

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

61254

FILE: B-185172

DATE: August 2, 1976

MATTER OF: Cabrillo Food Service, Inc.

98770

**DIGEST:**

1. Protest involving size certification of successful bidder is timely although not filed until after award was made since successful bidder was allowed to change its certification after bids were opened and public notice of change was made available to other bidders only in local SBA office.
2. Question arises as to good faith of contractor's self certification as small business where it declines to furnish SBA with information necessary for size status determination pursuant to protest by unsuccessful bidder. However, contract need not be terminated since such action would not in the best interest of Government.
3. Even if ASPR may be interpreted to allow post bid opening change in bidder's size certification, contracting officer should assure that all bidders are notified of change so that timely challenges to amended certification may be made.

Cabrillo Food Service, Inc. (Cabrillo) protests the award to Transcontinental Cleaning Co. (Transcontinental) of a contract for food service at McClellan Air Force Base, California. The contract was solicited under invitation for bids (IFB) No. F04699-75-B-0093, issued June 12, 1975 by the Department of the Air Force, and was totally set aside for small business.

When bids were opened on July 28, 1975, a representative of Cabrillo was present, but Transcontinental, the fourth low bidder, was unrepresented. The bid opening officer, upon inspecting Transcontinental's bid, announced that the bidder had checked the block on Standard Form (SF) 33 indicating that it was not a small business concern. Later the same day, Transcontinental sent a telegram to the contracting officer stating that it had inadvertently indicated that it was not a small business, and requested that its bid be corrected to show that it was a small business. The contracting officer, who received the telegram

on July 29, 1975, determined that Transcontinental's mistake was minor and could be corrected.

Subsequently, the low bidder was determined not to be responsible, and the second and third low bidders alleged mistakes in bid and were permitted to withdraw. On September 26, 1975, the contract was awarded to Transcontinental, the fourth low bidder, and on the same day notice of the award was sent to Cabrillo, the fifth low bidder. Cabrillo filed a size protest against Transcontinental, and on October 21, 1975, the Small Business Administration (SBA) ruled, for use in future procurements, that Transcontinental was other than a small business under the applicable size standard. By mailgram of October 22, 1975, Cabrillo protested the award to this Office.

Essentially, Cabrillo protests that Transcontinental was well aware that it did not qualify as a small business and that the contracting officer also should have been aware that Transcontinental was not a small business.

We turn first to the timeliness of Cabrillo's protest. In pertinent part, our bid protest regulations require that a protest to the agency be made within 10 working days after the basis of protest is known or should have been known, if a later protest to this Office is to be timely. 40 Fed. Reg. 17979, § 20.2(a)(2) (1975). For purposes of determining the date from which we should measure the timeliness of Cabrillo's initial protest to the Air Force, the Air Force points out in its report that prior to award, notice of Transcontinental's amended size certification could be found in the abstract of bids available at the local SBA office. However, it recognizes that the adequacy of this notice is open to reasonable disagreement. We think such notice is insufficient, and that the timeliness of Cabrillo's initial size protest to the Air Force should be measured from the date the Air Force notified it that Transcontinental had won the award, which was September 26, 1975. After its receipt of advice that award had been made to Transcontinental, Cabrillo protested the award to the contracting officer by telephone on October 2, 1975, and confirmed the protest by mailgram dated October 3, 1975, which the contracting officer received October 6, 1975. Its initial agency protest was thus timely.

On October 6, 1975, the contracting officer forwarded Cabrillo's protest to the Small Business Administration for a size determination, stating in a letter to Cabrillo of that date that "we are sending an inquiry to the Small Business Administration for an official determination. You will be advised as soon as the reply is received."

B-185172

However, the letter failed to note, as required by ASPR §1-703(b)(1)(c), that SBA's size determination would affect only future procurements, thus leaving Cabrillo ignorant of whether its protest could affect the instant procurement. On October 14, 1975, Cabrillo sent a protest mailgram to SBA, and on October 20, 1975, Cabrillo sent a protest mailgram directly to the Director, Procurement and Production, McClellan Air Force Base. In his telegraphic response to the protest, dated October 22, 1975, the Director indicated, as prescribed by ASPR §1-703(b)(1)(c), supra, that the protest had been referred to SBA for a size determination for use in future procurements. His response of October 22, 1975, we think, is the initial adverse agency action from which Cabrillo's ten-day period for protest to our Office should run. Since this Office received Cabrillo's protest on October 23, 1975, the protest is timely.

In support of the protest, we have been provided with a report from the SBA. It states that when Transcontinental certified itself to the contracting officer on July 28, 1975, to be a small business concern for this food services procurement it had been placed on notice by SBA that its status as a small business concern for janitorial services at another installation (Fort Sheridan, Illinois) had been protested and was under investigation by SBA. In this connection, SBA reports that the applicable size standard for food services was average annual receipts not exceeding \$4 million for the concern's three preceding fiscal years, while the size standard for janitorial services was average annual receipts not exceeding \$3 million. SBA's records show that on the Fort Sheridan procurement and then later on the instant procurement, as well as on a third procurement for janitorial services (at Lewis Research Center, Cleveland, Ohio), Transcontinental declined to furnish SBA with the necessary informational form (SBA Form 355). Therefore, in each of these cases SBA determined (on August 19, October 17 and October 21, 1975, respectively) that the concern was other than a small business since it had failed to comply with SBA's request for information. While SBA notes that it is possible for a concern to be large for janitorial services and small for food services, it believes that in view of the circumstances Transcontinental did not in good faith certify itself to be a small business concern for the instant food service procurement.

The contracting officer points out, however, that she was unaware of a size standard challenge relative to Transcontinental on the earlier procurement when the instant award was made. Moreover, she reports that Transcontinental's officials insisted to her on October 31, 1975 that the small business representation was made in good faith and that the initial large business representation had been made by a clerk who inadvertently checked the wrong box. Moreover, these officials contended that any doubt concerning size status would have been removed by the fact that the food services size standard was changed from \$4 million to \$5.5 million effective August 5, 1975 (Notice of this pending change had been published by SBA in 40 Federal Register 24210, on June 5, 1975.) Concerning Transcontinental's failure to furnish SBA with the requested information, its president stated that when the SBA request was made on October 15, 1975, the firm's books were in the hands of its auditors and also " \* \* \* he did not intend to bid on any more Government contracts and, therefore, he did not feel compelled to respond to the Small Business Administration. " We note in this regard that the SBA's "Fact Sheet" furnished to our Office indicates that a Transcontinental representative explained to an SBA official in an October 16, 1975 telephone conversation that "he would advise Mr. Spivey [the firm's president] not to complete SBA Form 355 and that he should not bid on any more small business set-aside procurements. "

The contracting officer further states that the IFB initially specified a contract period from October 1, 1975 through September 30, 1976. As a result of delays in connection with processing mistakes in bids and pre-award surveys on the three low bidders, award could not be made prior to September 26, 1975. Since a 3 week preparation time was considered necessary for a contractor to begin performance of these services, a no-cost supplemental agreement was entered into with Transcontinental when award to it was made, whereby it was agreed that the service would commence November 1, 1975 and run through October 31, 1976.

We note these facts because, by the end of October, when Transcontinental's disputed size status became known to the contracting officer, she was faced with a situation where any further delay in contract performance would be adverse to the Air Force. The services in question were being performed by Government personnel who had been advised that their services would no longer be required after October 31, 1975. Thus, some of these personnel were to be discharged from Government employ while others

were to be reassigned (including military personnel who were placed on orders for assignment elsewhere). Nevertheless, the contracting officer reports that steps were taken to see whether Government personnel could be retained subsequent to October 31, 1975 and contractor performance delayed. It was decided that a delay of contract performance "could only be effected at considerable Government expense and inconvenience to Government employees." In addition, she noted that the contractor had incurred expenses in anticipation of the November 1 performance date. Moreover, the contracting officer felt that she had no evidence to refute Transcontinental's statement concerning its inadvertent error and that in good faith it changed its representation to being a small business.

In view of the circumstances, we believe the contracting officer acted reasonably. She was faced with a difficult situation, whereby contract termination would have resulted in further expense and delay to the Government. Her determination not to initiate termination action is understandable.

At the same time, we question the good faith of Transcontinental's post-bid opening certification. Although SBA did not determine that Transcontinental was a large business concern for the purposes of this procurement, it was unable to determine that the contractor was a small business since the contractor failed to furnish SBA with the information needed to make a size determination. Transcontinental has explained this failure on the basis that the information requested by SBA was unavailable because of an internal audit and because it did not intend to bid for Government contracts in the future. SBA records indicate, however, that the contractor's justification for not furnishing the requested information was that it did not intend to bid on future small business set-asides. In addition, we note that the contractor had failed to furnish SBA with requested information two months previously in connection with the Fort Sheridan procurement, presumably when the information would not have been in the possession of the contractor's auditors.

It seems to us that this unfortunate situation could have been avoided by the Air Force. The contracting officer allowed Transcontinental to change its size certification on the strength of ASPR §2-405(ii), which cites as an example of a minor bid informality a bidder's failure to make a representation concerning its size status. While the instant case involved a change of self-certification rather than a failure to self-certify, the contracting officer concluded that the same result should obtain.

B-185172

Even if ASPR § 2-405(ii) is interpreted to permit the change--a matter we need not decide--we believe the contracting officer had a duty to provide the other bidders with the opportunity to challenge the amended size certification in a timely manner, as contemplated under ASPR §1-703(b)(1) (1975 ed.). The Air Force itself recognizes that while notice of the amended certification was provided through publication of the abstract of bids at the local SBA office, the adequacy of such notice is subject to reasonable disagreement. It seems to us that the contracting officer should have referred the matter of Transcontinental's size status to the SBA for a size determination once it became clear that this bidder was in contention for the award. By following this procedure the contracting officer could have been assured that the self-certification process was not being abused.

At this stage of the contract performance we have no reason to doubt Air Force's assessment that contract termination would not be in the Government's best interest. However, we are recommending to the Air Force that steps be taken to avoid a reoccurrence of this situation.

*R. F. K. 114*  
Deputy Comptroller General  
of the United States