



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: American Mobilphone Paging, Inc.

File: B-238027

Date: April 5, 1990

Eileen R. Picture, for the protester.

Craig R. Schmauder, Esq., Army Corps of Engineers, for the agency.

James Vickers, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Where timely size protest is filed after small business-small purchase set-aside award and awardee does not contest Small Business Administration finding that it is other than a small business, intent of Small Business Act and integrity of competitive system is served by terminating the contract and, if otherwise appropriate, making award to only small business quoter.

DECISION

American Mobilphone Paging, Inc., protests the award of a purchase order to MobileComm by the United States Army Corps of Engineers, Mobile District, for the rental of 30 Motorola BPR 2,000 Display Pagers. American asserts that MobileComm is not a small business and therefore is not eligible for award.

We sustain the protest.

Request for quotations No. DACW01-90-T-0033, a small business-small purchase set-aside, was issued on October 23, 1989. The low quotation was received from MobileComm at \$14.75 per month per pager. American and A-Plus Communications, Inc., each quoted \$15.50 per pager per month. While American certified itself as a small business, both MobileComm and A-Plus failed to complete the certification in their quotes. The contracting officer contacted both firms concerning their status and both firms responded by letters stating that they had less than \$3.5 million in

annual average receipts. Based on these letters, the contracting officer determined they qualified as small businesses. On November 16, MobileComm lowered its quote to \$13.75 per month. The Corps awarded it the purchase order on November 16. Notice of the award was given to the other firms on November 20.

On November 22, American protested the size status of MobileComm to the contracting officer, who forwarded the matter to the Small Business Administration (SBA) on November 29. On January 4, 1990, SBA found MobileComm to be other than a small business.

The Corps did not disturb the award to MobileComm because the size protest was filed after the award had been made. According to the Corps, under Federal Acquisition Regulation (FAR) § 19.302(j) SBA's size determination has prospective application but does not affect the award.

American argues that while it did not file its written protest prior to award it did speak with the agency contract specialist before the closing date and advised her that MobileComm had improperly certified itself as a small business previously and if it did so again American would challenge the certification. American contends that this, along with the awardee's failure to initially certify its small business status, should have alerted the contracting officer to question MobileComm's size and to have filed his own size protest as permitted by FAR § 19.302(b).1/

A contracting officer may rely on an offeror's self-certification that it is a small business unless he has information prior to award that would reasonably impeach the certificate. American's statement that it would challenge MobileComm's status if that firm submitted an offer, without any evidence supporting its position that MobileComm was not a small business, did not constitute such information. As we said in Robertson and Penn, Inc., d/b/a National Serv. Co., 65 Comp. Gen. 874 (1986), 86-2 CPD ¶ 350, a contracting officer is not required to question an offeror's size status solely on the basis of a competitor's bare assertion. Moreover, the fact that the certification in question was not completed did not impose such an obligation on the contracting officer since a failure to complete the small

1/ In its protest to our Office, dated December 11, American also protested the size status of A-Plus. The contracting officer forwarded this protest to the SBA. On February 2, 1990, the SBA also found A-Plus to be other than a small business.

business size status certification is regarded as only a minor informality that can be corrected even under the strict rules governing sealed bidding. See, e.g., Gracon Corp., B-224344, July 7, 1986, 86-2 CPD ¶ 41.

Nonetheless, we do not think the award made to MobileComm should be allowed to stand. We recognize that FAR § 19.302(j) treats size status protests received after award of a contract as having no applicability to that contract. We have pointed out, however, that an agency should consider terminating an award for convenience if, pursuant to a timely size protest, the contractor is found to be a large business, see Conversational Voice Technologies Corp., B-224255, Feb. 17, 1987, 87-1 CPD ¶ 169; Solon Automated Servs., Inc., B-198670, Nov. 18, 1980, 80-2 CPD ¶ 365, and in certain cases we have found termination to be appropriate. See R.E. Brown Co., Inc., B-193672, Aug. 29, 1979, 79-2 CPD ¶ 164; see also Superior Asphalt Concrete Co., B-184337, Dec. 5, 1975, 75-2 CPD ¶ 372.

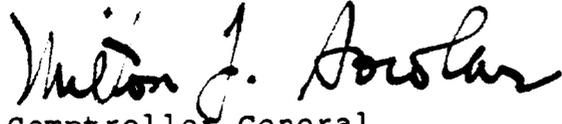
We think this is such a case. First, although American filed its size status protest after award, it could not have done otherwise because under the small purchase procedures which govern this procurement there is no requirement that the agency issue a preaward notice to unsuccessful vendors and none was issued here.^{2/} See FAR §§ 13.106(b)(9) and 15.1001(b). Because the size protest was filed within 5 days of American's receiving notice from the Corps of the award to MobileComm, it was timely under SBA's size status regulations. 13 C.F.R. § 121.9(a) (1989); see also FAR § 19.302(d). SBA's regulations, specifying that a protest received "after the time limits set forth herein shall not apply to the procurement . . . in question," envision that the results of a timely size status protest will apply to the procurement in question. Id. Second, in the size status proceeding before SBA, MobileComm chose not to defend its status but, according to the SBA, simply informed SBA that it "would not qualify as a small business concern."

Under the circumstances, we think that it would be inconsistent with the integrity of the competitive procurement system and the intent of the Small Business Act, which requires small purchases to be awarded in most cases to a

^{2/} American asserts that its size status protest was filed prior to the actual award of the purchase order and should have been considered a pre-award protest. However, MobileComm signed and accepted the order on November 16. The protest was filed on November 22. We therefore find no merit to this assertion.

small business, to permit MobileComm, which under the terms of the RFQ was ineligible for award, to continue to perform. We therefore are recommending that MobileComm's contract be terminated for convenience and the award for the remainder of the requirement be made to American if that firm is otherwise eligible. American is also entitled to its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

for 
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of the United States