



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Hornes Motor Lodge

File: B-225688.3

Date: October 15, 1987

DIGEST

Protest challenging contracting officer's alleged failure to comply with regulatory requirements concerning filing size status protest with Small Business Administration (SBA) is academic where SBA has already ruled that the challenged firm is a small business.

DECISION

Hornes Motor Lodge protests the Army's award of a contract to Convention Marketing Services under invitation for bids (IFB) No. DABT47-86-B-0120, issued as a total small business set-aside for lodging, meals, and transportation for applicants at the Military Entrance Processing Station in Charlotte, North Carolina. Hornes argues that by allowing Convention Marketing to change its subcontracting arrangements and substitute a large business subcontractor shortly before award, the contracting officer deprived Hornes of the opportunity to file a timely protest challenging Convention Marketing's small business size status. Hornes also argues that the contracting officer should have filed her own size status protest against Convention Marketing when she learned that it intended to subcontract with a large business. We dismiss the protest.

Nine bids were opened on January 23, 1987, and a contract was awarded to the low bidder, Joewin, Inc., on January 27. Shortly after award, the second low bidder, Convention Marketing, protested Joewin's size status; the fourth low bidder, Econo Lodge, also protested the size status of all three low bidders (Joewin, Convention Marketing, and Hornes). In accordance with Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.302(c)(1) (1987), the contracting officer referred the protests to the Small Business Administration (SBA). SBA determined that Joewin was other than a small business, and the Army subsequently terminated

its contract. SBA also determined that both Convention Marketing and Hornes were small businesses. On April 1, Econo Lodge appealed the determination regarding Convention Marketing's size status to SBA's Office of Hearings and Appeals.

Meanwhile, the contracting officer began to investigate Convention Marketing's responsibility. In its bid, Convention Marketing had designated its lodging subcontractor as Economy Inn and its dining subcontractor as Steak 'n Eggs, a large business; it later notified the contracting officer that it intended to substitute A-1 Catering, a small business, as the dining subcontractor. The contracting officer determined in early April that neither of the proposed subcontractors was satisfactory and found Convention Marketing to be nonresponsible. She then referred the matter to SBA for possible issuance of a Certificate of Competency (COC).

While the COC matter was before SBA, Convention Marketing arranged for a different subcontractor, Ramada Inn, a large business, to provide both food and lodging. On June 1, SBA issued a COC to Convention Marketing based on this revised arrangement. The contracting officer at this point informally expressed concern to SBA over Ramada's status as a large business, but was orally assured by an SBA official that since Convention Marketing was in complete control of the contract there would be no size status problem. On June 12, a contract was awarded to Convention Marketing for services to begin on July 1.

On June 26, SBA's Office of Hearings and Appeals decided the appeal filed by Econo Lodge concerning Convention Marketing's size status. At the time the appeal was filed, Convention Marketing had not yet substituted Ramada Inn as its proposed subcontractor, and the preliminary matter at issue on appeal, based on the facts as they then stood, was whether Convention Marketing's size should be determined as of the date of its self-certification, at which time its designated meals subcontractor was Steak 'n Eggs (a large business), or as of the date of the SBA determination, at which time its subcontractor was A-1 catering (a small business). Econo Lodge argued that a firm's size is to be measured as of the date of its self-certification, and that Convention Marketing's affiliation with Steak 'n Eggs as proposed in its bid therefore should be controlling in determining its size.

The Office of Hearings and Appeals agreed, citing 13 C.F.R. § 121.5(a) (1987), which requires that the size status of a concern (including its affiliates) be determined "as of the date of written self-certification as a small business as

part of a concern's submission of a bid or offer." The Office of Hearings and Appeals went on to determine that Convention Marketing's arrangement with Steak 'n Eggs and Economy Inn, as originally proposed in its bid, did not affect its status as a small business.

Hornes now contends that Convention Marketing is not a small business due to its affiliation with Ramada, and that the contracting officer acted in bad faith by permitting Convention Marketing to substitute Ramada as a subcontractor after the period for the filing of a timely size status protest by other bidders had expired^{1/} and by failing to notify other bidders of the change. Hornes further contends that the contracting officer should have filed her own size status protest when she learned that Convention Marketing intended to subcontract with Ramada.

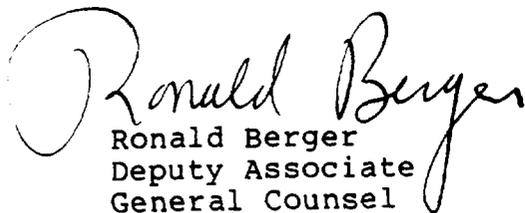
In view of SBA's decision that Convention Marketing is a small business based on the subcontracting arrangements in its original bid, it is clear that Hornes was in no way prejudiced by its inability to file a timely size status protest after Convention Marketing later substituted Ramada as its subcontractor, or by the contracting officer's failure to issue her own size status protest at that time. Given that under SBA's regulations it was Convention Marketing's size as of the date of its self-certification that determined its eligibility as a small business for this procurement, Convention Marketing's subsequent arrangements with Ramada do not provide any basis for challenging Convention Marketing's size status. See 13 C.F.R. § 121.5(a). Since SBA already has ruled on Convention Marketing's size status as of bid opening, the conclusive date for a status determination, the protester's objection to its inability, and the contracting officer's failure, to file a size status protest based on the subsequent change in subcontractors is academic. See Service Engineering Co., B-225623, Apr. 28, 1987, 87-1 CPD ¶ 442.

To the extent that the protester objects to SBA's rule that size is to be determined as of the date of self-certification, we note that this is not a matter for our consideration in view of SBA's conclusive statutory authority to determine matters of small business size status

^{1/} To be timely, a size status protest by another bidder generally must be filed within 5 days after bid opening. FAR, 48 C.F.R. § 19.302(d).

for federal procurements. See 15 U.S.C. § 637(b)(6) (1982);
Newgard Industries, Inc.--Reconsideration, B-226272.2,
Apr. 17, 1987, 87-1 CPD ¶ 422.

The protest is dismissed.


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