



G A O

Accountability * Integrity * Reliability

Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Universal Construction Company, Inc., d/b/a Turner-Universal

File: B-292407

Date: August 18, 2003

Clifton B. Welch, Esq., and John D. Marshall, Jr., Esq., Griffin Cochrane & Marshall, for the protester.

Joel S. Rubinstein, Esq., and Lawrence M. Prosen, Esq., Bell, Boyd & Lloyd, for GSC Construction, Inc., an intervenor.

Bernard J. Roan, Esq., and Christi Dame, Esq., National Aeronautics and Space Administration, and John W. Klein, Esq., and Kenneth Dodds, Esq., U.S. Small Business Administration, for the agencies.

Linda S. Lebowitz, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

In accordance with the Small Business Act and the clause at Federal Acquisition Regulation § 52.219-4, agency properly awarded a contract to an Historically Underutilized Business Zone small business concern whose evaluated price was not more than 10 percent higher than the evaluated price of a large business.

DECISION

Universal Construction Company, Inc., d/b/a Turner-Universal, protests the award of a contract to GSC Construction, Inc. under invitation for bids (IFB) No. MSFC-0-03-03, issued by the National Aeronautics and Space Administration (NASA), for the construction of a 5-story office building at the Marshall Space Flight Center in Alabama. Turner-Universal, a large business that submitted the apparent low bid, protests the award to GSC, an Historically Underutilized Business Zone (HUBZone) small business concern, as a result of the agency's application of a 10 percent HUBZone price evaluation preference to Turner-Universal's low bid.

We deny the protest.

The IFB was issued on an unrestricted basis on March 17, 2003, and incorporated the clause at Federal Acquisition Regulation (FAR) § 52.219-4, captioned “Notice of Price Evaluation Preference for HUBZone Small Business Concerns.”¹ In relevant part, this clause provides the following:

- (a) *Definition.* “HUBZone small business concern,” as used in this clause, means a small business concern that appears on the List of Qualified HUBZone Small Business Concerns maintained by the Small Business Administration.
- (b) *Evaluation preference.* (1) Offers will be evaluated by adding a factor of 10 percent to the price of all offers, except—
 - (i) Offers from HUBZone small business concerns that have not waived the evaluation preference;
 - (ii) Otherwise successful offers from small business concerns[.]

FAR § 52.219-4(a), (b); see Delaney Constr. Corp.; Tug Hill Constr., Inc. v. United States, 56 Fed. Cl. 470 (2003).

Ten firms, including Turner-Universal and GSC, submitted bids by the stated bid opening time. As relevant here, Turner-Universal, a large business, submitted the apparent low bid; GSC, a HUBZone small business concern, submitted the apparent seventh low bid. (The second through fourth low bids were submitted by non-HUBZone small business concerns and the fifth and sixth low bids were submitted by large businesses.) In accordance with the clause at FAR § 52.219-4, as quoted above, because GSC was a HUBZone small business concern and it did not waive the application of the 10 percent HUBZone price evaluation preference, the

¹ The HUBZone program was created in 1997 and is designed to provide federal contracting assistance for qualified small business concerns that are located in, and that employ persons that reside in, historically underutilized business zones, in an effort to increase employment opportunities, investment, and economic development in those areas. In order to be eligible for contracting assistance, a concern must meet specific criteria involving ownership, control, principal office location, and the residence of its employees, and must be certified by the U.S. Small Business Administration (SBA). 15 U.S.C. § 632(p). Once a firm receives HUBZone certification, its name appears on the SBA’s List of Qualified HUBZone Small Business Concerns and the firm becomes eligible for HUBZone program preferences that include, of most relevance in this protest, a HUBZone price evaluation preference in an unrestricted, full and open competition. 15 U.S.C. § 657a(b)(3)(A).

agency added a 10 percent price evaluation preference to the bid submitted by Turner-Universal. The following table summarizes the price evaluation:

	Type of Business	Bid as Submitted	10% Preference	Bid as Evaluated
Turner-Universal	Large Business	\$17,056,832	\$1,705,683	\$18,762,515
GSC	HUBZone Small Business	\$17,954,010	N/A	\$17,954,010

Contracting Officer's Statement at 6.²

As a result of the application of the 10 percent HUBZone price evaluation preference, GSC's bid was evaluated as low. The agency awarded the contract to GSC.

Turner-Universal protests the agency's application of the 10 percent HUBZone price evaluation preference to its bid, which resulted in GSC's evaluated price being lower than Turner-Universal's evaluated price.

The Small Business Act provides that

in any case in which a contract is to be awarded on the basis of full and open competition, the price offered by a qualified HUBZone small business concern shall be deemed as being lower than the price offered by another offeror (other than another small business concern), if the price offered by the qualified HUBZone small business concern is not more than 10 percent higher than the price offered by the otherwise lowest, responsive, and responsible offeror.

15 U.S.C. § 657a(b)(3)(A).

In other words, in accordance with the Small Business Act and the regulatory implementation of that Act as contained in the clause at FAR § 52.219-4 (which was incorporated in this IFB), in an unrestricted, full and open competition, a HUBZone small business concern can displace a large business as the low bidder if the evaluated price of the HUBZone small business concern is not more than 10 percent higher than the evaluated price of the large business.

² We note that the bid amount shown in the contracting officer's statement for Turner-Universal is slightly higher than the bid amount shown in Turner-Universal's protest. Protest at 3. In the above chart, we have used the slightly lower amount as shown in Turner-Universal's protest.

Here, the agency added 10 percent to Turner-Universal's bid, thereby making Turner-Universal's evaluated price higher than GSC's evaluated price. Since the evaluated price of GSC, a HUBZone small business concern, was not more than 10 percent higher than that of Turner-Universal, a large business, the agency, consistent with the Small Business Act and the clause at FAR § 52.219-4, properly awarded the contract to GSC.³ On this record, we have no basis to object to the award to GSC based on its low evaluated price.

The protest is denied.⁴

Anthony H. Gamboa
General Counsel

³ Turner-Universal raises various arguments about how it, as a large business, could not be displaced by GSC, a HUBZone small business concern, when an intervening non-HUBZone small business concern has a lower price than GSC, which Turner-Universal maintains would negate the application of the above-discussed preference to its bid and would require that the award be made to it. Protester's Comments at 2. Turner-Universal bases these arguments on an "example" contained in 13 C.F.R. § 126.613, which does appear to support the protester's position. That "example," however, was not incorporated or otherwise referenced in this IFB and, as explained by the SBA in its report filed in this protest, the "example" contains an error. SBA Report at 3-4. In addition, to the extent Turner-Universal believes that the evaluation scheme in this IFB was inconsistent with the "example" in 13 C.F.R. § 126.613, this matter involves an alleged solicitation impropriety that was not timely raised prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (2003). Finally, as discussed above, in this case the agency applied the HUBZone price evaluation preference consistent with the Small Business Act and the applicable FAR clause as incorporated in this IFB and properly awarded the contract to GSC.

⁴ In developing the protest record, our Office solicited the views of the SBA, which concurred with NASA's position that this protest should be denied.