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**DECISION**



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

FILE: B-206276

DATE: April 15, 1982

MATTER OF: M & H Concrete Structures, Inc.

**DIGEST:**

1. Protest concerning small business status of bidder is not subject to review by GAO since by law matter is exclusively for consideration by Small Business Administration.
2. Protests against small business status of any bidder, whether or not low, on procurement set aside solely for small business participation must be made within 5 working days after bid opening; contracting agency is not required to notify bidders of disqualification of low bidder for award and of intention to award to second low bidder so that objection to small business status of that bidder may be raised within 5 working days after notification.
3. Notice of award given to protester 3 days after award was made complied with DAR § 2-408.1; in any event, failure to provide prompt notice of award is merely procedural irregularity which does not affect validity of award.

M & H Concrete Structures, Inc. (M & H), protests the award made to the second low bidder under United States Army Corps of Engineers (Pittsburgh District) invitation for bids No. DACW59-82-B-0001, opened in December of 1981, on the bases that the awardee/bidder is not a small business concern, a prerequisite for award, and that M & H was only informed that the agency "intended" to make an award to other than the original low bidder on January 28, 1982 (after the award had been made). It is contended that failure to advise M & H of the intended award before it was made denied M & H an adequate opportunity to contest the small business status of the second low bidder for the purposes of this procurement.

As regards the first basis of the M & H protest, our Office does not have the legal authority to consider protests relating to the size status of small business concerns. Under 15 U.S.C. § 637(b)(5) (1976) the Small Business Administration is empowered to determine conclusively matters concerning a bidder's small business size status for the purpose of Federal procurements and sales. Alliance Properties, Inc., B-205253, November 10, 1981, 81-2 CPD 398; GMP Scientific Corporation, B-201356, January 6, 1981, 81-1 CPD 8; Spradlin Corporation, B-186167, April 15, 1976, 76-1 CPD 257.

The second basis of the M & H protest is without merit. A protest against the small business status of any (not merely the original low bidder) of the bidders on a procurement must be filed within the 5-day-period requirement set forth in paragraph 1-703(b)(1) of the Defense Acquisition Regulation (DAR) (1976). Octagon Process, Inc., B-189805, October 19, 1977, 77-2 CPD 304. In the DAR paragraph, it is provided that:

"\* \* \* Any bidder, offeror, or other interested party may, in connection with a contract involving a small business set aside or otherwise involving small business preferential consideration, challenge the small business status of any bidder or offeror by sending or delivering a protest to the contracting officer responsible for the particular acquisition. \* \* \* In order to apply to the acquisition in question, such protest must be filed with and delivered to the contracting officer prior to the close of business on the fifth day exclusive of Saturday, Sunday, and legal holidays after bid opening date for formally advertised and small business restricted advertised acquisitions. \* \* \*"

M & H did not file a protest against the small business status of the eventual awardee within that 5-day period. The contracting agency is not required to notify bidders

of the disqualification of the low bidder for award and of its intention to award the contract to the second low bidder so that bidders may object to the small business status of the second low bidder within 5 working days after that notification rather than after the bid opening. B-167179, August 19, 1969.

Further, as regards the notice of award received by M & H on January 28, it is required under DAR paragraph 2-408.1 that notice be given to unsuccessful bidders promptly. Since the award was made, we are advised, on January 25, it would appear that the notice given M & H was prompt and, therefore, proper. In any event, the failure to provide prompt notice of the award is merely a procedural irregularity which does not affect the validity of an award. Leon Whitney, Certified Public Accountant, B-190792, December 19, 1978, 78-2 CPD 420.

Accordingly, the protest is dismissed in part and denied in part.

*William J. Douglas*  
for Comptroller General  
of the United States