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DECISION



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

FILE: B-208285

DATE: September 20, 1982

MATTER OF: Sauter Construction Company, Inc.

DIGEST:

Protester has failed to carry its burden of proof and protest is summarily denied where the only evidence that the contracting agency failed to follow the procurement regulations regarding the referral of a size status protest to the Small Business Administration is the conflicting statements of the protester and the contracting agency.

Sauter Construction Company, Inc. (Sauter), protests the decision by the contracting officer to reject as untimely the protest Sauter filed with the contracting agency--the Bureau of Reclamation, Department of the Interior--under invitation for bids No. 3D-C7512. In its initial protest, Sauter argued that Ridge Construction Company is a large business and, therefore, ineligible for award under this small business set-aside.

Under 15 U.S.C. § 637(b) (1975), the Small Business Administration (SBA) has conclusive authority to determine size status for Federal procurements, and any challenge to the size status of a small business must be made according to SBA procedures rather than in the context of a bid protest. Friend Manufacturing Corporation, B-205072, January 6, 1982, 82-1 CPD 18. However, where a protester questions whether the contracting agency has complied with the regulations regarding the referral of a size status protest to SBA, our Office will consider whether the regulations have been followed. See, for example, Mil-Tec Systems Corp; ACR Electronics, Inc., B-200260, B-200260.2, February 9, 1981, 81-1 CPD 78.

The agency has advised us that bids were opened on June 23, 1982. In its protest letter, Sauter states that it sent a telegram via Western Union, which was telephoned to the contracting officer's office on

June 30 and confirmed in writing on July 1. However, the contracting officer ruled that Sauter's protest was untimely and awarded the contract to Ridge Construction Company on July 15, 1982.

Under Federal Procurement Regulations (FPR) § 1-1.703.2 (1964 ed. amend. 192), any protest against the small business status of another bidder must be filed with the contracting officer, either by telephone or in writing, not later than the fifth working day after bid opening. Sauter's protest of June 30, followed by written confirmation on July 1, would be in accordance with the procedures set out in FPR § 1-1.703-2(b)(1)--June 30, 1982, was the fifth working day after bid opening. However, the contracting agency advises us that it never received a telephone call on June 30 and that the first notice it received of the protest was on July 1--the sixth working day after bid opening. Although Sauter has provided us with a copy of its telephone bill, which shows that it sent a telegram on June 30, there is no evidence that Western Union called in the telegram or to whom the call was made.

It is well recognized that the protester has the burden of affirmatively proving its case. Reliable Maintenance Service, Inc.--request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. Moreover, we have held that the protester has failed to meet this burden where the only available evidence is the conflicting statements of the protester and the contracting agency. Del Rio Flying Services, Inc., B-197448, August 6, 1980, 80-2 CPD 92. Since the only evidence here concerning the timeliness of Sauter's size protest is the conflicting statements of Sauter and the agency, Sauter has failed to meet its burden of proof.

We summarily deny the protest.

Harry S. Van Cleave
Comptroller General
of the United States