

DECISION



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

60270

FILE: B-184144

DATE: December 8, 1975

MATTER OF: Handi-John Portable Chemical Toilet Company

DIGEST:

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Award of small business set-aside contract to bidder, who had been determined small by SBA regional office, which was subsequently reversed by Size Appeals Board, was in accordance with applicable regulations and resulting contract is merely voidable, not void, at option of Government and it would not be in Government's best interest to terminate in view of contract being 50 percent complete.

On February 12, 1975, the General Services Administration (GSA) issued invitation for bids No. GS-04S-21072 for the rental and service of portable toilets for Fort Gordon and Robins Air Force Base, Georgia. The procurement was a small business set-aside for item 13, the item in dispute here.

The low bid was submitted in the name of Sani Serva Systems, Inc., 1915 Fairway Drive, Augusta, Georgia (Sani-Ga.) and was signed by Mr. Frank R. Ranson, Secretary-Treasurer. On the reverse side of Standard Form 33, the bidder represented that it was a Virginia corporation and that it was controlled or owned by a parent company, Sani Serva System, Inc., 1014 Jefferson Avenue, Newport News, Virginia (Sani-Va.). The bid gave the name of Richard H. Harsey as manager and payments under the contract were to be sent to the Newport News address.

On March 29, 1975, 2 days after bid opening, the size status of the low bidder was protested by Handi-John Portable Chemical Toilet Company (Handi-John). The protest was forwarded by the contracting officer to the Small Business Administration Regional Office, Philadelphia, Pennsylvania (SBA), for a size determination.

On April 21, 1975, the SBA issued its determination. The determination, addressed to Sani Serva System at its Newport News, Virginia, address, stated, in part, that:

"The bid in this particular instance was prepared by Sani Serva System, Inc., but only after consultation and input supplied by Mr. Richard Harsey regarding the computation of prices to be submitted. The bid was submitted under the name of Sani Serva System, Inc., 1915 Fairway Drive, Augusta, Georgia. Mr. Richard Harsey operates the My-Tanik Sewage and Drain Service at the 1915 Fairway Drive, Augusta, Georgia address. Mr. Richard Harsey also operates under an Agreement of Lease with the Sani Serva System, Inc., 1014 Jefferson Avenue, Newport News, Virginia."

The SBA determination then reviewed the provisions of the Agreement of Lease and the relationship between Richard Harsey and Sani-Va. It also determined that Sani-Va. was other than a small business by reason of its affiliation with the Phil Carter System and Revel Craft, Inc. However, the Determination concluded as follows:

"Since Mr. Richard Harsey, 1915 Fairway Drive, Augusta, Georgia is a Lessee having the right to profit commensurate with its ownership and the risk of loss or failure, the Agreement of Lease does not constitute it as an affiliate of Sani Serva System, Inc., Newport News, Virginia. This office, therefore, finds Sani Serva System, Inc., 1915 Fairway Drive, Augusta, Georgia is an eligible small business concern for this procurement."

Based on the above size determination, the contracting officer on May 22, 1975, awarded the contract to the low bidder.

On May 15, 1975, Handi-John appealed the SBA determination to the SBA Size Appeals Board and on August 28, 1975, the Board held that the award had not been made to Sani-Ga. (Richard Harsey) but to Sani-Va., a large business. However, the contracting officer was not advised of the filing of the appeal until June 3, 1975, or 12 days after the award had been made. Therefore, the award, based on the outstanding regional determination, was in accordance with the Federal Procurement Regulations § 1-1.703-2(d) (1964 ed. amend 134) which states, in part, as follows:

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"* * * If an award has been made prior to the time the contracting officer receives notice of the appeal, the contract awarded shall be presumed to be valid and any determination rendered by SBA concerning the small business status of the concern involved shall be considered in future procurements."


Handi-John has protested to our Office that the contract was awarded to a large business and the SBA regional office should have issued its decision based on the bid as submitted, which Handi-John alleges clearly shows that Sani-Va. was the bidder, and not gone beyond the representations on the S.F. 33 to discuss the Agreement of Lease.

Pursuant to 15 U.S.C. § 637(b)(6) (1970), SBA is empowered to determine a business concern's size status for procurement purposes. Offices of the Government having procurement powers must accept as conclusive SBA's determination as to which concerns are to be designated small business. Under the SBA regulations, only the Size Appeals Board can alter a regional office's determination and, therefore, the contracting officer was without authority to disregard the April 21 ruling. 53 Comp. Gen. 434 (1973).

While the regional office determination was reversed by the Board, this does not render the award void but merely voidable at the option of the Government. This is so because the contract was awarded based on the only SBA ruling made at that time and was in accordance with the applicable regulations. 41 Comp. Gen. 252 (1961).

In these circumstances, our Office does not consider it in the best interest of the Government to terminate the instant contract which is 50 percent completed.

Accordingly, the protest of Handi-John is denied.


Deputy Comptroller General
of the United States