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United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Priority One Services, Inc.--Costs

File: B-288836.5

Date: November 8, 2002

Kevin P. Mullen, Esq., Piper Rudnick, for the protester.
Michael Colvin, Department of Health & Human Services, for the agency.
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reimbursement of costs of filing and pursuing a protest, which was recommended in a decision sustaining a protest of a procurement set-aside for small businesses, is denied where the protester was ineligible for award under the protested procurement because it was not a small business and the protester did not comply with the 13 C.F.R. § 121.1009(g)(3) (2001) requirement that it immediately notify responsible officials of an adverse size determination under the same size standard as included in the protested procurement.

DECISION

Priority One Services, Inc. protests the denial by the National Institute of Allergy and Infectious Diseases (NIAID), National Institutes of Health (NIH), Department of Health & Human Services (HHS), of its claim for the costs of filing and pursuing its protest, under request for proposals (RFP) No. NIAID-DIR-01-56, a small business set-aside, for the care, use, and the humane treatment of laboratory animals and technical skills related to the scientific study and manipulation of animals and animal products.

We deny the request that we recommend reimbursement of the firm's protest costs.

This claim arose from our decision in Priority One Servs., Inc., B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79, in which we sustained Priority One's protest against an award to SoBran, Incorporated. We sustained the protest because the agency failed to perform a proper cost-realism evaluation and conducted improper discussions with SoBran. We recommended that the agency reopen discussions, request revised proposals, reevaluate proposals, and make a new award selection determination. We

also recommended that Priority One be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees.

HHS argues that because Priority One has been found by the Small Business Administration (SBA) to be other than a small business, and thus was ineligible for award under the protested procurement, it was not an interested party under our Bid Protest Regulations and should not be reimbursed its costs of filing and pursuing the protest. The protester argues that it was a small business when it filed its protest and there is no reason to modify the recommendation made in our initial decision that these costs be reimbursed. In order to better understand the parties' respective positions, some background facts are necessary.

On April 20, 2001, Priority One certified that it was a small business under the protested NIAID solicitation's \$20 million size standard. Meanwhile, on June 21, Priority One submitted a proposal in response to another NIH solicitation containing the same size standard, where it also certified that it was a small business.

On August 28, Priority One was advised of the award to SoBran under the protested NIAID solicitation and on September 7 protested that award to our Office. On October 1, Priority One received the award under the other NIH solicitation. A size protest of this award was filed with the SBA on October 2.

On October 9, HHS submitted its report on the protested NIAID procurement, and on October 19 Priority One filed its comments on the report and a supplemental protest.

On October 23, the SBA Area Office found that Priority One was not a small business concern for the other NIH procurement. Priority One did not bring this adverse size determination to the attention of the NIAID contracting officer.

On November 3, HHS submitted its report on the supplemental protest, and on November 12 Priority One submitted its comments on that report.

On November 13, Priority One filed an appeal of the SBA Area Office's size determination with the SBA's Office of Hearings and Appeals (OHA).

As indicated, we sustained the protest on December 17. At that time neither party had brought the SBA's adverse size determination on the other NIH procurement to our attention. In response to our decision, NIAID implemented the recommended corrective action, including obtaining revised proposals, and again selected SoBran for award on March 11, 2002. On March 12, Priority One protested this selection, which we dismissed on March 15 because Priority One was to receive a debriefing on that date.

Meanwhile, on March 13, the OHA affirmed the adverse size determination of Priority One on the NIH procurement.

On March 20, following a debriefing, Priority One again protested the SoBran award to our Office. HHS immediately requested that we dismiss the protest because the SBA OHA determination that Priority One was other than small on the NIH procurement meant that Priority One was not an interested party eligible to challenge the award under the protested small business set-aside procurement, which had the same size standard for which Priority One was ruled other than small. We requested the views of the SBA, which stated that under applicable regulations Priority One was not a small business eligible for award under the protested NIAID procurement.

On May 1, we dismissed Priority One's protest, finding it was not an interested party eligible to challenge the award under the small business set-aside. We found in this regard that:

SBA's interpretation is consistent with the plain language of 13 C.F.R. § 121.1009(g)(3) [(2001)] that states "a concern determined to be other than small for a particular size standard is ineligible for any procurement . . . requiring the same or lower size standard" (emphasis added). The additional requirement under that regulation for the firm to immediately inform responsible officials under pending procurements of the adverse size determination appears to provide for the prompt application of the adverse size determination to the firm's eligibility under other procurements where a contract has yet to be awarded.

Priority One Servs., Inc., B-288836.4, May 1, 2002, 2002 CPD ¶ ___, at 3.

Meanwhile, on February 14, Priority One filed with NIAID its claim for the costs of filing and pursuing its sustained protest which we recommended be reimbursed in our December 17 decision. On May 13, NIAID denied Priority One's claim. This denial was based upon our May 1 decision, finding that Priority One was not an interested party because it was other than a small business and was thus not eligible for award under the solicitation. NIAID asserted that the reasoning in that decision was equally applicable to our December 17 decision sustaining the protest because when we issued that decision Priority One was not a small business and was thus not an interested party. Priority One then filed its claim with our Office.

As discussed in our May 1 decision, even though Priority One self-certified itself as a small business when it submitted its proposal on the protested procurement and had not been found to be other than small by the SBA until after it had filed its protest, the SBA, citing applicable regulations, does not consider Priority One to be a small business eligible for award under this procurement at any time after the SBA area office issued its adverse size determination. In this regard, under the SBA's regulations, a "size determination becomes effective immediately and remains in full and force and effect unless and until reversed by OHA." 13 C.F.R. § 121.1009(g)(1).

As indicated in our May 1 decision, 13 C.F.R. § 121.1009(g)(3) obligates a concern which had already certified itself as small on a pending procurement (such the one protested here) to “immediately” inform the officials responsible for the pending procurement of an adverse size determination. Priority One did not notify NIAID of the adverse size determination and the record indicates that NIAID procurement officials only became aware of the adverse size determination about the time that the OHA issued its decision. Priority One offered no response to our query as to why this regulation was not complied with. If NIAID had been apprised of the adverse size determination, it would presumably have sought a dismissal request on the grounds that Priority One was not an interested party, a request we would have granted. We therefore conclude that it would be inappropriate for Priority One to be reimbursed its costs of filing and pursuing its protest.

The request for a recommendation of reimbursement of protest costs is denied.

Anthony H. Gamboa
General Counsel