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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: CMS Information Services, Inc.

File: B-290541

Date: August 7, 2002

Richard L. Moorhouse, Esq., and James L. D'Agostino, Esq., Reed Smith, for the protester.

Raymond M. Saunders, Esq., Department of the Army, and Jean H. Lewis, Esq., Missile Defense Agency, for the agency.

John W. Klein, Esq., and Kenneth Dodds, Esq., for the Small Business Administration.

Theklus L. Thompson, Esq., for the General Services Administration.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where a competitive request for quotations issued under the Federal Supply Schedule limits competition to small business vendors, procuring agency properly may require firms to certify as to their small business size status as of the time they submit their quotations.

DECISION

CMS Information Services, Inc. protests the terms of request for quotations (RFQ) No. HQ0006-02-Q-0012, issued by the Missile Defense Agency (MDA) to acquire automated information systems support services. CMS asserts that the RFQ improperly requires vendors to certify their small business status as of the time they submit their quotations.

We deny the protest.

The RFQ contemplates the award of a task order under the successful vendor's preexisting Federal Supply Schedule (FSS) contract, and specifically states that MDA is conducting a streamlined competitive procurement among small business

sources. RFQ at 20. The RFQ requires vendors to self-certify as small businesses as of the date of quotation submission. RFQ at 18.¹

This protest relates solely to the small business certification requirement. Specifically, CMS asserts that it is improper for the agency to require it to certify its small business size status as of the time it submits its quotation. According to the protester, it certified its small size status in 1997, at the time it submitted its initial offer to the General Services Administration (GSA) for award of its FSS contract; it maintains that its small business status for purposes of receiving task order awards was established by this certification, and that it should remain in effect for the duration of its FSS contract.² CMS maintains that the Small Business Administration's (SBA) regulations at 13 C.F.R. § 121.404 (2002) support its position by establishing the date of initial offer submission as the time when SBA will determine a firm's size status. CMS concludes that, if it is required to recertify its status as of the time it submits its quote, it will in essence be improperly excluded from participation in the acquisition because it cannot currently represent itself as small.

We find nothing improper in the challenged requirement. The purpose of the Small Business Act as it relates to government acquisitions is to ensure that a fair proportion of all government contracts be placed with small business concerns. 15 U.S.C. § 644 (2000). Implicit in this is the notion that the work under the contract will actually be performed by a small business. Toward this end, the Federal Acquisition Regulation (FAR) is designed, for example, to ensure that small businesses perform a majority of the work under a set-aside contract. FAR § 52.219-14. The self-certification requirement in the RFQ is consistent with these purposes.³

¹ MDA limited the competition to small business vendors consistent with the supplemental instructions pertaining to acquisitions for services under GSA's FSS for this particular special item number (SIN 132-51). In this respect, the supplemental instructions provide: "When buying IT professional services under SIN 132-51 ONLY, the ordering office, at its discretion, may limit consideration to those schedule contractors that are small business concerns." GSA FSS Contract No. FCIS-JB-980001B at 115-16.

² CMS states in its protest that its FSS contract was awarded on February 17, 1997 and extends through February 18, 2003, with three 5-year options. Accordingly, the contract has a potential duration of 21 years.

³ The RFQ incorporated by reference, but did not include a copy of, FAR § 52.212-3, which requires vendors to, among other things, certify their small business size status. CMS argues that the agency's failure to attach a copy of the clause to the RFQ is a "fatal defect" in the RFQ because vendors do not have the actual document to submit with their quotes. We fail to see the import of this alleged defect, since the
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The SBA regulation relied on by CMS does not establish that the requirement is improper. That provision states as follows: “Generally, SBA determines the size status of a concern (including its affiliates) as of the date the concern submits a written self-certification that it is small to the procuring agency as part of its initial offer including price.” 13 C.F.R. § 121.404. CMS concludes that its FSS contract self-certification is the self-certification “as part of its initial offer” referenced in this language, and thus is the proper basis for determining its small business status for purposes of the RFQ. We disagree. This provision, by its plain terms, applies only where a firm is submitting an offer; it does not go the next step and provide that small business status can be established only in connection with the submission of an offer (as opposed to a quotation) or, conversely, that agencies are not permitted to consider small business status, as here, at the time of the submission of a quotation in response to an FSS RFQ. Rather, neither this, nor any other SBA regulation, squarely addresses the question.⁴ We conclude that, in light of the purpose of the Act and the absence of any specific statutory or regulatory prohibition, there is nothing objectionable in an agency’s requiring that FSS vendors responding to a task order RFQ be small as of the date quotations are due, instead of relying on the original FSS self-certification, which may not reflect a vendor’s current small business status.⁵

Our view is consistent with that of SBA, the agency responsible for administering the Small Business Act (we solicited SBA’s views in connection with this protest).⁶ SBA

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protester obviously is on sufficient notice of the self-certification requirement, and it does not assert that other vendors will be misled so as to prejudice CMS.

⁴ While there are no SBA regulations on point, our interpretation is consistent with SBA’s regulations relating to the time for filing size status protests, which recognize the fundamentally different nature of multiple award schedule contracts. While size protests must ordinarily be filed within 5 days of award, 13 C.F.R.

§ 121.1004(a)(1), (2), such a protest is timely if filed any time during the life of a multiple-award schedule contract, or any renewal thereof. 13 C.F.R.

§ 121.1004(a)(3).

⁵ We think requiring competing vendors to update their certifications is particularly reasonable considering that FSS contracts may be of an extremely long duration—as noted above, CMS indicates that its contract has a potential duration of 21 years—increasing the likelihood that work will be performed by a vendor that is not a small business at the time of performance.

⁶ We note that, as a general rule, our Office will defer to SBA’s judgment in matters such as this, which fall squarely within its responsibility for administering the Small Business Act. See SCS Eng’rs, B-210166, Sept. 29, 1983, 83-2 CPD ¶ 388.

acknowledges that its regulations do not specifically cover the situation here, and that the Office of Hearings and Appeals (OHA) also has not addressed these specific circumstances. However, SBA cites several cases decided by OHA as collectively supporting the view that an agency may properly require prospective vendors to recertify in these circumstances.⁷ In particular, in Size Appeals of: SETA Corp., Fed. Emergency Mgmt. Admin., SBA No. SIZ-4477 (2002), OHA considered the question of whether an agency should use a firm's original certification tendered when it entered into its FSS contract, or a subsequent certification tendered in response to a competitive RFQ issued by a requiring activity. OHA found:

Here, while there is no renewal of the contract [such as through the exercise of an option], there is instead an RFQ which required a self-certification as a small business. FEMA [the requiring activity] undertook a procurement as a small business set-aside. SETA [the appellant] certified that it was not a small business when it submitted its response to the RFQ. Under [a prior OHA decision], it is this later certification that is applicable to the procurement, and which controls.

Id. at 11.

We also solicited GSA's views on the matter, since GSA administers the FSS program. In its submission, GSA argues that the appropriate time to determine whether a small business set-aside is warranted is prior to issuance of the solicitation for the multiple FSS contracts, not at the time an ordering agency issues a specific task or delivery order. Letter from GSA to GAO at 3. GSA then goes on, however, to agree that FSS procedures allow agencies ordering under certain schedules, such as MDA here, to limit consideration for a specific task or delivery order to small businesses. Id. at 4. The issue before us is not whether MDA's action should be viewed as a set-aside (which GSA contends would be improper) or an order limited to small businesses (which GSA apparently agrees would be proper); the issue is whether, in an order limited to small businesses, MDA is permitted to require vendors to certify to their current size status. On that issue, GSA's submission is silent.

Since there is nothing in the contract or applicable statutes and regulations setting the time at which small business status must be established, we conclude that MDA

⁷ We point out that OHA's cases appear to distinguish between RFQs that result in the award of a blanket purchase agreement (BPA) and RFQs that result in the award of a task order. See NAICS Appeal of: SCI Consulting, Inc., SBA No. NAICS-4488 (2002). We see no basis for this distinction since, in both cases, the acquiring activity is ultimately placing orders against a firm's FSS contract.

properly may require competing vendors to establish their size status as of the date when quotations are submitted.

The protest is denied.

Anthony H. Gamboa
General Counsel