



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Marketing Group

File: B-242527

Date: May 13, 1991

Paul B. Fellencer for the protester.
George N. Brezna, Esq., United States Marine Corps, for the agency.
John Formica, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the contracting officer failed to comply with the regulations by waiting 3 weeks before forwarding a firm's size status protest to the Small Business Administration (SBA), and the delay effectively deprived the firm of having its size protest considered by the SBA prior to award.

DECISION

Eagle Marketing Group protests the award of a contract to Kolbe, Inc. under request for proposals (RFP) No. M00264-90-R-0016, a small business set-aside, issued by the United States Marine Corps for dishwashers. Eagle contends that the award was improper because Kolbe is not a small business, and its size status protest challenging Kolbe's eligibility for award was improperly handled by the agency.

We sustain the protest.

The solicitation, which was issued on June 8, 1990, included four line items for furnishing and installing dishwashers at four mess halls located at the Marine Corps Combat Development Command, Quantico, Virginia. The RFP stated that award would be made on the basis of the lowest overall price. Five firms submitted proposals, with Eagle submitting a proposal and an alternate proposal. After evaluation, the agency issued an amendment clarifying the solicitation requirements and requesting best and final offers (BAFO). Four firms submitted BAFOs, with Eagle again submitting a proposal and an alternate proposal, both on an "all or none basis." On September 20, the agency notified the unsuccessful offerors, including

Eagle, that Kolbe was the apparent successful offeror for all four line items.

Eagle immediately filed a protest via facsimile machine which was received by the agency on September 20, challenging Kolbe's small business size status on the basis that Kolbe's supplier is a large business. The agency, rather than forwarding Eagle's protest to the Small Business Administration (SBA), conducted its own "investigation" into the size status of Kolbe's supplier and informed the protester on September 27 that it had concluded that Kolbe's supplier qualified as a small business. Eagle filed a response via facsimile machine, which was received by the agency on September 27, again challenging Kolbe's small business size status on the basis that Kolbe's supplier is a large business.

The agency made award to Kolbe on September 28 notwithstanding Eagle's protest. On October 11, the agency forwarded Eagle's protest to the SBA, informing it that award had not been withheld pending SBA's size determination "[b]ecause the failure to acquire dishwashing equipment would have a severe impact on food service operations at the . . . Base."

The SBA issued a decision on December 5 that Kolbe was other than a small business concern for the purposes of this procurement.

The protester contends that the award to Kolbe was improper because the firm is not a small business and the size status protest challenging Kolbe's eligibility for award was not properly handled by the agency because it was not promptly forwarded to the SBA. Eagle concludes that Kolbe's contract should be terminated and that it should receive award for the remainder of the requirement, or in the alternative that it should be compensated for lost profits.

As a preliminary matter, the agency argues that Eagle's offer exceeded the funding available for the dishwashers and therefore Eagle is not an interested party to maintain this protest. An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award or failure to award a contract. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1991). Generally, a party will not be deemed to have the necessary economic interest if it would not be in line for the award if the awardee were eliminated from the competition. James McGraw, Inc., B-236974.2, Jan. 24, 1990, 90-1 CPD ¶ 99.

Here, Eagle submitted the only offer other than Kolbe's that was technically acceptable under all four line items. Thus, if Kolbe's offer could not be accepted because of its size status and Eagle's offer exceeded the available funding, at

least part of the agency's needs for the dishwashers would have to be resolicited.^{1/} Therefore, even though Eagle's offer could not be accepted because of its high price, it could participate in the resolicitation, and it has a sufficient economic interest to maintain this protest. Consolidated Constr., Inc., B-219107.2, Nov. 7, 1985, 85-2 CPD ¶ 529.

Federal Acquisition Regulation (FAR) § 19.302(c)(1) requires that a contracting officer who receives a protest of an offeror's small business representation promptly forward the protest to the SBA. In this instance, the contracting officer did not promptly forward Eagle's size protest but instead waited approximately 3 weeks after receipt on September 20 of Eagle's initial protest to forward it to SBA. The agency has not provided any explanation for this delay, and in any event, the regulations do not provide any exception to the requirement that the contracting officer promptly forward a size status protest to SBA. Consolidated Constr., Inc., B-219107.2, supra. The agency's failure to promptly forward Eagle's size protest to SBA was clearly improper.

The effect of this improper action was to deprive Eagle of the opportunity of having its size status protest considered by the SBA prior to the agency's award to Kolbe. We recognize that on September 28 the agency made award under circumstances which could well have qualified under FAR § 19.302(h)(1) as justification for award notwithstanding a pending size status protest. Nevertheless, it is reasonable to assume that had the agency immediately forwarded Eagle's September 20 protest to the SBA, and informed the SBA of its need for an expeditious decision, as it could only withhold award for a limited time, the SBA may have rendered a decision within that time. See Science Sys. and Applications, Inc., B-236477, Dec. 15, 1989, 89-2 CPD ¶ 558. In any event, in the absence of clear evidence to the contrary, we will assume that Eagle was prejudiced by the agency's failure to promptly forward its size status protest to the SBA as required, and therefore sustain the protest on this basis. Id.

We do not recommend corrective action since performance under the contract is complete. Further, there is no basis for the award of proposal preparation costs because Eagle could not have received award under this solicitation. Consolidated Constr., Inc., B-219107.2, supra. Neither is Eagle entitled to the recovery of lost profits because there is no legal

^{1/} It is possible that the agency could have made award under line items 1-3 to other offerors who were lower than Eagle. Those firms' offers were considered to be technically unacceptable under line item 4.

authority which permits the recovery of anticipated profits, even where an offeror has been wrongfully denied the award of a contract. Ralph Turnbull--Claim for Costs and Lost Profits, B-238399, Feb. 12, 1990, 90-1 CPD ¶ 183. Eagle is, however, entitled to the costs of filing and pursuing its protest, because as explained previously, Eagle was effectively prevented from having a fair opportunity to compete under a resolicitation by the agency's failure to promptly forward its size status protest to the SBA. See Consolidated Constr., Inc., B-219107.2, supra. Eagle should submit its claim for the costs of filing and pursuing its protest directly to the agency. 4 C.F.R. § 21.6(d).

Shilton L. Fowler

Acting Comptroller General
of the United States