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Comptroller General
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United States Government Accountability Office
Washington, DC 20548

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Decision

Matter of: Trident³, LLC

File: B-405781.3

Date: July 5, 2012

Allen Perkins, Esq., A. Perkins Law Firm, LLC, for the protester.
Gregory Kreuzberg, Esq., Department of the Navy, Naval Supply Systems Command; John W. Klein, Esq., Sam Q. Le, Esq., and Meagan K. Guerzon, Esq., Small Business Administration, for the agencies.
Eric M. Ransom, Esq., and Edward Goldstein, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contract award terminated pursuant to negative size status determination should be reinstated following successful appeal to the Small Business Administration, Office of Hearings and Appeals, is denied where contracting agency followed all applicable regulations in terminating the award, and properly solicited revised proposals from all offerors.

DECISION

Trident³, LLC, protests the solicitation of new proposals by the Department of the Navy in connection with request for proposals (RFP) No. N00189-11-R-0027, issued as a small business set-aside under the Small Business Administration's 8(a) program, for weather observation and forecasting services at 21 naval air stations, outlying landing fields, and auxiliary landing fields.

We deny the protest.

The Navy originally issued this requirement as RFP No. N00189-10-R-0030 in April 2010, and made an award in January 2011. Following that award however, another competitor filed a size status protest at the SBA, as well as a protest at our Office. The Navy ultimately took corrective action in that matter, and our Office dismissed the protest.

The Navy then issued the present RFP for the requirement on May 24, 2011, and made an award to Trident on August 30. However, after discovering an error in the

procurement during the debriefing process, the Navy informed the offerors that it would reevaluate the proposals and make a new award decision. When the reevaluation was completed, the Navy again made the award to Trident on September 19. Other offerors then filed protests at the SBA challenging Trident's size status, as well as protests at our Office.

On October 14, the SBA area office determined that Trident was "other than small" for the purposes of the procurement, and was ineligible to receive the award. The Navy then advised that it would terminate the award to Trident, request revised proposals, and conduct a new evaluation. The Navy terminated the contract on October 25, and our Office dismissed the protests. Later that day, Trident filed an appeal of the SBA area office determination with the SBA's Office of Hearings and Appeals (OHA).

On December 1, the agency issued amendment 0004, which reopened the solicitation for the remaining offerors and revised the performance work statement by removing one of the site locations from the solicitation. On December 6, the agency issued amendment 0005, to add back the site location removed by amendment 0004 as an optional task.

On January 23, 2012, OHA informed the Navy that it had granted Trident's size status appeal--reversing the SBA Area Office's determination--and that Trident was therefore eligible for award under the RFP. Trident then sent the Navy a written demand for the reinstatement of Trident's September 19, 2011 contract award, or a new award under the RFP. The Navy ultimately refused, stating that Trident's contract had been terminated and the RFP reopened, that amendments had been issued, and that additional amendments were necessary to reflect changed requirements and incorporate new evaluation criteria. However, based on the OHA ruling, the Navy readmitted Trident to the competition, and provided it with all RFP amendments issued during the period of Trident's appeal. The Navy then issued amendment 0006 on March 26, which revised the instructions to offerors, the evaluation criteria, the performance work statement, and the wage determinations, and added new line items for contingency support. The Navy also issued amendment 0007 on March 29, which included a new past performance information form, revised the past performance evaluation language, and extended the date for offerors to submit revised proposals.

After the agency's refusal to reinstate the previous award and issuance of amendments 0006 and 0007, Trident filed this protest on March 30, arguing that the Navy is required to award it the contract in accordance with Federal Acquisition Regulation (FAR) § 19.302(i), that the Navy issued multiple minor RFP amendments as a pretext for denying the reinstatement of Trident's prior award,

and that issuance of amendments changing the evaluation criteria improperly favored the incumbent.¹

In relevant parts, FAR § 19.302(i) states that:

An appeal from an SBA size determination may be filed by any concern or other interested party whose protest of the small business representation of another concern has been denied by an SBA Government Contracting Area Director, any concern or other interested party that has been adversely affected by a Government Contracting Area Director's decision, or the SBA Associate Administrator for the SBA program involved. . . . The SBA will inform the contracting officer of its ruling on the appeal. The SBA decision, if received before award, will apply to the pending acquisition. SBA rulings received after award shall not apply to that acquisition.

Trident argues that because the SBA OHA decision was received before the agency made a new contract award under the RFP, the OHA decision applies to the pending acquisition. Trident further asserts that “[i]f the Navy would now apply the SBA decision to the current solicitation an award to Trident should be immediately forthcoming because [Trident] has already twice been found the successful offeror.” Protest at 3.

Our Office contacted the SBA in connection with this protest in order to solicit its opinion on the Navy's actions in this case. In response, the SBA argued that the Navy had not violated applicable regulations. According to the SBA, upon learning that OHA had reversed the area office determination that Trident was ineligible, the agency's “only obligation is to allow Trident to submit an offer for the current award and evaluate Trident's eligibility as of the date of its offer for the current award.” SBA Opinion, at 4. By taking this action, the SBA maintains that the Navy has complied with applicable regulations, and that Trident's protest should be denied. We agree with the SBA.

The duties of a contracting agency following a size status protest determination are set forth in the SBA's regulations at 13 C.F.R. § 121.1009 (2012). As relevant here, the regulations state:

¹ The agency noted in a request for dismissal that the incumbent firm is not, in fact, an offeror under the current RFP. We also note that, as explained below, there is no authority requiring the agency to reinstate an award under these circumstances. We therefore treat the protester's arguments in this area as a general allegation of bias in deciding to issue these amendments.

(2) A contracting officer shall not award a contract to a protested concern that the Area Office has determined is not an eligible small business for the procurement in question.

(i) If a contracting officer receives such a determination after contract award, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal is filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the size determination finding the protested concern ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

13 C.F.R. § 121.1009(g)(2).

In this case, the Navy properly followed the SBA's regulations by terminating Trident's award, when it learned that the SBA area office determined that Trident was ineligible, and Trident had not yet filed an OHA appeal. Further, because a contract award under the RFP no longer existed at the time Trident's OHA appeal was filed, 13 C.F.R. §§ 121.1009(g)(2)(ii) and 121.1009(g)(2)(iii) had no application in this case. The above regulations, therefore, did not preclude the agency from proceeding with a reopened RFP while Trident's size status appeal was pending at OHA, and then reinstating Trident in the ongoing competition once OHA reached its decision.

Moreover, we are not aware of, nor has Trident cited, any statute or regulation that expressly requires an agency to reinstate a terminated contract on the basis of an SBA OHA reversal of a negative size status determination.² As noted above, FAR § 19.302(i), merely provides that "[t]he SBA [OHA] decision, if received before award, will apply to the pending acquisition." Thus, in the absence of any such regulation, the agency did not err in simply readmitting Trident to the ongoing procurement and providing all offerors, including Trident, with an opportunity to submit revised proposals in response to solicitation amendments incorporating

² The protester argues that language in 75 Fed. Reg. 9129 supports its claim for the award. This Federal Register notice concerns SBA proposed rules amending its regulations, and states that "if the SBA issues an initial decision that a concern is ineligible, award should not be made to that concern, unless and until the decision is overturned on appeal." We do not read this language as mandating reinstatement of a terminated award, and conclude that the agency in this case followed the applicable SBA and FAR regulations, as discussed.

changed agency requirements, a new wage determination, and new evaluation criteria.

The remainder of Trident's protest essentially argues that the agency's amendments were issued in bad faith. According to Trident, the agency issued multiple minor amendments to the solicitation as a pretext for denying the reinstatement of Trident's award. Trident also asserts that the changes to the past performance evaluation criteria set forth in amendments 0006 and 0007 were designed to improperly influence the outcome of the procurement. We see no evidence of bad faith or bias in the agency's actions here. Government officials are presumed to act in good faith and a protester's claim that an agency official was motivated by bias or bad faith must be supported by convincing proof. Brian X. Scott, B-310970, B-310970.2, Mar. 26, 2008, 2008 CPD ¶ 59 at 4. Our Office will not attribute unfair or prejudicial motives to procurement officials on the basis of inference or supposition. Id.

As noted above, following the termination of Trident's September 19 contract award, the agency issued amendment 0004 to the RFP to reopen the competition. This amendment also updated the performance work statement and removed one site location. Five days later, the agency issued amendment 0005, which added back as an option task the site location removed by amendment 0004. The agency explained that the location was initially removed because the Navy anticipated transitioning that requirement to performance by government personnel. However, the location was then added back to the RFP as an optional task after [DELETED]. Trident has provided no evidence to rebut the agency's explanation of the purpose of these amendments; thus, we have no basis to conclude that they were improper.

After OHA notified the Navy of its determination that Trident was eligible for award under the RFP and Trident was readmitted to the competition, the Navy issued amendments 0006 and 0007, which revised the instructions to offerors, the evaluation criteria, the performance work statement, and the wage determinations, and added new line items for contingency support. Concerning the changes to the past performance evaluation criteria, the agency explains that the changes were dictated by mandatory source selection plan criteria included in a March 4, 2011 Department of Defense (DOD) memorandum, and a February 28, 2012 update to the Naval Supply Systems Command, Fleet Logistics Center Norfolk's (FLCN) source selection plan template.

In previous acquisitions processed by FLCN, the agency noticed that while small business offerors may have past performance references that are relevant in some areas of scope, complexity, and magnitude, the references may not be relevant in all three areas. To foster as much competition as possible, FLCN therefore instituted standard language in the source selection plan template to allow past performance references to be aggregated, such that small businesses with some relevant past performance on a single contract will have the opportunity to have

their entire past performance submission combined to determine relevancy. The past performance evaluation criteria set forth in amendments 0006 and 0007 to the RFP, issued after the February 28 update to the FLCN source selection plan template, reflect this new approach to past performance evaluation.

In its comments, Trident argues that while the protested changes are set forth in the FLCN source selection template, the agency has not connected the change in the source selection template to the DOD memorandum. However, where the agency has identified the source of the updated past performance evaluation criteria and the reasoning for its inclusion in the RFP, we see no evidence of bias in the agency's issuance of the challenged amendments. Further, agencies enjoy broad discretion in the selection of evaluation criteria, and we will not object to the use of particular evaluation criteria so long as they reasonably relate to the agency's needs in choosing a contractor that will best serve the government's interests. SML Innovations, B-402667.2, Oct. 28, 2010, 2010 CPD ¶ 254 at 2.

The protest is denied.

Lynn H. Gibson
General Counsel