one at Limestone. Without a communications link installed by March 8, training of new hires at the Limestone facility could not begin on schedule and the contracting officer concluded that this would adversely affect DFAS' operational mission. Award was made to Electra on February 8.

PROTEST AND ANALYSIS

Noting that SBA has conclusive authority to determine an offeror's small business size status, UNAT alleges that DITCO lacked authority to refuse to accept its self-certifications without referring the matters to the SBA in light of the decisions of the SBA's San Francisco office.

FAR § 19.301(b) states that contracting officers shall accept small business self-certifications unless they have reason to question them. Questions concerning specific representations are to be referred to SBA in accordance with FAR § 19.302. Id. FAR § 19.302(h)(1) provides that awards shall not be made until the SBA has made a size status determination or 10 business days have expired since SBA's receipt of a referral, whichever occurs first; however, award shall not be withheld when a contracting officer determines in writing that an award must be made "to protect the public interest."

In view of this public interest exception, we have held that there is no absolute requirement that a contracting officer refer size status questions to the SBA when a determination has been made that protection of the public interest requires an immediate award. Ward Corp., B-253591.2, Nov. 23, 1993, 93-2 CPD ¶ 297. The decision regarding referral is a matter of agency discretion, the exercise of which "must be measured against a standard of reasonableness in the particular case." Id. The exigencies of each procurement must be taken into account in determining the reasonableness of a failure to make a referral to the SBA. Id.

Even where an agency makes award pursuant to an agency determination and is later reversed by SBA in a size determination, the later SBA determination has prospective effect only and termination of the protested contract is not required. Superior Eng'g and Elecs. Co., Inc., B-224023, Dec. 22, 1986, 86-2 CPD ¶ 698; Howard Johnson Motel, B-234668, June 30, 1989, 89-2 CPD ¶ 16. In this context, determinations of urgency are generally left to the discretion of procuring agencies because they are in the best position to know their minimum needs, Howard Johnson Motel, supra; and a military agency's assertion that there is an urgent need for certain supplies or services carries considerable weight. Superior Eng'g and Elecs. Co., Inc., supra.

Based on these standards, as discussed below, we find that the contracting officer had a reasonable basis in each case for concluding that protection of the public interest necessitated immediate awards.

As a preliminary matter, however, we find that the contracting officer also had a reasonable basis for discounting the San Francisco regional office's size determinations based on a lessor-lessee rationale in questioning UNAT's self-certification as a small business. First, she was informed by SBA upon inquiry in the first case that the effect of the decisions was limited in application to the particular cases before the San Francisco office. Second, there is no mention of a lease in either of UNAT's proposals in the matters before this Office. Further, the decisions are not consistent with SBA's analysis concerning approximately 40 other telecommunications cases involving UNAT under the "ostensible contractor rule" which had been upheld by OHA. In this regard, we note that OHA has subsequently and specifically rejected UNAT's assertion that the lessor-lessee analysis is appropriate in the Size Appeal of United Native American Telecommunications, Inc., No. 3997 (February 22, 1995), which involved the establishment of telecommunications circuits for DITCO.

As to the public interest determination regarding the need to make an immediate award for the establishment of a circuit between Fort Bliss and Kirtland AFB (solicitation No. -0005), we give great weight to DITCO's finding that communications were essential to protect the public interest in light of the large scale military readiness training exercise involved, especially since DITCO concluded that the initiative was "required to prepare for combat readiness and national security of the U.S. Ground Forces." The determination was made on January 30 to meet a required service date of February 28--leaving only 4 weeks from the date of award to establish an operational telecommunications circuit; under the circumstances, we find that the contracting officer acted reasonably.

The second public interest determination (solicitation No. -5493A) involving the circuit to be established between Boston and Limestone, Maine was made on February 8--only 4 weeks prior to the required service date of March 8 when an operational circuit was necessary to support the training of new personnel at Limestone. The hiring of new personnel--part of a congressionally mandated program to reorganize and consolidate DFAS offices across the country--had already begun when the public interest determination was made. We find the basis for the determination--the need to

¹In concluding that the record supports the reasonableness of the contracting officer's doubts about UNAT's self-certifications, we do not substitute our judgment for that of the SBA as to what type of analysis should apply in size determination cases.

meet a pre-established training schedule in pursuit of an agency consolidation effort and therefore to avoid additional personnel costs for the new hires if they could not be timely trained--to be reasonable under the circumstances. See Howard Johnson Motel, supra (public interest required an uninterrupted supply of food, lodging and transportation for incoming personnel at a Military Entrance Processing Station).

Accordingly, the protests are denied.²

\s\ Michael R. Golden
for Robert P. Murphy
General Counsel

²UNAT also objects to DITCO's determination that the firm would not comply with a solicitation requirement that for an SDB, 50 percent of the contract funds would be used to pay the SDB's own employees. We need not address this issue in light of our decision on the size status issue.