

Vodraska



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: CSR, Inc.

File: B-260955

Date: August 7, 1995

Robert B. Bowytz, Esq., and Daniel S. Koch, Esq., Paley, Rothman, Goldstein, Rosenberg & Cooper, for the protester. James S. Hostetler, Esq., and Susan K. Fitch, Esq., Kirkland & Ellis, for EMT Associates, Inc., an interested party.

Terrence J. Tychan, Joseph W. Adamik, and Mike Colvin, Department of Health & Human Services, for the agency. David R. Kohler, Esq., and Susan L. Sundberg, Esq., for the Small Business Administration.

Adam Vodraska, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee will not comply with the small business set-aside solicitation's subcontracting limitation that requires at least 50 percent of costs for contract performance incurred for personnel to be expended for employees of the contractor is inappropriate for General Accounting Office consideration where the same matter was considered by the Small Business Administration, which has conclusive authority over size issues and which had the same documents on which the protester bases its protest, in determining that the awardee is a small business.

DECISION

CSR, Inc. protests the award of a contract to EMT Associates, Inc. under request for proposals (RFP) No. 277-95-5002, issued by the Department of Health & Human Services, Substance Abuse and Mental Health Administration, for an evaluation of substance abuse prevention demonstration programs. CSR contends that EMT's proposal should have been rejected as unacceptable because it indicated that EMT would not comply with the RFP's subcontracting limitation.

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We dismiss the protest.

The RFP contemplated the award of a 5-year, cost-plus-fixed-fee contract for the evaluation of youth substance abuse prevention outreach programs conducted by public and private grantee organizations at different sites throughout the country. As part of the program evaluation, the contractor is to collect data from program participants at the various sites.

The RFP was issued as a total small business set-aside and instructed offerors that proposals must comply with Federal Acquisition Regulation (FAR) clause 52.219-14, Limitation on Subcontracting, which states:

"[b]y submission of an offer and execution of a contract, the Offeror/Contractor agrees that in performance of the contract in the case of a contract for--

"(1) Services (except construction). At least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern." FAR § 52.219-14(b).

This requirement is contained in the Small Business Act, 15 U.S.C. § 644(o)(1) (1994), and is to prevent small business concerns from subcontracting to large businesses the bulk of a contract set aside for small business. Diversified Computer Consultants, B-230313; B-230313.2, July 5, 1988, 88-2 CPD ¶ 5.

After initial evaluation and discussions, both EMT and CSR submitted best and final offers (BAFO). The agency determined that EMT's proposal offered the best value to the government, considering technical factors and price. Prior to making award, the agency expressly determined that EMT's proposal complied with the subcontracting limitation, based on an analysis that compared the labor costs to be incurred by EMT, which certified itself to be a small business concern, with the labor costs to be incurred by EMT's major subcontractor, Macro International, Inc., which is a large business.

CSR received the agency's notice of proposed award to EMT on March 17, 1995, and filed a timely size protest challenging EMT's status as a small business concern with the contracting officer on March 20, who referred the matter to the SBA Regional Office. CSR protested that EMT had affiliated itself with Macro and that EMT would violate the subcontracting limitation because of the labor that would be provided through Macro. In response to CSR's size protest, the agency and EMT provided the SBA Regional Office with the

subcontracting analysis performed by the agency, as well as EMT's technical proposal, business proposal, and BAFO, including detailed cost information for both EMT and Macro.

On March 30, CSR filed a protest with our Office, contending that the award to EMT was improper because that firm's proposal indicated that it would violate the RFP's subcontracting limitation, given the costs that would be incurred for Macro employees.¹

In its April 5 size status determination, the SBA Regional Office found that EMT is a small business under the applicable size standard, that EMT was not affiliated with its subcontractor Macro for this procurement, and that EMT's BAFO complied with the RFP's limitation on subcontracting.

On April 11, the agency awarded the contract to EMT, and authorized performance of the contract notwithstanding CSR's protest to our Office, finding that urgent and compelling circumstances did not permit awaiting our decision in the matter. See 31 U.S.C. § 3553(d)(3)(C)(II) (1988).

On April 26, CSR filed an appeal of the SBA's size status determination with the SBA Office of Hearings and Appeals (OHA). The OHA responded on June 21, 1995, that because CSR's appeal was filed more than 5 days after receipt of the size determination, OHA considered the appeal untimely for this procurement. See 13 C.F.R. § 121.1705(a)(2) (1995). OHA dismissed the protest as moot because although the appeal was timely for future procurements, the size determination was contract-specific in that EMT could still self-certify itself as small in the future under the same size standard and a decision on the merits in this case would have no applicability to future procurements. See 13 C.F.R. § 121.1607(b).

After receipt of the agency report responding to its protest to our Office, which contained EMT's BAFO and the agency's subcontracting limitation analysis, CSR contended that the analysis failed to consider the costs associated with contract labor for data collection at the various program sites to be obtained through EMT's subcontractor, Macro. CSR contends that this faulty analysis resulted in an award to EMT in violation of the subcontracting limitation, as

¹CSR also protested that EMT's proposal did not represent the best value to the government. However, in commenting on the agency report, the protester did not address the agency's response to this objection, and we consider this protest issue to have been abandoned by the protester and will not consider it. See Nicolet Instrument Corp., B-258569, Feb. 3, 1995, 95-1 CPD ¶ 48.

well as an erroneous SBA determination that EMT's proposal complied with this limitation.

The SBA, the agency, and EMT each take the position that where, as here, the SBA has specifically ruled that an offeror's proposal complies with the subcontracting limitation and that the offer is therefore small, our Office should not consider the matter. We agree.

Our Office will not review a protester's challenge to another company's size status, nor will we review a decision by the SBA that a company is, or is not, a small business for purposes of federal procurements, since the Small Business Act gives the SBA, not our Office, the conclusive authority to determine matters of small business size status. 15 U.S.C. § 637(b)(6); 4 C.F.R. § 21.3(m)(2) (1995); American Bristol Indus., Inc., B-249108.2, Oct. 22, 1992, 92-2 CPD ¶ 268; Columbia Research Corp., B-247073.3, June 4, 1992, 92-1 CPD ¶ 492; Survive Eng'g Co., B-235958, July 20, 1989, 89-2 CPD ¶ 71. The SBA considers a small business concern's compliance with the subcontracting limitation, or "50 percent rule," to be a matter of size. See Size Appeal of Lightcom Int'l, Inc., SBA No. 3829 (1993). In this regard, the SBA has promulgated 13 C.F.R. § 121.904(d), which reads in pertinent part:

"For purposes of determining compliance with the prime contractor performance of work requirements set forth in 15 U.S.C. § 644(o)(1), the size of a concern shall be determined as of the following dates--

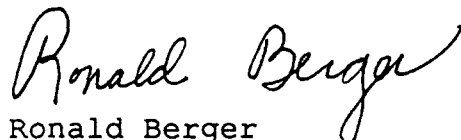
(2) In a negotiated procurement, compliance shall be determined as of the date the concern submits its best and final offer. If a concern is determined not to be in compliance at the time it submits its best and final offer, it may not thereafter come into compliance for that procurement by revising its subcontracting plan."

This regulation was promulgated pursuant to the SBA's authority under the Small Business Act to implement the statutory requirements of 15 U.S.C. § 644(o)(1), which, as previously mentioned, forms the basis for the 50 percent rule.

As noted by the protester, we have considered protests that an offer or bid indicates that the offeror or bidder will not comply with the subcontracting limitation. See, e.g., National Medical Staffing, Inc.; PRS Consultants, Inc., 69 Comp. Gen. 500 (1990), 90-1 CPD ¶ 530; Vanderbilt Shirt Co., 69 Comp. Gen. 20 (1989), 89-2 CPD ¶ 333; Diversified Computer Consultants, supra. However, the present protest is inappropriate for our consideration since the SBA, which has conclusive authority to make size determinations, has expressly determined, as part of its size decision for this procurement, that EMT's proposal evidences compliance with the subcontracting limitation. See Independent Metal Strap Co., Inc., B-240033.3, Dec. 12, 1990, 90-2 CPD ¶ 481; see also Wesley Medical Resources, Inc., B-257677, Aug. 17, 1994, 94-2 CPD ¶ 75.

While CSR urges that SBA has failed to consider vital information showing that EMT's proposal does not comply with the subcontracting limitation, the record shows that the SBA considered all the documents on which CSR bases its contentions. The question of what information must be considered by SBA during a size protest is inextricably linked to SBA's authority to make size determinations, and is not for our consideration. Wesley Medical Resources, Inc., supra.

The protest is dismissed.



Ronald Berger
Associate General Counsel