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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Brechan Enterprises, Inc.--Costs

File: B-294046.2

Date: November 4, 2004

Jacob Nist, Esq., Perkins Coie, for the protester.

B.J. Braun, Esq., United States Coast Guard, for the agency.

Jonathan L. Kang, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's request for a recommendation that it be reimbursed the reasonable costs of filing and pursuing its protest is granted where the record shows that the agency unduly delayed taking corrective action in response to a clearly meritorious protest; reimbursement of costs is recommended notwithstanding post-protest indicia that suggests the protester might not be small and thus not eligible for award in the procurement, which was set aside for small businesses.

DECISION

Brechan Enterprises, Inc. requests that our Office recommend that the United States Coast Guard reimburse Brechan's reasonable costs of filing and pursuing its protest challenging the award of a contract to Anderson Construction Co. under request for proposals (RFP) No. DTCG87-04-R-643058, a small business set-aside issued by the United States Coast Guard for steam distribution system repairs at the Coast Guard's Integrated Support Command in Kodiak, Alaska.

We recommend that the Coast Guard reimburse Brechan's reasonable costs of filing and pursuing its protest.

Brechan filed the initial protest on May 7, 2004, alleging that the agency improperly evaluated Anderson's proposal and engaged in improper discussions with Anderson. Following "outcome prediction" alternative dispute resolution by our Office, during which our attorney informed the parties of the attorney's view that GAO would likely sustain the protest, the agency took corrective action. On July 30, we dismissed the protest as academic. Brechan subsequently requested that our Office recommend

that the agency reimburse Brechan for the reasonable costs of filing and pursuing its protest.

Our Office may recommend that an agency reimburse a protester its protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (2004); Shindong-A Express Tour Co., Ltd.–Costs, B-292459.3, Mar. 25, 2004, 2004 CPD ¶ 75 at 5.

Here, the agency does not dispute that Brechan's protest was meritorious or that the agency unduly delayed taking corrective action. See Agency Response to Protester's Request for Costs, Aug. 16, 2004. Instead, the sole issue raised by the agency is whether Brechan was a small business at the time of its initial protest. Id. The agency argues that if Brechan was not an interested party to bring the initial protest, it is not entitled to protest costs, regardless of the merits of the protest or the agency's corrective action. Id.

In its proposal, Brechan self-certified its status as a small business for purposes of the competition. On July 20, Brechan notified our Office that it had become aware of an informal interpretation by the Small Business Administration (SBA) regarding small business affiliation rules that could potentially affect Brechan's size status. This issue was never fully developed on the record during the protest, and we dismissed the protest without notice of any action by SBA concerning Brechan's size.

An offeror may self-certify that it is a small business concern in connection with a specific solicitation if it meets the definition of a small business concern applicable to the solicitation and has not been determined by SBA to be other than a small business; the contracting officer must either accept the firm's self-certification or refer to SBA any challenges raised by an interested party or the agency itself. Federal Acquisition Regulation (FAR) § 19.301; AMI Constr., B-286351, Dec. 27, 2000, 2000 CPD ¶ 211 at 4. Because Brechan self-certified as a small business, and the contracting officer did not refer the matter to SBA prior to award and SBA never issued an adverse determination, Brechan was a small business for purposes of the procurement at the time it filed its protest.

Subsequent to the filing of this request by Brechan for a recommendation that it be reimbursed its reasonable costs of filing and pursuing its protest, the contracting officer filed a size protest with the SBA Regional Office in Anchorage challenging Brechan's status as a small business. SBA declined to hear the size protest because Brechan had by that time notified the Coast Guard that it would not participate in the recompetition and because the recompeted award had been made to Anderson. See E-mail from SBA to Contracting Officer (Aug. 20, 2004) ("There is simply no authority for SBA to initiate a size determination in this matter because there is no

contract award at issue.”)¹ Following SBA’s declination, the Coast Guard requested that our Office request an informal opinion from SBA regarding Brechan’s size.²

Brechan correctly notes that under SBA regulations, an informal or advisory opinion by SBA regarding a company’s size is not binding on any party. 13 C.F.R. § 121.403. The Coast Guard refers to our decision, JACO & MCC Joint Venture, B-293354.2, May 18, 2004, 2004 CPD ¶ 122 at 7 n.7, where we requested an advisory opinion from SBA, and relied upon that opinion in the resolution of the protest. However, JACO is not an analogous situation, as our request for SBA’s opinion in that decision concerned the interpretation of SBA regulations governing the evaluation of a joint venture under the SBA mentor-protégé program. In JACO, we did not request that SBA address the size of the protester. Thus, because an informal or advisory opinion here would have no binding effect on Brechan’s size status, we declined to request such an opinion from SBA for purposes of resolving Brechan’s request for a recommendation of entitlement to protest costs.

Furthermore, even if SBA were to issue a formal size determination, that determination would not have any retroactive effect on Brechan’s size for purposes of its initial protest, as the effect of such a determination after the award of a contract is prospective. See, e.g., FAR § 19.302(j); Planned Sys. Int’l, Inc., B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43 at 3 (adverse SBA decision issued after award does not require cancellation of the award); Dawkins Gen. Contractors & Supply, Inc., B-243613, B-243613.11, Sept. 21, 1992, 92-2 CPD ¶ 190 at 3 (adverse SBA size determinations apply prospectively only). Although Brechan’s request presents the somewhat unusual circumstance of an agency’s challenge to the size status of an unsuccessful offeror after award has been made, in the context of a recompetition in which the offeror is not participating and solely for the purpose of challenging entitlement to protest costs, we believe that our cases and SBA regulations do not provide for a retroactive challenge to Brechan’s standing. Accordingly, we conclude that there is no basis to challenge Brechan’s status as a small business for purposes of this request.³

¹ The SBA Regional Office appears to have relied on the SBA rule that “[a] protest challenging the size of a concern which does not pertain to a particular procurement or sale will not be acted on by SBA.” 13 C.F.R. § 121.1007(a).

² Our Office does not issue size determinations or consider challenges to an offeror’s size, as that role is reserved solely for SBA. See 4 C.F.R. § 21.5(b)(1).

³ The agency also cites Priority One Servs., Inc.–Costs, B-288836.5, Nov. 8, 2002, 2002 CPD ¶ 191, in support of its contention that a resolution of Brechan’s size status is necessary to determine whether Brechan is entitled to costs. In Priority One, we found that the protester failed to bring to the agency’s, and subsequently to our Office’s, attention the fact that, prior to the time that we sustained the protest, SBA had issued a formal decision finding that the protester was not a small business. On that basis, we determined that the protester was not entitled to costs,

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Based on the record, Brechan's request for a recommendation that it be reimbursed the reasonable costs of filing and pursuing its protest is granted. Further, in light of the discussion above, we conclude that Brechan is a small business for purposes of filing its claim for costs with the agency.

Anthony H. Gamboa
General Counsel

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notwithstanding its otherwise meritorious protest, as it was not an interested party at the time of the initial protest. Here, by contrast, SBA did not issue a formal size determination regarding Brechan's size, either during or after the pendency of the protest, and consequently its self-certified size status remains valid.