

11259

P2-11

DECISION

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

FILE: B-193672

DATE: August 29, 1979

MATTER OF: R. E. Brown Co., Inc. *DLG 07648*

[Protest of Awardee Size Status]
DIGEST:

Size status protest filed after award but within five days after bid opening is timely under FPR § 1-1.703-2(b) and consequently agency should terminate contract awarded to business determined by Small Business Administration (SBA) to be large business, provided SBA affirms its decision that protester is responsible and continuity of services is not jeopardized.

R. E. Brown Co., Inc. (Brown) *DLG 07649* protests the award of a contract to Mennen-Greatbatch, Inc. (M-G) under invitation for bids (IFB) No. 662-14-79 issued by the Veterans Administration (VA) as a small business set-aside. The contract is for the maintenance of physiological monitoring equipment at the VA Medical Center, San Francisco, California.

Two bids were received by VA in response to the IFB. M-G submitted the apparent low bid of \$72,900. Since M-G had certified it was a small business and the contracting officer had not received a protest of M-G's size status, the contract was awarded to M-G two days after bids were opened.

Upon being notified of the award to M-G, Brown registered a protest with the contracting officer challenging M-G's status as a small business concern. Brown's protest was filed within 5 days of bid opening. Brown also filed a protest with our Office alleging that M-G had receipts of approximately \$18-20 million in 1977 and therefore was not small under the IFB which limited the procurement to firms with average annual receipts of under \$2 million over the past three years. Brown also alleged that the award violated FPR § 1-1.703-2(b) because

~~006384~~ 110244


VA did not wait five days after bid opening before making an award. Brown additionally alleged that the contracting officer informed Brown that if the Small Business Administration (SBA) ruled M-G was other than small, VA would terminate M-G's contract and resolicit its needs on an unrestricted basis. Brown asserted that the latter action would violate the "spirit and letter" of the Small Business Act.

During the pendency of this matter we were advised by Brown that SBA had ruled that M-G was not a small business. In view thereof, we contacted VA to see whether it intended to terminate M-G's contract. Thereafter, we received a brief report from VA indicating that it was going to conduct a preaward survey of Brown and if any doubts concerning Brown's responsibility arose it would refer the matter to SBA. Although VA did not specifically state that it would terminate M-G's contract and make an award to Brown it was implicit in its report that it intended at that time to do so.

Subsequently, we have ^{GAO WCO} been advised that while SBA has granted Brown a COC, VA is reluctant to award a contract to Brown because it does not believe that Brown has the ability to service certain equipment covered by the contract without the assistance of M-G and M-G has refused to cooperate with Brown. Accordingly, VA has requested that SBA reconsider its decision to issue Brown a COC. ✓

Brown's objections concerning M-G's status as a small business concern are not for our consideration since SBA is empowered by statute to conclusively determine the size status of businesses for Federal procurements. See Carden Company, B-193839, January 31, 1979, 79-1 CPD 76. As indicated, the SBA has agreed with Brown that M-G is not a small business for this procurement. We do not believe, as Brown maintains, that under FPR § 1-1.703-2(b), a contracting officer is required to wait five days after bids have been opened before making an award. FPR § 1-1.703-2(b) merely sets forth the requirements for filing a timely size status protest. (For a protest to be timely it must be filed within five days after bid opening.)

However, an award made within five days of bid opening is subject to a timely size status protest, since otherwise such an award could circumvent the small business size status protest procedures. See Superior Asphalt Concrete Company, B-184337, December 5, 1975, 75-2 CPD 372. Brown's size status protest, filed within five days after bid opening, was timely under FPR § 1-1.703-2(b). In view of SBA's ruling that M-G is not a small business, we believe that VA should terminate the contract awarded to M-G and make an award to Brown if SBA affirms its decision to issue Brown a COC and if the continuity of these services will not be jeopardized.


Deputy Comptroller General
of the United States