

DECISION

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

FILE: B-210314; B-210314.2 **DATE:** February 7, 1983

MATTER OF Consolidated Marketing Network, Inc.;
Four Star Maintenance Corporation

DIGEST:

1. GAO will not consider protest against small business size standard in solicitation, since Small Business Administration Size Appeals Board is sole adjudicator of size standard issues.
2. GAO generally will dismiss protest alleging that small business bidder exceeds size limitations contained in solicitation, since Small Business Administration has statutory authority to determine size status of small businesses for Federal procurement purposes.
3. GAO will dismiss protest alleging that small business bidder cannot perform at bid price, because rejection of below-cost bid requires a determination that bidder is nonresponsible. If contracting agency makes affirmative determination of responsibility, GAO will not review it except in circumstances not present here; if bidder is found nonresponsible, contracting agency must refer matter to Small Business Administration.

Consolidated Marketing Network, Inc. and Four Star Maintenance Corporation protest the proposed award of a contract for base housing repair and maintenance services at Beale Air Force Base, California, under invitation for bids No. F04666-82-B-0039. Consolidated argues that the Air Force applied an incorrect size standard for this procurement, while Four Star alleges that Alliance Properties, Inc., the low bidder, exceeds the Small Business Administration (SBA) size limitations contained in the solicitation and has bid too low to be considered responsive to the contract requirements. We dismiss both protests.

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Consolidated supports its contention with an SBA Size Appeals Board decision pertaining to a solicitation for base housing maintenance issued by Langley Air Force Base, Virginia, arguing that the contracting officer at Beale should have specified a size standard for small business of \$2 million in average annual receipts, not \$7.5 million.

Under 15 U.S.C. § 637(b)(6) (1976), the SBA has conclusive authority to determine a small business concern's size status for procurement purposes. In implementing regulations, 13 C.F.R. § 121.3-8 (1982), the SBA states:

“ * * * * The determination of the appropriate classification of a product or service shall be made by the contracting officer. Both classification and the applicable size standard (number of employees, average annual receipts, etc.) shall be set forth in the solicitation and such determination of the contracting officer shall be made final unless appealed in the manner provided in § 121.3-6 * * * .”

The cited section sets forth procedures by which the Size Appeals Board reviews and makes final decisions as to contracting officers' determinations. Thus, if Consolidated believed that the Size Appeals Board's decision concerning the solicitation issued by Langley Air Force Base applied to the protested procurement, it should have raised this issue with the Board before the December 21, 1982 bid opening, as specified in 13 C.F.R. § 121.3-6(b)(3)(ii).

Similarly, if Four Star wished to challenge the size status of Alliance, it should have protested to the contracting officer within 5 days after bid opening, in accord with 13 C.F.R. § 121.3-5(a). The contracting officer would have referred the matter to the SBA regional director, whose decision, if adverse, also could have been appealed to the Board within 5 days under 13 C.F.R. § 121.3-6(b)(3)(i). It appears that neither firm followed these procedures within the times specified; in any event, our Office will not consider their protests.

Four Star also states that Alliance's bid is 10 percent lower than its own, and argues that the Government may be obliged to terminate any contract awarded to Alliance because of poor performance and monetary problems. We frequently have stated that a below-cost bid provides no basis for challenging the award of a Government contract to a responsible prospective contractor. Dragon Services, Inc., B-208081, July 27, 1982, 82-2 CPD 86. If the Air Force finds that Alliance is responsible, which it must do before awarding the contract, this would constitute an affirmative determination of responsibility. Because such determinations are largely subjective business judgments, our Office does not review them absent a showing of possible fraud on the part of procuring officials or an allegation that definitive responsibility criteria contained in the solicitation were not applied. Guardian Security Agency, Inc., B-209694, November 22, 1982, 82-2 CPD 471.

On the other hand, if Alliance is found nonresponsible and it is a small business, the Air Force must refer the matter to the SBA, which will conclusively resolve the matter by issuing or refusing to issue a Certificate of Competency. Our review here also is limited to cases involving bad faith. Technical Food Services, Inc., B-203742.2, September 15, 1981, 81-2 CPD 219. Four Star has not alleged that any of these exceptions applies; therefore, we will not consider the protest on this basis.

The protests are dismissed.

Harry R. Van Cleve
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Acting General Counsel