

**DECISION**

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

*14-2  
Ashen  
26899*

**FILE:** B-212626

**DATE:** November 18, 1983

**MATTER OF:** The Republic Asphalt Paving Company

**DIGEST:**

Where a protester failed to deliver to the contracting officer within 5 working days after bid opening a protest both alleging that another bidder was not a small business and containing the detailed basis for such allegation, and where also information which would have reasonably impeached the self-certification of the other bidder is neither brought to the attention of the contracting officer nor readily available such that its existence and significance should have been discovered by the contracting officer, then the latter did not abuse his discretion by accepting the bidder's self-certification at face value.

The Republic Asphalt Paving Company protests the Veterans Administration's (VA) failure to refer Republic's protest of the size status of Gray Construction, Inc., to the Small Business Administration (SBA) and the subsequent award of a contract to Gray under invitation for bids (IFB) No. 552-78-83, a small business set-aside for street repairs at the VA Medical Center, Dayton, Ohio. The contracting officer claims he initially understood Republic to be protesting only the responsibility, and not the size status, of Gray. We deny the protest.

When bids were opened on June 22, 1983, only Gray and Republic had submitted bids, and Gray's bid appeared low. Both Gray and Republic certified that they were small business concerns which were neither owned nor controlled by a parent company. However, Republic alleges that it informed the contracting officer by telephone on June 22 that it had reason to believe that Gray was not a small business concern. The contracting officer admits that a contract specialist at the Medical Center received a telephone call

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from Republic, but denies that Republic questioned the size status of Gray during that conversation. Instead, he claims that Republic merely "talked about following a car from our parking lot and having the license plate traced . . . and Gray Construction being qualified to perform this work."

Both Republic and the contracting officer agree that Republic was requested to submit its complaint in writing. The contracting officer states that the reason the VA requested a letter was that from the contents of the telephone conversation it "had no idea what [Republic] wanted." Accordingly, Republic, in a June 22 letter, wrote the contracting officer that:

"Relative to the opening of bids on this date at your facility for Street Repairs, Ref: IFB 552-78-83, 552-83-1010, in which our company was apparently the second lowest, I wish to request that the qualifications of the Gray Construction Company of Cincinnati, Ohio, the other bidder, be cleared with the Small Business Administration.

"The above request is being made because the representative present at the bid opening for the Gray Construction Company was driving a new Dodge car with license plates #MUS 738, said car being registered with the Ohio Department of Motor Vehicles as being owned by the Valley Asphalt Corporation of Cincinnati, Ohio.

"I would appreciate your following through on this matter. Thank you."

The contracting officer indicates that he viewed Republic's request that Gray's "qualifications" be "cleared" with the SBA only as questioning Gray's responsibility, or ability to render satisfactory performance, and not its size status. Finding Gray responsible after checking references at two other government agencies for which Gray had satisfactorily performed contracts, the contracting officer did not refer the matter to the SBA for a Certificate of Competency as he would have been required to do

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under 15 U.S.C. § 637(b)(7) (1982) had he found Gray nonresponsible; nor did he inform Republic of his determination.

The VA then proceeded to make award to Gray as the low, responsible bidder on June 28. Republic, having received no response from the contracting officer to its protest to the agency, subsequently filed this protest with our Office. Although the VA apparently then learned that Republic was in fact protesting Gray's self-certification as a small business and that the SBA had found in the context of a different procurement that Gray was not a small business, it refused to terminate the contract with Gray because by then more than 45 percent of the contract had been performed.

If a bidder challenges the small business status of another bidder on a particular procurement by delivering to the contracting officer within 5 working days after bid opening a protest which alleges that the other bidder is not a small business concern and which contains the basis for the protest, including specific detailed evidence in support of the claim, then the contracting officer must forward such a protest to the SBA and, except in unusual circumstances, temporarily suspend procurement activity. See Federal Procurement Regulations (FPR) § 1-1.703-2(a), (b) and (e) (1964 ed., amendment 192). A contracting officer, in the absence of such a protest, generally has authority to accept at face value a certification by a firm that it is a small business. Nevertheless, if information is brought to the attention of the contracting officer, or if information whose existence and significance should reasonably be discovered by the contracting officer is readily available to him, see Foam-Flex Inc., 62 Comp. Gen. 300 (1983), 83-1 CPD 383, and such information reasonably impeaches the self-certification, then the contracting officer must independently file a direct size status protest with the SBA. See Foam-Flex Inc., *supra*; Putnam Mills Corporation, 61 Comp. Gen. 667 (1982), 82-2 CPD 301; FPR § 1-1.703-1(c)(4). The VA's contracting officer states that he would have done so in this case had he understood Republic to have been protesting Gray's size status.

We do not doubt that Republic intended to protest Gray's size status in the June 22 telephone conversation and letter to the contracting officer. On June 23, Republic wrote its Congressman that it had requested the VA to verify with the SBA the "credentials of The Gray Construction Company . . . as a small business company." However, the information which Republic has shown that it brought to the attention of the contracting officer did not constitute a protest of Gray's size status, as such a "protest" is defined by the FPR. Nor did such information plus that which was reasonably available to the contracting officer and the existence and significance of which should have been apparent to him reasonably impeach Gray's self-certification and thus render the contracting officer's failure to independently file a protest with the SBA an abuse of discretion. See Putnam Mills Corporation, supra. Although the contents of Republic's June 23 letter to its Congressman tends to support the reasonableness of its assertion that it specifically informed the contracting officer during the June 22 telephone conversation that it was protesting Gray's self-certification as a small business, the lack of such a specific charge in Republic's June 22 letter to the contracting officer tends to support the reasonableness of the latter's denial that Republic made any such specific allegation during the telephone conversation. Given the differing factual contentions, both of which are reasonable and supported by credible evidence, and given the burden a protester must bear of affirmatively proving its case, we must accept the agency's version of the telephone conversation as providing the contracting officer no more relevant information about the nature of Republic's complaint than that provided in the June 22 letter. See Alchemy, Inc., B-207954, January 10, 1983, 83-1 CPD 18.

As for the June 22 letter, Republic neither specifically alleged that Gray was not a small business nor referred to Gray's size. At no place in the letter did Republic allege that Valley Asphalt was a large business, that Valley Asphalt controlled Gray in violation of Gray's certification that Gray was not controlled directly or indirectly by a parent company or, in any case, that any combination of Valley Asphalt and Gray constituted a large

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business. Thus, even if the allegation that the representative of Gray at the bid opening drove an automobile registered to Valley Asphalt should have put the contracting officer on notice of a possible connection between the two companies, there is no indication that he should also have realized that such a connection called into question Gray's certification as a small business. As for Republic's reference to Gray's "qualifications," this reasonably could have been understood to refer to Gray's ability to render satisfactory performance rather than to its size status.

Under these circumstances, we do not believe that Republic has met its burden of showing that the contracting officer abused his discretion. The protest is denied.

*for Harry R. Van Cleave*  
Comptroller General  
of the United States