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Decision

Matter of: TrustComm, Inc.

File: B-408456; B-408456.2

Date: September 20, 2013

Amanda J. Dietrick, Esq., and Michael R. Charness, Esq., Vinson & Elkins LLP, for the protester.

Amy O'Sullivan, Esq., and Stephan Rice, Esq., Crowell & Moring LLP, for MTN Government Services, Inc., the intervenor.

Talbot J. Nicholas II, Esq., United States Coast Guard, for the agency.

Frank Maguire, Esq., and David A. Ashen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined not to terminate contract of awardee in an acquisition set aside for small business concerns notwithstanding Small Business Administration (SBA) determination (almost 9 months after size status protest) that the awardee is other than small where there were countervailing circumstances that weighed against termination, including that delivery of required equipment could not be obtained from the offeror next in line for award without repeating extensive first article testing, and the resulting delay to an already delayed program would result in significant costs and adversely affect mission effectiveness of Coast Guard cutters.

DECISION

TrustComm, Inc., of Stafford, Virginia, protests the United States Coast Guard's decision to continue performance of a contract awarded to MTN Government Services, Inc. (MTNGS), of Leesburg, Virginia, under request for proposals (RFP) No. HSCG79-12-R-T10009, a 100% small business set-aside solicitation for communications equipment for Coast Guard cutters. The protester asserts that since the Small Business Administration (SBA) has determined MTNGS to be other than a small business, MTNGS was ineligible for award and its contract therefore should be terminated.

We deny the protest.

BACKGROUND

Acquisition History

Prior to 2009, the Coast Guard used Inmarsat-B satellite service to provide underway data connectivity to its cutter fleet. In 2009, the Coast Guard began an effort to replace Inmarsat-B with a combination of Fleet Broadband (FBB) and Ku-Band (Ku) satellite service. In September 2009, the Coast Guard awarded contracts for both FBB and Ku equipment and services. The Ku contract was terminated after a protest. In the resolicitation for the Ku contract, the Coast Guard separated the procurement into two components: an equipment procurement and an “airtime, support, and NOC operation” procurement. Agency Report (AR), Tab 7, Determinations and Findings (First D&F), Sept. 20, 2012, at 2. The hardware provided under the equipment contract failed to pass first article testing, however, and the Coast Guard elected to cease procurement under that contract and re-solicit for the Ku equipment. Id. at 2-3. The Coast Guard advises that, as a result of difficulties encountered to date in establishing a long-term contract to purchase Ku-Band system equipment, the Coast Guard’s “Large Cutter” satellite connectivity program is “three years behind schedule,” and this delay “has created and continues to create fiscal and mission effectiveness impacts.” Id. at 3.

The RFP for the current procurement of Ku equipment, issued on May 16, 2012, contemplated the award of a five year indefinite-delivery/indefinite-quantity (ID/IQ) contract for underway cutter connectivity upgrades to include iDirect-based or equivalent Ku-Band terminal equipment for up to 40 Coast Guard cutters. The RFP indicated that the contract would have a maximum value of \$7 million. The solicitation, a 100% small business set-aside, provided that award would be made to the lowest-priced technically acceptable offeror. RFP at 1-2, 32.

Six proposals were received. On August 30, the agency notified all offerors of its intent to make award to MTNGS. The protester asserts, and the agency has not disputed, that TrustComm was next in line for award.

SBA Size Status Protest

On September 7, 2012, TrustComm filed a timely size status protest with SBA, challenging MTNGS’s status as a small business for this procurement. AR, Tab 6, Size Protest. The size protest was forwarded to SBA on September 10, 2012. Contracting Officer Statement (COS) at 2.

On September 20, the Coast Guard issued a Determination & Findings (First D&F) justifying award to MTNGS as the lowest-priced, technically acceptable offeror. COS at 3; First D&F. The First D&F cited Federal Acquisition Regulation (FAR) § 19.302, which provides in relevant part as follows:

Within 10 business days after receiving a protest, the challenged concern's response, and other pertinent information, the SBA will determine the size status of the challenged concern and notify the contracting officer, the protester, and the challenged concern of its decision.

FAR § 19.302(g)(1). The Coast Guard, however, had been advised by the SBA Area Size Program Manager "that due to a serious back-log in cases it could take up to 3 months for the SBA to make a determination." AR, Tab 10, Determination and Findings, June 13, 2013 (Second D&F), at 1-2. In addition, the First D&F noted that the delays in acquiring the Ku equipment had resulted in the Coast Guard's satellite connectivity program being three years behind schedule, and indicated that further delays would result not only in increased costs but also in a negative impact on schedule and capabilities for Coast Guard cutters. First D&F at 3. The First D&F provided, therefore, that "based on past association with the SBA as it pertains to timeliness of size determinations, it is the Government's decision to go forward with award of this solicitation after the 10th business day [25 September 2012] if the SBA has not made its determination." First D&F at 2. On September 27, the SBA not having ruled on the size status protest, the Coast Guard made award to MTNGS and notified unsuccessful offerors.

From November 2012 to May 2013, the Coast Guard conducted first article testing in which MTNGS's proposed equipment was put through rigorous underway testing and laboratory testing at a Navy facility. Second D&F, Addendum, June 20, 2013, at 2. Further, by mid-June, 2013, the Coast Guard had "purchased six systems and taken delivery of five systems for first-article tests." Second D&F, Memorandum, June 14, 2013, at 1. According to a Coast Guard memorandum:

The [first article testing] took eight months and included installation and testing onboard three cutters, bench/lab testing at the USCG Telecommunications and Information Systems Center in Alexandria, VA, EMI/EMC [electromagnetic interference/compatibility] testing at the Naval Surface Warfare Center in Dahlgren, VA, and EMI/EMC testing onboard Coast Guard cutters. During [first article testing], the Coast Guard tested several different hardware components and versions of internal firmware/software. As a result of [first article testing], the Coast Guard is modifying the contract to incorporate changes to the antenna to "harden" the system from an EMI perspective. The Coast Guard has a \$1.47M order for 20 production systems which will be placed by the Contracting Officer on or about 13 June 2013. Production installations are scheduled to begin 1 July, 2013.

Id.

On May 31, 2013, almost 9 months after TrustComm filed its size protest, the SBA issued a determination that MTNGS was not a small business for purposes of this

procurement. AR, Tab 9, SBA Size Status Determination.¹ TrustComm then contacted the contracting officer by telephone on June 5 to determine whether the Coast Guard intended to terminate MTNGS's contract on the basis that it was not eligible for award. Protest at 4. According to TrustComm, the contracting officer advised "that MTNGS's contract would not be terminated under any circumstances." Id.

On June 13, 2013, the Coast Guard issued its Second D&F to continue with the performance by MTNGS and to issue an initial production delivery order for 20 production systems. The Second D&F advised that:

[i]t is the recommendation of the USCG that contract performance continues with MTN Government Services, Inc. for several significant countervailing reasons to include the significant increase in costs associated with cancelling this contract and awarding a new contact with the next lowest priced technically acceptable offer from TrustComm. In addition to the increased costs, significant schedule and capabilities for the USCG Large Cutter Fleet will be negatively impacted by any further delays in deploying the Ku-Band System.

Id. at 2-3. A June 14 memorandum attached to the Second D&F set forth in detail the costs the agency expected to incur if MTNGS's contract were terminated. Second D&F, Memorandum, at 1. According to the memorandum, those costs represented "over \$14M in added costs to the government, reduced capabilities for Coast Guard cutters, and the additional workload of numerous commands to re-award contracts and repeat testing and prototyping efforts." Id. at 1.

TrustComm filed this protest on June 17, 2013.² On June 18, the Coast Guard issued an initial production delivery order to MTNGS for 20 Ku-Band production units

¹ MTNGS has not appealed this determination. Intervenor E-Mail, Sept. 9, 2013.

² The agency asserts that the protest is untimely. In this regard, the agency argues that, to be timely, TrustComm had to file its protest within ten days of learning that the Coast Guard had awarded a contract to MTNGS in the face of TrustComm's size status protest at SBA. In the alternative, the agency asserts that TrustComm had to file its GAO protest within ten days of learning of the SBA's size status determination. We disagree. Under our Bid Protest Regulations, a protest based on issues other than alleged improprieties in a solicitation must be filed no later than 10 calendar days after the protester knew, or should have known, of the basis for protest, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (2013). Here, TrustComm protests the failure of the Coast Guard to cancel the award to MTNGS after the SBA determined MTNGS to be other than a small business. TrustComm explains that it had no reason to know that the agency would not cancel the award to MTNGS, and

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and associated equipment for delivery during the period June 10, 2013 through June 9, 2014. COS at 3; AR, Tab 11, Delivery Order, June 18, 2013. On September 1, the Coast Guard issued a delivery order for two additional Ku-Band production units and associated equipment. Supp. AR; AR, Tab 12, Delivery Order, Aug. 28, 2013.

DISCUSSION

TrustComm asserts that since MTNGS was not a small business, it was ineligible for award and the contract therefore is illegal and should be terminated.

We find the agency determination to continue with performance under MTNGS's contract to be unobjectionable. As an initial matter, we note that consistent with the FAR, the Coast Guard did not award a contract until more than 10 business days after furnishing the SBA with a copy of TrustComm's size protest. See FAR § 19.302(h)(1). Further, the FAR does not require termination of a contract based on a subsequent SBA determination that an awardee is other than small. FAR § 19.302(h)(2); see Planned Sys. Int'l, Inc., B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43 at 2-3. In this regard, we generally have not questioned the propriety of an award made by an agency before a decision by the SBA on a size protest had been issued, where the 10 business day period for issuing such decisions had expired, even where the awardee was later determined by the SBA to be other than a small business concern. See, e.g., ALATEC Inc., B-298730, Dec. 4, 2006, 2006 CPD ¶ 191 at 4-5; Planned Sys. Int'l, Inc., supra, 2-3.

We have recognized, however, that even where the requirements of FAR § 19.302 have been satisfied by the agency in making an award, termination of the awardee's contract may be appropriate where a timely size protest was filed, there was no appeal of the SBA size ruling that the awardee was not a small business, and there are no countervailing circumstances that weighed in favor of allowing a business concern that is not small to continue performance. See, e.g., Tiger Enters., Inc., B-292815.3, B-293439, Jan. 20, 2004, 2004 CPD ¶ 19 at 4; Diagnostic Imaging Technical Educ. Ctr., Inc., B-257590, Oct. 21, 1994, 94-2 CPD ¶ 148 at 2-3. We have found that under such circumstances, when there are no countervailing reasons for preserving an award to a business that is not small, it would be inconsistent with the integrity of the procurement system and the intent of the Small Business Act, 15 U.S.C. §§ 631-657a, for an agency to permit a business that is ineligible under the terms of the solicitation to continue contract performance. ALATEC Inc., supra, at 5.

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award to it, until it was advised by the contracting officer on June 5 that MTNGS's contract would "not be terminated under any circumstances." Protest at 4. TrustComm's protest was filed on June 17, and therefore was timely.

Here, we agree with the agency that the record demonstrates the existence of countervailing circumstances supporting the agency determination to continue MTNGS's contract. As an initial matter, we find that the agency reasonably determined that award to TrustComm would necessitate repeating the first article testing, resulting in significant delays and additional costs. See COS at 4-5. Although TrustComm argues that new first article testing will not be required, it has not shown that the agency's assumption is unreasonable.³

Further, the record indicates that the delays resulting from disturbing the award to MTNGS would adversely affect the Coast Guard's mission effectiveness. The SBA determination here was issued almost 9 months after TrustComm's size protest, a delay wholly beyond the control of the Coast Guard. See Alliance Detective & Security Service, Inc., B-299342, Apr. 13, 2007, 2007 CPD ¶ 56 at 6-7 ("protracted SBA size protest process" considered in finding "countervailing reasons" not to disturb award). If the agency were required to terminate MTNGS's contract and instead make award to TrustComm, thereby necessitating new first article testing, this would add a substantial delay to the Coast Guard's satellite connectivity program, which, because of delays in acquiring the Ku equipment, is already three years behind schedule. First D&F at 3. The Coast Guard reports that further delays in this procurement will lead to "mission effectiveness impacts," delaying a system

³ While TrustComm claims that its proposed equipment is "identical" to the system delivered by MTNGS, the contracting officer reports that TrustComm cannot simply replicate the subtle design changes and the identification of unique configuration and revision levels that MTNGS had to address during its first article testing. COS at 4-5. Our review of the record indicates that the first article testing here involved modification of the awardee's proposed solution based on the results of rigorous testing. As noted, the first article testing took eight months and included installation and testing onboard three cutters, bench/lab testing at the USCG Telecommunications and Information Systems Center, EMI/EMC testing at the Naval Surface Warfare Center, and EMI/EMC testing onboard Coast Guard cutters. Second D&F, Memorandum, at 1. During the first article testing, the Coast Guard tested several different hardware components and versions of internal firmware/software, and worked with MTNGS to standardize a specific set of hardware components, hardware configuration/revision levels, software configuration/revision levels, and design changes to mitigate the effect of EMI. COS at 4-5; Second D&F, Addendum, at 2-5. TrustComm has not shown to be unreasonable the agency's determination that in view of the complex and subtle process that occurred during the first article testing with MTNGS, the only way to ensure that the Coast Guard receives a safe, secure and conforming product from a new contractor would be to redo the first article testing.

that will provide “substantially better performance,” to meet the Coast Guard’s “global maritime and law enforcement efforts.” Id.⁴

In addition, the Coast Guard determined that the agency would incur significant additional costs if MTNGS’s contract were terminated. These costs include the loss of much of the \$1 million Ku-Band airtime pre-purchased for Fiscal Year 2013 (with only the airtime required by the “prototype” Ku cutters being used). Second D&F, Memorandum, at 2-3. Also, the agency expects that delaying Ku-Band implementation would result in significant increased costs--perhaps up to \$15 million per year--for FBB satellite airtime. Specifically, the record indicates that the Coast Guard uses FBB as the primary satellite service for 31 cutters at a service cost of approximately \$4,500 per cutter “per underway day.” According to the agency, once the cutters have Ku-Band equipment installed, it will become the primary communications channel and FBB will be used as a backup only (estimated at 15% of underway days). Id. at 2. In addition, the agency expected to incur a \$500,000 loss with respect to the replacement of installed prototype equipment and \$350,000 to repeat EMI/ECM testing. Id. at 2-3. Although TrustComm has questioned the magnitude of these costs--suggesting for example that if testing could be accomplished in just 4 months, the costs associated with the continued primary use of FBB satellite service would be only \$5 million or less, Comments at 12--it has not shown that the agency unreasonably determined that there would be significant additional costs if MTNGS’s contract were terminated.⁵

⁴ In this regard, the agency reports that in the absence of KU satellite service, Coast Guard cutters are using Fleet Broadband (FBB) service as their primary data link, a role that FBB service was never meant to serve. According to the agency, while the maximum FBB data throughput can reach 432 kilobits per second (Kbps), near busy ports or shipping lanes--where many ships may be using FBB service simultaneously--actual data speeds may only reach 200 Kbps or less. This contrasts with the data speeds available with the Ku-Band, which provide cutters with minimum speeds of 512 Kbps to 1 megabyte per second. The agency notes that as a result of the reduced data throughput, some mission essential applications will not be available during the period that they are restricted to FBB only. Second D&F, Memorandum at 3. In addition, while Coast Guard cutters currently have both FBB and slower Inmarsat-B satellite service available, the Coast Guard’s Inmarsat-B service will end in October 2013, leaving cutters with only one means of underway connectivity until Ku-Band service becomes available. Id. In this regard, the record indicates that while the agency could continue Inmarsat-B leases for another year, the cost would be prohibitive inasmuch as a single Inmarsat-B lease (service for one ship in one ocean region) costs over \$750,000 per year. Second D&F, Memorandum, at 3.

⁵ In addition, the calculations above do not fully take into account the costs associated with other actions the agency has taken since it declined to terminate the
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In sum, we conclude that the “countervailing circumstances” identified by the Coast Guard provide significant support for its decision to permit MTNGS to continue contract performance notwithstanding the SBA’s determination the awardee was not eligible for award under a procurement conducted as a small business set-aside. See ALATEC, Inc., supra, at 4-5.

The protest is denied.

Susan A. Poling
General Counsel

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contract after the SBA’s ruling on MTNGS’s size status. In this regard, the agency has issued delivery orders for production units, spare parts, training and technical support; in fact, a chart prepared by the Coast Guard indicates that as of mid-September 2013, 15 installations have been completed, including 7 (of 22) production installations. Supp. AR at 2.