

## **AGENCY IMPROPERLY ALLOWED LARGE AWARDEE TO INCLUDE ITS OVERHEAD AND PROFIT IN SMALL BUSINESS CALCULATION**

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The Government Accountability Office (“GAO”) recently sustained a protest against a U.S. Air Force award where there was a specific material requirement for small business participation, and the awardee allowed a large business to include its overhead and profit in its calculation of the amount to be paid. *Peraton, Inc.*, B-417358, June 11, 2019. The solicitation was for engineering , development and sustainment services in support of Air Force satellite systems.

The solicitation stated that award would be made on a best-value tradeoff basis, weighing cost/price and two technical subfactors: systems engineering and program management. The program management technical factor included five individual criteria, including a requirement for small business participation. The solicitation advised offerors that “[f]ailure to meet any one of the individual criteria ...will result in an ‘anawardable’ rating at the subfactor level. The solicitation established a 25 percent minimum requirement for small business participation, to be evaluated on a pass/fail basis. The solicitation further stated that the percentage “shall be based on percentage of small business costs/prices on labor contract line items only, to include firm-fixed price line items that are predominately labor. The percentage shall be calculated on an annual basis by dividing total small business expenditures by total labor costs/prices on all task orders on just those labor line items.” The document including the calculations was to become part of the contract upon award.

The awardee, Engility, asserted that its small business subcontracting percentage was 27 percent, but this was challenged by Peraton, who stated it was only 23.8 percent, when one excluded Engility’s overhead and fee (profit). The protester argued that the term “total small business expenditures” could only mean the amount actually paid to small businesses. The Air Force however, stated it should be “the total cost to the government for utilizing small business, including the prime contractor’s fee [and overhead].”

GAO sustained the protest and rejected the Air Force’s interpretation. GAO stated that the formula was clear, “It is readily apparent that the purpose of a small business subcontracting requirement is to assess the extent to which an offeror proposes small businesses to actually perform and be paid for the work required under a solicitation.” GAO found it plainly unreasonable to count as small business payments money that was charged to the government as overhead and fees. GAO found the Air Force interpretation illogical and inconsistent with the plain language of the solicitation.

The GAO concluded that the Air Force position was “unpersuasive” that a large business offeror could meet a material requirement for small business participation by counting amounts paid to the large business instead of its small business subcontractors. The agency’s evaluation was unreasonable, inconsistent with the terms of the solicitation, and had not even been documented by the Air Force.

Takeaway: In determining if an offeror meets a mandatory small business requirement in a solicitation, amounts that will be paid to a large business, instead of its small business subcontractors, may not be counted. Only amounts actually to be paid to small business should be counted, unless there is a different scheme set forth in the solicitation, and even that scheme may not pass muster at the GAO.

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