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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Technical Support Services

File: B-298527

Date: October 12, 2006

Ronald S. Perlman, Esq., Ralph C. Thomas, III, Esq., Susan W. Ebner, Esq., and John J. Jacko, III, Esq., Buchanan Ingersoll & Rooney PC, for the protester. Robin Ray Coll, Esq., Naval Air Systems Command, and Lara H. Hudson, Esq., United States Small Business Administration, for the agencies. Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where protester's small business size status was challenged in protest to Small Business Administration (SBA), and SBA did not issue size determination within 10 days after filing, but ultimately it determined that protester did not qualify as small business, agency properly proceeded with award to another small business offeror, and was not required by applicable regulations to terminate that contract in order to make award to protester when SBA subsequently reversed size determination on appeal.

DECISION

Technical Support Services (TSS) protests the award of a contract to Quantell, Inc. under request for proposals (RFP) No. N00421-05-R-0114, issued by the Department of the Navy as a total small business set-aside for administrative and training services. TSS maintains that it is entitled to the award because, although the Small Business Administration (SBA) initially determined that TSS was other than small and thus ineligible for award, SBA's Office of Hearings and Appeal (OHA) reversed that determination. TSS concludes that the Navy, therefore, should be required to terminate Quantell's contract and make award to TSS.

We deny the protest.

The solicitation was issued on August 15, 2005. On December 19, the Navy announced that TSS was the intended awardee; on December 21, it forwarded protests challenging TSS's size status to the SBA Area 2 regional office; and on

January 11, 2006, the regional office issued a determination finding that TSS was not a small business concern eligible for award. Subsequently, on January 24, the Navy announced that it intended to make award to Quantell. On that same date, TSS filed an appeal of the regional office's size status determination with OHA and provided the Navy with notice of the appeal. On February 14, OHA remanded TSS's size determination to the regional office for further deliberation; on March 16 the Navy made award to Quantell; and, on March 20, the SBA regional office again found that TSS was not a small business concern. TSS again filed an appeal with OHA which, on June 20, sustained the appeal, finding that TSS was in fact a small business concern. On July 14, the Navy notified TSS that it would not terminate Quantell's contract in order to make award to TSS. TSS maintains that it is entitled to the award.

The Federal Acquisition Regulation (FAR), the principal regulation governing federal procurements, provides as follows regarding situations where a protest challenging the proposed awardee's size status has been filed:

After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until (i) the SBA has made a size determination or (ii) 10 business days have expired since SBA's receipt of a protest, whichever occurs first.

FAR § 19.302(h)(1). SBA's regulations similarly recognize the 10-day period for making a decision. See 13 C.F.R. § 121.1009(a) (2006).

Here, the protests challenging TSS's size status were forwarded to SBA on December 21, and TSS acknowledges that SBA contacted it for information regarding its size status on December 22. Protester Response to Dismissal Request at 3. This being the case, the Navy was permitted to make an award to Quantell after January 9, that is, 10 business days later. Since the agency made award to Quantell on March 16, which is more than 50 business days after the size protests were received by SBA, the award was permissible under the applicable regulations. FAR § 19.302(h)(1); Planned Sys. Int'l, Inc., B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43 at 2. In accordance with FAR § 19.302(i), the OHA ruling received by the agency after award did not apply to the protested acquisition. See also 13 C.F.R. § 121.1009(g)(3) (OHA decision received after award does not apply to the current procurement).¹

¹ TSS cites MTB Investments, Inc., B-275696, Mar. 17, 1997, 97-1 CPD ¶ 112, in support of its claim that termination is called for here. However, the facts there were materially different from those here. Whereas the Navy complied with applicable regulations here, the contracting officer in MTB determined that the protester, MTB, was not a small business concern, and made award to another offeror without sending the matter to SBA for a size determination, as required by the FAR. Based on this violation of the FAR, we sustained the protest and

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Since the award was made in accordance with the FAR and SBA regulations, and since OHA's decision on appeal did not apply to the procurement, the agency was not required to terminate Quantell's contract in favor of an award to TSS.

In comments filed in response to a request by our Office, SBA posits that OHA's remanding of the first regional office determination (finding TSS other than small) in effect vacated that decision; it goes on to reason that, since the agency made award to Quantell on March 16, prior to SBA's March 20 final determination that TSS was other than small, the award was improper. SBA concludes that, since there was no proper award in place at the time TSS filed its appeal, OHA's appeal decision applied to this procurement, and the agency, therefore, is required to terminate Quantell's contract and make award to TSS. See FAR § 19.302(i). We do not agree with SBA's position. The SBA's regulations state that an OHA decision received after award does not apply to the procurement and will have future effect. 13 C.F.R. § 121.1009(g)(3). Furthermore, the regulations do not in any way suggest that OHA's decision to remand the regional office determination, made subsequent to the award to Quantell, has any bearing on the propriety of the award. SBA's position ignores the fact that, as discussed above, the award to Quantell was made more than 10 days after the size protests were received and, therefore, was permitted under the explicit terms of the FAR, whether or not a final size determination had been issued at the time of award.

TSS similarly maintains that there was no valid award to Quantell, citing FAR § 19.302(g)(2), which provides that an award to another offeror will only be "presumed to be valid" if it is made before the contracting officer receives notice that the originally intended awardee had appealed a negative size status decision. According to TSS, since the Navy made award to Quantell after it received notice of TSS's appeal of the first negative size status determination (the one that thereafter was remanded by OHA), the award to Quantell is not presumed valid. Again, however, this argument ignores the fact that the agency was permitted to proceed with the award to Quantrell because more than 10 days had passed since the size protests were received by SBA. While the intended effect of the "presumed to be valid" language in FAR § 19.302(g)(2) is not clear, there is no indication that it should be read as negating the clear language in FAR § 19.302(h)(1).²

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recommended that the agency refer the matter to SBA and terminate the award if SBA determined that MTB was a small business concern.

² Notably, the "presumed to be valid" language appears to be inconsistent with FAR § 19.302(i) and 13 C.F.R. § 1009(g)(3), provisions which clearly state that an appeal decision by OHA does not apply to a procurement where the decision is received by the agency after an award has been made. In this regard, we have previously considered this provision and have concluded that if an agency makes award (that is otherwise consistent with applicable regulations) before it receives an appeal

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TSS argues that, under FAR § 19.302(h)(3), the procuring agency is obligated to notify SBA if it is making award before a size determination is received; TSS maintains that the Navy failed to do so and that the award to Quantell, therefore, was invalid. While the record does not indicate that the Navy specifically advised SBA that it planned to make award to Quantell before it received the size status determination, the Navy reports that it in fact contacted SBA before making the award and, on March 14, was told by SBA that it was finalizing its second determination that TSS was not small and that the Navy should proceed with the award. Agency Comments on SBA Response at 5-6.³

The protest is denied.

Gary L. Kepplinger
General Counsel

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decision from OHA, the award is valid even where the agency had notice that an appeal was being filed. Suddath Moving Sys., Inc., B-229992, Apr. 1, 1988, 88-1 CPD ¶ 332 at 2.

³ TSS also argues that, under FAR § 19.302(h)(2), the Navy was required to determine that further delay would be disadvantageous to the government before it made award to Quantell. We need not decide whether TSS's interpretation of this regulation is correct since, even assuming that it is correct, the record indicates that the agency had an urgent basis for making the award.