Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Resource Applications, Inc.

File: B-271079.6

Date: August 12, 1996

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J. Michael Slocum, Esq., Slocum, Boddie & Murry, for RAO Enterprises, Inc. d/b/a Integrated Laboratory Systems, an intervenor.
Anthony G. Beyer, Esq., Environmental Protection Agency, for the agency.
Mary G. Curcio, Esq., David A. Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Procuring agency properly proceeded with award under small business set-aside procurement without providing generally required pre-award notice to unsuccessful offerors where agency made reasonable urgency determination, an exception under which pre-award notice is not required; although Small Business Administration (pursuant to a timely size protest) subsequently determined that awardee is other than small, and this size determination applies to current procurement, the contract need not be terminated where there is no other offeror eligible for award and the agency continues to have an urgent need for the services.

DECISION

Resource Applications, Inc. (RAI) protests the award of a contract to RAO Enterprises, Inc. d/b/a Integrated Laboratory Systems (RAO), under request for proposals (RFP) No. D500055R1, issued by the Environmental Protection Agency (EPA) for performance of Environmental Service Assistance Team (ESAT) support services for various EPA programs.

We deny the protest.

Two offerors, RAI and RAO, responded to the solicitation. RAI's proposal was eliminated from the competitive range after initial proposals were evaluated based on a number of serious proposal deficiencies that led the agency to conclude that RAI's proposal could be made acceptable only if it was substantially rewritten. On January 30, 1996, the EPA executed a written determination, pursuant to Federal Acquisition Regulation (FAR) § 15.1002(b)(2), that urgency necessitated award to RAO without advance notice to RAI; EPA made award to RAO on January 31. After

being notified of the award on February 1, RAI protested to our Office that its proposal was improperly eliminated from the competitive range. We denied the protest. Resource Applications, Inc., B-271079; B-271079.2, May 20, 1996, 96-1 CPD ¶ 244. RAI also submitted a timely size protest, arguing that as the result of a joint venture agreement with a large business, RAO did not qualify as a small business eligible for award. On March 4, based on RAO's failure to provide requested information, the Small Business Administration's (SBA) regional office ruled that RAO was not a small business for the procurement. EPA has declined to terminate RAO's contract.

RAI challenges aspects of the agency's urgency determination, questions the award to RAO, and maintains that the contract should be terminated.

A procuring agency may properly award a contract under a small business set-aside without providing pre-award notice, where it reasonably determines that the urgency of the requirement necessitates doing so. FAR § 15.1002(b)(2). Here, the agency made a reasonable urgency determination and the award therefore was proper.

EPA's written urgency determination stated that award had to be made before February 1, the date that the prior contract expired, due to the time sensitive nature of many of the tasks to be performed.[1] It stated that it is imperative that no break in service occur because of the following tasks: maintaining cultures for toxicity testing, which must be checked on a daily basis; sample analysis, including analysis of some samples with 14-day holding times, which, if exceeded, would require EPA to resample or disregard the data; and data review, used to assess the impact of certain conditions on human health, which must be completed in 2 days.

EPA's report in response to RAI's protest further explains the perceived urgency. EPA reports that RAO has been directed to perform a number of urgently required tasks, including hazardous waste characteristic testing on cultured biological testing organisms, which cultures are used in on-going testing which is sequential in nature and must be performed continuously and on a daily basis. Any disruption would require the agency to return to the hazardous waste site to collect new samples, resulting in additional cost and delay to the government's hazardous waste clean up activities. The agency also issued a work order to support a project dealing with contaminated private drinking water wells. These various task orders were issued with short deadlines (from a few days to a few weeks).

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[1]The contract called for collection and analysis of chemical and biological test samples, reviewing test data to assess quality and completeness, and providing logistical and administrative support for field, analytical and quality assurance activities.

RAI does not challenge the agency's findings with respect to urgency, except the agency's reliance on health-related concerns. In this regard, the urgency determination states that the contractor must begin performance of the data reviews, which have a 20-day turnaround time, since health-related decisions await the results of the reviews. RAI challenges the agency's reference to health-related concerns in the determination on the basis that because the agency first elaborated on the nature of the health-related concerns in its report in response to the protest, such concerns could only have been an afterthought.

We do not agree that health-related concerns were not adequately expressed in the urgency determination; the cited statement shows that health-related concerns were the reason for the data reviews and the 20-day turnaround time. Further, although the health-related concerns were only discussed at length in the response to the protest, when the determination was prepared the agency had no reason to detail the health-related concerns; this level of detail only became necessary when the agency was required to respond to RAI's challenge of the determination. In any case, we also view as a legitimate concern the agency's desire to have a contractor continue monitoring performance on previously taken samples in order to avoid extra expense and delay.[2]

RAI also argues that the agency should have adopted other available alternatives to awarding the contract to RAO without notice to RAI due to urgency--EPA, for example, could have extended the incumbent's contract. The FAR, however, specifically authorizes agencies to award a contract without providing pre-award notice where, as here, it determines that urgency exists. Thus, the agency was not required to delay the award and extend a contract that was due to expire.

We conclude that the award without prior notice to RAI was proper.

EPA takes the position that since the award was proper, and since RAI's challenge to RAO's size status was not filed until after the award had been made, SBA's determination that RAO is other than a small business applies to future procurements only. We disagree. Under SBA's regulations, as interpreted by that agency, a size status protest on a negotiated procurement received within 5 business days after the protester receives notification of the identity of the

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[2]RAI also argues that EPA could have given notice of the intended awardee in December, when it first knew that RAO was the only competitive range offeror. However, there was no requirement that the agency provide such notice. Moreover, while RAO was the only competitive range offeror on December 15, it was not until January 30, after two rounds of discussions regarding cost and technical issues and the submission by RAO of two best and final offers (BAFO), that RAO was actually selected and approved by the source selection official for award.

awardee is timely, regardless of whether award has been made, and therefore applies to the procurement in question. 13 C.F.R. § 121.1603 (1995) (now 13 C.F.R. § 121.1004 (1996)). As held by SBA in its size determination, since RAI's size status protest was filed within 5 days after it received notice that RAO was the awardee, the size status protest was timely and applies to this procurement.[3] See Eagle Design and Management, Inc., B-239833 et al., Sept. 28, 1990, 90-2 CPD ¶ 259.

As noted by EPA, our Office has not always recommended termination where the procuring agency, on the basis of a proper urgency determination, proceeds with award under a small business set-aside procurement without providing the generally required pre-award notice to unsuccessful offerors, and SBA subsequently determines that the awardee is other than small. See, e.g., Conversational Voice Technologies Corp., B-224255, Feb. 17, 1987, 87-1 CPD ¶ 169. Although such an SBA determination pursuant to a timely size protest applies to the procurement in question, and thus in order to give effect to the Small Business Act termination of the awardee's contract is warranted where feasible, see Digital Imaging Technical Educ. Ctr., Inc., B-257590, Oct. 21, 1994, 94-2 CPD ¶ 148, ordinarily termination will not be feasible where the urgency continues. See Solon Automated Servs., Inc., B-198670, Nov. 18, 1980, 80-2 CPD ¶ 365. In this regard, as a general matter, termination is not a practicable remedy where there is an urgent need for the goods or services being procured and a change in contractor would significantly delay performance. See Van Ben Indus., Inc. et al.--Recon., B-235431.4 et al., Jan. 29, 1990, 90-1 CPD ¶ 118; Science Applications Int'l Corp.; Department of the Navy--Request for Recon., 71 Comp. Gen. 481 (1992), 92-2 CPD ¶ 73; Recommendation Concerning Defense Supply Agency Contract No. DSA100-76-C-1280, 56 Comp. Gen. 296 (1977), 77-1 CPD ¶ 58. Where, however, it appears that the goods or services in question are no longer urgently needed, the procuring agency generally should terminate the contract awarded to the large business. See, e.g., Ideal Servs., Inc.; JL Assocs., Inc., B-238927.2 et al., Oct. 26, 1990, 90-2 CPD ¶ 335 (where SBA determines that no small business offers were received under a small business set-aside, agency should resolicit on an unrestricted basis rather than reinstate award to large business).

Here, EPA maintains that the urgency cited in its determination to proceed with award without providing pre-award notice to RAI justifies not terminating RAO's contract. In this regard, the record establishes that EPA has a continuing urgent need for the contractor to perform environmental testing and analysis relating to hazardous wastes and the contamination of drinking water; this work includes

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[3]EPA, contends that the SBA did not comply with the 10-day period of the FAR 19.302 and that its size determination, therefore, had no application, citing Systems Research & Applications Corp.; Infotec Dev., Inc., B-270708, et al., Apr. 15, 1996, 96-1 CPD ¶ 186. The record is not clear on this point, and we need not resolve it in light of our conclusion below.

maintaining biological samples which, to remain viable, must be checked on a daily basis, and on-going testing which is sequential in nature and must be performed continuously. According to the agency, any disruption to this work would result in significant additional cost and delay to the government's cleanup activities and could prolong the risk to human health from contaminants. Further, at the time of award and at the time of SBA's decision (and currently), RAO was the only competitive range offeror; as discussed, RAI's proposal properly was eliminated from the competitive range on the basis that it would require a substantial rewrite in order to become acceptable. Given EPA's continued urgent requirement for ESAT support services and the need to avoid any disruption to this work, such as that attendant upon a change in contractors, and the fact that RAO is the only competitive range offeror, we believe that the agency could reasonably find that termination of RAO's contract was not feasible. See Van Ben Indus., Inc., et al.--Recon., supra.

However, we note that the contract awarded to RAO was for a base period and four 1-year option periods. Given that the agency's urgency determination applies to its immediate needs, and given that RAO ultimately was determined to be other than a small business and thus ineligible for award under the small business set-aside, it would be inappropriate for the agency to exercise the options in RAO's contract. See generally Ricoh Corp., 68 Comp. Gen. 531 (1989), 89-2 CPD ¶ 3.

The protest is denied.[4]

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[4]RAI generally argues that EPA acted in bad faith in order to assure award to RAO without having to deal with a protest or other interference. RAI asserts that this position is supported by EPA's decision to award the contract to RAO without providing pre-award contract notice, its failure to provide RAI with immediate notice that it had been eliminated from the competitive range, and its failure to provide RAI with notice of the status of its offer, despite RAI's requests for this information. However, to show bad faith there must be a showing that the agency intended to harm the protester. Complere Inc., B-257946, Nov. 23, 1994, 94-2 CPD ¶ 207. RAI's arguments do not meet this burden. The award without notice was proper, as discussed, and there simply is no evidence that the other actions complained of were motivated by an agency intent to harm RAI.