

DOCUMENT RESUME

03885 - [A2794038]

[Protest against Award to Self-Certified Small Business].
B-187053. September 30, 1977. 6 pp. + enclosure (1 pp.).

Decision re: Sentinel Protective Services, Inc.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense -
Procurement & Contracts (058).

Organization Concerned: Department of the Army: Fort Rucker, AL;
Small Business Administration; Transco Security, Inc.

Authority: A.S.P.R. 1-703(d) (3). A.S.P.R. 2-407.8(b) (3) (iii).
SBA Regulations, sec. 121.3(a) (ii). 42 Comp. Gen. 219.

The protester objected to the award of a small business set-aside contract based on the alleged bad faith small business size certification of the awardee. The contract to the self-certified small business firm was justified since the award was made on the basis of the Regional Office Small Business Administration determination that the contractor was a small business and before the Size Appeal Board determined that the contractor was large. (Author/SC)

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Marc Bosan

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DECISION



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

FILE: B-187053

DATE: September 30, 1977

MATTER OF: Sentinel Protective Services, Inc.

DIGEST:

Contract for guard services awarded to self-certified small business firm under small business set-aside was justified where award was made on basis of Regional Office Small Business Administration determination that contractor was small and before Size Appeals Board determined that contractor was large. However, on basis of Small Business Administration report indicating that SBA District office erroneously failed to consider awardee's size at time of bid opening, SBA is instructed to take action to insure consistent application of size standards in future.

Sentinel Protective Services, Inc. (Sentinel) protests the award of a contract for guard services at Fort Rucker, Alabama to Transco Security, Inc. (Transco) based on the alleged bad faith small business size certification of Transco.

Invitation for Bids No. DAET 01-75-B-0085, was issued by the Department of the Army, Fort Rucker, Alabama, as a small business set-aside. A bid dated April 19, 1976 was submitted by "Transco Security, 7710 Reading Road, Cincinnati, Ohio 45237." In its bid, Transco certified that it was a small business concern, was incorporated in Illinois, and was not owned or controlled by a parent company. The bid was signed by "Raymond Spivey, Vice President" and contained a certification by the secretary/treasurer of the corporation in section B17 stating that:

"* * * Mr. Raymond Spivey, who signed this contract on behalf of the Contractor, was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers."

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To this certification was affixed a corporate seal stating "Transcontinental, Inc., Illinois."

At the April 26, 1976 bid opening, Transco was the sixth lowest bidder. On July 27, 1976, the incumbent contractor and seventh lowest bidder, Sentinel, was advised that Transco was being considered for award. By letter of July 28, 1976, Sentinel protested the proposed award to the contracting officer, contending that Transco was an affiliate of Transcontinental Corporation, Chicago, Illinois and was not a small business concern. The contracting officer subsequently referred the matter to the District Office of the Small Business Administration (SBA) in Columbus, Ohio which requested Transco to submit a completed SBA Form 355. By letter of August 19, 1976, the District Director of the Columbus, Ohio office notified the contracting officer that, based on information submitted by Transco Security, Inc., that firm was determined to be a new corporation whose annual receipts did not exceed the solicitation's limitation for small business concerns.

On August 24, 1976, Sentinel appealed the District Director's size determination to the SBA Size Appeals Board. On September 5, 1976, while this matter was before the Size Appeals Board for consideration, the contracting officer notified Sentinel that award would be made under the instant solicitation because a prompt award was deemed to be advantageous to the Government under ASPR § 2-407.8(b)(3)(iii). The contract was awarded for a nine month period running from October 1, 1976 to June 30, 1977.

On December 27, 1976, the SBA Size Appeals Board released its "Findings and Decision" holding that Transco was other than a small business. In pertinent part, that decision stated.

"Transco is 90% owned by Raymond Spivey and 10% by Fred Gaviglia. On the Form 355, Mr. Gaviglia is listed as President and Director. Mr. Spivey is listed only as a Director; however, Mr. Spivey signed the bid sheet for this procurement as Vice President of Transco. The Attorney for Transco, stated that Mr. Spivey is actually the Secretary-Treasurer of Transco. Transco's receipts since July 28, 1976, the date of incorporation, have been \$21,533.

Sentinel alleged that Transco is affiliated with the following concern:

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Transcontinental Cleaning Co., Inc., a/k/a
Transcontinental, Inc. 21 N. Skokee Highway,
Lakebluff, Illinois

Raymond Spivey worked for this concern 12
years and allegedly ceased association with
it in May 1976.

The Officers of Transcontinental, Inc. are:

William P. Spivey - President
Byron D. Santachi - Vice President
Mary Ann Kaiser - Secretary/Treasurer

Transcontinental Cleaning Co. (Transcontinental,
Inc.), was found to be other than small by SBA
Chicago in August 1975, October 16, 1975, and
October 21, 1975. A letter dated August 20, 1976,
from Raymond Spivey for Transco stated that
Transco is a division of Transcontinental, Inc.

* * * * *

The Board concludes that Transco and Transcon-
tinenta are controlled by the same three parties,
Raymond and William Spivey, who are brothers.
Therefore, the concerns are affiliated due to the
'identity of interest' of Raymond and William
Spivey in Section 121.3(a)(ii) of the SBA Regula-
tions. * * *."

Transco filed a petition for reconsideration of the Board's
decision and on March 11, 1977 the Board sustained its initial
decision.

Sentinel has recognized that the possibility of remedial action
in the instant case was substantially reduced by the short contract
term remaining after the SBA Size Appeal Board's March 11, 1977
ruling, affirming its earlier decision that Transco was not a small
business concern. Nevertheless, Sentinel believes that evidence of
bad faith on the part of Transco is manifest here and that, unless
our Office addresses the question of what constitutes bad faith,
"there will be no end to such actions that can be taken by con-
tractor's concerning their size status in the future."

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In support of its contention that Transco's self-certification as a small business was made in bad faith, Sentinel points out that Transco Security, Inc. was incorporated in Delaware on July 28, 1976, three months after Transco Security submitted a bid certifying itself to be an existing Illinois corporation. Sentinel contends that the referenced Illinois corporation was Transcontinental, Inc. whose corporate seal and identification number were used in the Transco bid and whose secretary/treasurer signed the corporate certificate in the Transco bid. Furthermore, although in its bid Transco certified that it was not owned or controlled by a parent company, the September 3, 1976 letter accepting award on behalf of Transco (signed by the company's president) states:

"Transco Security Service
7710 Reading Road
Cincinnati, Ohio 45237
Division of Transcontinental, Inc."

Transco's post-bid opening efforts to qualify as a small business and its failure to state in its bid its affiliation with Transcontinental, Inc., are clearly pertinent to the question concerning whether Transco submitted its self-certification in bad faith. However, performance having been completed under the contract, we consider the more significant problem to be the prevention of a recurrence of a situation in which award is made on the basis of an SBA District office decision which is subsequently reversed by the SBA Size Appeals Board at a time when remedial action is either impracticable or impossible. Consequently, on June 29, 1977, we wrote to the SBA stating, in part:

"The initial SBA size determination indicates that Transco's affiliation with a large business concern was not apparent to the District office at the time of its determination. However, a Form 355 [Application for Small Business Size Determination] was required to be submitted by Transco and this document should have revealed the affiliations upon which the Size Appeals Board's decision was based. We would like to know whether the Appeals Board had information available to it which was not available to the District office and, if so, the nature of the information and why it was not available to the District office."

In its response, the SBA stated, in part:

"The difficulty in our Columbus District Office decision probably arose out of the distinction between size status at the time of bid opening and size status at the time of

award. Although the general position of the Size Appeals Board is that the concern in question must be small at both of the relevant times, a field office might fail to consider appropriately size status at time of bid opening. In this case, at the time of bid opening, the bid document had the corporate seal of TI, the President indicated that the corporation was not organized at the time of bid, and the file shows that the company was organized shortly after it was notified it would receive award. Also, the President of Transco indicated that Transco was receiving financial backing from TI in order to submit the bid.

"On the other hand, after Transco was organized the bank providing the financing indicated that Transco was a separate corporation with no control by TI. Apparently the Columbus District Office considered the size status of Transco only after it was organized in arriving at its conclusion that Transco was small."

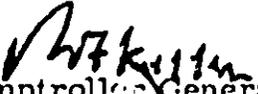
In view of the fact that, under Armed Services Procurement Regulation (ASPR) § 1-703(d)(3), award may be made on the basis of the small business size status determination of the SBA District office, it is essential to the integrity of the small business size self-certification procedure that SBA insure consistent application of the existing standards based on a thorough review of all the relevant information available. Consequently, we are recommending to the SBA that it take appropriate action, including amendment of its regulations, to insure that all SBA District offices are aware that, to be eligible for award as a small business, the prospective contractor must be small both at the time of bid opening and at the time of award, based on the standard applicable at the time of award. Cf. 42 Comp. Gen. 219 (1962).

Finally, Sentinel has objected to the Army's decision to make award prior to final resolution of the question of Transco's size. In this regard, the Army contends that Sentinel "contributed in large measure" to its difficulties in the matter. Specifically, the Army states that the contracting officer in August 1976 did consider delaying the award pending a determination of Sentinel's appeal by the Size Appeals Board. Although Sentinel's contract had expired on June 30, 1976, the services in question were still being secured through Sentinel on a monthly basis. According to the Army, Sentinel was agreeable to these extensions only at a monthly price of \$100,911.00 compared to its monthly price under the previous contract of \$94,025.00 and its bid price under the instant solicitation of \$93,446.67.

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Thus, faced with Sentinel's high interim price, a bid price of \$90,417.00 per month from Transco, a decision from the SBA District Office that Transco was small, and the contracting officer's inability to obtain assurance from the Size Appeals Board of an early decision on the Sentinel appeal, she concluded that a prompt award to Transco for the remaining 9-months of the contract period was in the Government's interest. The Army states that "If Sentinel had not been overreaching in the price demands it placed on the Army during the 3-month interim period, it apparently would have been the successful contractor under the solicitation. There would not have been an award to Transco prior to resolution of the outstanding protests."

For the reasons set forth by the Army, we believe that the contracting officer was justified in making award to Transco.


Acting Comptroller General
of the United States



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

Marc Boman
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September 30, 1977

The Honorable A. Vernon Weaver
Administrator, Small Business
Administration

Dear Mr. Weaver:

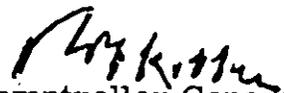
In our decision of today in B-187053, copy enclosed, we considered the protest by Sentinel Protective Services, Inc. against award of a contract for guard services to Transco Security, Inc., a self-certified small business, under Invitation for Bids No. DABT 01-76-B-0085, issued by the Department of the Army.

While we have concluded that the award was properly made by the Army on the basis of the SBA Columbus District office's determination that Transco was a small business, we note that the SBA District office failed to take cognizance of the rather obvious fact that, at the time of bid opening, Transco did not qualify as a small business. Under decisions of the Small Business Administration and this Office, a firm must be adjudged small as of both the time of bid opening and the time of award.

As the integrity of the small business size self-certification procedure rests on consistent enforcement of applicable standards, we consider it imperative that your Office take appropriate action to insure that, in future size determinations, all SBA District offices determine whether the prospective contractor properly certified itself as of the time of bid opening and whether the firm is small at the time of award. We suggest that your Office consider changing the current regulations to make explicit the two-fold requirement that, to be eligible for award under a small business set-aside, a bidder must be small both at the time of bid opening and at the time of award, based on the standard applicable at the time of award. Cf. 42 Comp. Gen. 219 (1962).

It is requested that you inform us of the actions taken to implement this recommendation.

Sincerely yours,


Acting Comptroller General
of the United States

Enclosure

cc: Ms. Claire Dondero
Secretary of the Size Appeals Board