DECISION

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

60358

FILE: B-184430 DATE: January 2, 1976

MATTER OF: Enterprise Roofing Service

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DIGEST:

1. Protester should be considered as interested party absent objective evidence to contrary. Mere allegation by awardee based upon its experience that protester was not eligible small business under SBA "Grandfather" clause is insufficient, considering significance of issues involved, to show protester as uninterested in protest dealing with sufficiency of notice of applicable size standard.

2. Question regarding propriety of IFB's failure to reference applicable SBA "Grandfather" clause (used in determining small business size status) effective 7 days prior to bid opening, where IFB indicated different dollar threshold for small business standard, is significant issue under Bid Protest Procedures.

3. Any situation which could reasonably be construed as being one in which procuring agency advocates use of size standard differing from that then applicable under SBA regulation would amount to encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. Thus, where, as here, applicable SBA regulations were changed 7 days prior to bid opening and IFB can reasonably be construed as setting forth size standard differing from SBA's, encroachment has occurred and impact of encroachment on competition must be analyzed.

4. Where change to SBA's small business size standard was published in Federal Register prior to bid opening, all parties are held to be on constructive notice, even procuring agency, especially where material should have caused it to take action to amend IFB's stated size standards. Agency's unintentional failure to bring its IFB size standard into line with SBA's could have had substantial adverse effect on competition and in this regard IFB was defective. However, even if contract awarded had not been substantially performed, harm to competitive system generated by agency's inadvertence may not have necessitated GAO recommendation for termination.

Invitation for bids (IFB) No. N62474-74-B-3032 was issued on March 4, 1975, by the Western Division of the Naval Facilities Engineering Command. The IFB sought bids to replace roofing and miscellaneous repairs at the Naval Support Activity, Mare Island Naval Shipyard, Vallejo, California. The procurement was a 100-percent small business set-aside.

Standard form 20, included in the IFB, indicated that for the purpose of this procurement, any concern submitting a bid is classified as small if its average annual receipts for its preceding 3 fiscal years do not exceed $1 million. In response to the IFB the following bids were received upon opening, April 22, 1975:

	Item 1	Additive Item 1A
Western Roofing Service	$357,913	$45,302
Victor Z. Hanson	359,300	62,000
Merz Brothers	384,459	51,000
Coast Roof Co.	390,950	38,750
Sal Cola Construction Co.	411,956	59,000
Madsen Construction Co.	468,912	56,000

The agency notes that Enterprise did not submit a bid in response to the IFB, but rather was a subcontractor to one of the bidders. By letter of April 23, Enterprise complained to the contracting officer that several of the bids that were received on April 22 were submitted by firms which did not qualify under the conditions stated in the IFB regarding size standard. Enterprise sought an explanation of the regulations and any clarifications that the Navy could give. By letter of May 7, 1975, the Navy indicated the following:

> "Your understanding, as stated in your letter of 23 April 1975, concerning the $1,000,000 annual receipts limit to qualify as a small business concern was the size standard intended and used in the subject procurement. However, prior to bid opening the Small Business Administration published the so called 'Grandfather Clause' in the Federal Register (enclosure (1)), which apparently led the bidders you protested to submit their bids as small business concerns.
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> "Your protest letter of 29 April 1975, was received by this Command on 30 April 1975, which is considered untimely (received after five working days from the date of bid opening) and therefore cannot be considered on

the instant procurement. Your protest has been referred to the Small Business Administration for its consideration in any future actions. This Command, however, has lodged a protest of Western Roofing Service with the Small Business Administration, and will advise you of their determination."

Indeed, by letter of April 24, 1975, the Navy had in fact protested the size status of Western Roofing Service since the Command felt that Western could not meet the $1 million size standard and that the only way Western could submit a responsive bid was if the size standard had been changed to $7.5 million or the pending "Grandfather" clause was put into effect prior to bid opening. By letter of May 12, 1975, the Small Business Administration (SBA) responded to the Navy, indicating that the following "Grandfather" clause became effective on April 17, 1975, and was thus applicable to the subject procurement. The instant clause amended part 121 of chapter I of title 13, Code of Federal Regulations, revising section 121.3-8(a)(1) (1975) to read as follows:

"§ 121.3-8 Definition of small business for Government procurements.

* * * * *

"(a) * * *

"(1) Small if its average receipts for its preceding 3 fiscal years do not exceed $7.5 million: Provided, however, That if the requirements of the contracts are classified in an industry set forth in Schedule H of the part, it is small if it does not exceed the size standard established therein for that industry. (Notwithstanding the above proviso, for a period of 1 year from the effective date of this amendment, any concern which from March 18, 1973, to March 18, 1974, was primarily engaged in performing small business set-aside contracts is small for the purpose of any contract covered by the proviso if its average annual receipts for its preceding 3 fiscal years did not exceed $7.5 million. For the purpose of this rule, a concern was primarily engaged in performing small business set-aside contracts if 50 percent or more of its receipts (including receipts

> of its affiliates were attributable to such contracts.)"

Thus, the SBA went on to indicate that:

> "Regarding the size status of Western Roofing, because of the fact that the Grandfather Clause was in effect at bid opening, the firm could have had sales of up to $7.5 million (50% set aside) during the applicable period. Because of the fact that the firm certified itself to be a small business as of the time of the bid opening, its certification can be accepted by the contracting officer unless an adequately supported protest is filed. Accordingly, in the absence of such a protest at this time, the firm can be considered to be a small business for purposes of the procurement."

By letter of May 20, 1975, Enterprise was advised that its protest regarding the ability of Western Roofing to qualify as a small business concern was forwarded to SBA for consideration and that the SBA rejected its protest due to lack of specific details. The Navy also advised Enterprise that since the SBA decision on size status was final, an award had been made to Western Roofing. The Navy did not, however, respond to the question raised by Enterprise on May 8 as to "* * * our assumption * * * that the wording used in the bidding documents was definitive [as to the question of the size standard to be used]."

Western Roofing Service, the awardee, has raised several procedural questions with regard to Enterprise's protest. First, it argues that Enterprise is not an interested party in accordance with our bid protest procedures, 4 C.F.R. § 20, et seq. (1974), and also 40 Fed. Reg. 17979 (1975). With regard to this issue, we have stated that generally in determining whether a protester satisfies the interested party requirement consideration should be given to the nature of the issues raised by the protest and the direct or indirect benefit or relief sought by the protester. ABC Management Services, Inc., B-182533, October 21, 1975, 55 Comp. Gen. ____, 75-2 CPD 245; Kenneth R. Bland, Consultant, B-184852, October 17, 1975, 75-2 CPD 242; Coleman Transfer and Storage, Inc., B-182420, October 17, 1975, 75-2 CPD 238. This requirement that a

party be interested serves to insure a party's diligent participation in the protest process so as to sharpen the issues and provide a complete record on which the correctness of the challenged action may be decided. However, the concept of an interested party should not be equated with the concept of standing to sue as developed by the courts. ABC Management Services, Inc., supra; Coleman Transfer and Storage, Inc., supra. Western specifically alleges that while Enterprise stated that it was not eligible to bid on the subject IFB because its yearly average for the preceding 3 fiscal years was in excess of $1 million, thus exceeding the $1 million size standard set forth in the IFB, "* * * Enterprise presents no statement, documented or otherwise, that it considers itself eligible to bid under the exemption of the GF [(Grandfather)] clause."

We believe that a party should be considered as interested in the absence of objective evidence to the contrary. The sole evidence presented by Western to show that Enterprise is not "interested" is the following quote:

> "* * * From our own experience participating in and observing Government roofing solicitations over the years, and in subcontracting certain roofing contracts to Enterprise, we can safely aver that Enterprise is not one of those concerns eligible to bid under the exemption of the GF Clause."

We do not believe, considering the significant issues here involved, that the above-noted statement is sufficient for us to declare that Enterprise is other than an interested party. Moreover, contrary to the further assertions of Western, we do not think the mere fact that Enterprise did not participate in the solicitation as a bidder, but rather only as a subcontractor to another bidder, destroys its entitlement to be considered an interested party under our bid protest procedures.

Western also questions the timeliness of Enterprise's protest to our Office on two points. First, it alleges that since Enterprise was on constructive notice of the "Grandfather" clause contained in the Federal Register of April 17, 1975, it was required under our Interim Bid Protest Procedures and Standards, 4 C.F.R., supra, to protest the apparent impropriety in the IFB, namely, the use of an erroneous size standard, before bid opening. In this regard, section 20.2(a) of 4 C.F.R., supra, indicates that "Protests based upon alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." Therefore, Western argues that since Enterprise did not file its protest until long after bid opening, the protest is untimely.

Secondly, Western notes that (1) Enterprise did not introduce the issue regarding the omission of the "Grandfather" clause from the IFB until May 8, 1975, although it had previously questioned the size status of a number of the bidders who had participated in this solicitation, and (2) the contracting officer's answer to

Enterprise's complaints dated May 20, 1975, merely referenced the fact that Western was found to be small within the governing regulations of the SBA. This letter admittedly did not respond specifically to Enterprise's contention that without an addendum to the IFB regarding the "Grandfather" clause, the effective clause stated in the IFB should govern for purposes of the procurement at hand. Western, however, argues that regardless of the agency's failure to give Enterprise a decision on the merits of this issue, by its letter of May 20, 1975, it gave Western notice of adverse action in that it stated that an award has been made to Western Roofing Service and it was therefore incumbent upon Enterprise to protest to GAO within 5 working days thereafter. 4 C.F.R. § 20.2, supra.

We agree with Western that a substantial question has been raised as to the timeliness of this protest. However, in accordance with 4 C.F.R. § 20.2(b) (1974), the Comptroller General for good cause shown or where he determines that a protest raises issues significant to procurement practices or procedures may consider any protest which is not filed timely. See also Bid Protest Procedures section 20.2(c), 40 Fed. Reg., supra.

As stated in 52 Comp. Gen. 20, 23 (1972), "'Issues significant to procurement practices or procedures' refers not to the sum of money involved, but to the presence of a principle of widespread interest." In this regard, we are of the view that the issue regarding the applicable size standard to be used in a procurement where there is a conflict between the size standard expressed in the IFB and that which exists in the Federal Register is an issue of such widespread interest. Therefore, irrespective of the possible untimeliness of the Enterprise protest, our Office will consider this issue on the merits.

Western attempts to categorize the instant issue presented to us as a question involving the small business size status of bidders and rightfully quotes the rule that our Office has consistently held that these matters are for consideration by the SBA and that the SBA's determination of the size status of small business may not be reviewed by us absent a prima facie showing that the action of the SBA was taken fraudulently or with such willful disregard of the facts as to necessarily imply bad faith. Zac Smith & Company, Inc., B-183843, November 4, 1975, 75-2 CPD 276.

We do not, however, agree with Western's characterization of the instant issue. As noted by Western itself, the protest of

Enterprise to GAO for a decision is "a cut above its protest to SBA" regarding the size status of the four low bidders on the instant procurement. We do not question the SBA's determination as to Western's size. Our inquiry in this matter will therefore be restricted to the propriety of the procuring agency's alleged failure to reference the applicable "Grandfather" clause and the effect of any such failure upon competition.

The IFB in question contained the following provisions:

"NOTICE OF TOTAL SMALL BUSINESS SET-ASIDE (1972 JUL)

* * * * *

"(b) Definition. A 'small business concern' is a concern, including its affiliates, which is independently owned and operated, is not dominant in the field of operation in which it is offering on Government contracts, and can further qualify under the criteria set forth in the regulations of the Small Business Administration (Code of Federal Regulations, Title 13, Section 121.3-8). * * *

"(c) Small Business Size Standard for this Procurement: The average annual receipts of the concern and its affiliates for its preceding three fiscal years must not exceed $1,000,000 ." (Emphasis supplied.)

The IFB also indicated that the form of the contract to be executed will include clause 1 of Standard form 19-B, 1969 edition, which as amended read in pertinent part:

"* * * (For this purpose, a small business concern is a business concern, including its affiliates, which (a) is independently owned and operated, (b) is not dominant in the field of operation in which it is bidding on Government contracts, and (c) had average annual receipts for the preceding 3 fiscal years not exceeding $1,000,000.00. For additional information see governing regulations of the Small Business Administration.)" (Emphasis added.)

The IFB on at least two instances merely states that to be considered as a small business concern the firm must not have average gross receipts exceeding $1 million, although the IFB also indicates that a firm must further qualify under the applicable SBA regulations.

In the usual situation, where the size standard set forth in the IFB is the same as that indicated in the SBA regulations, there is no problem with this procedure. However, where the procuring agency indicates one size standard and the SBA indicates another, there is an immediate question raised as to which of the two seemingly inconsistent size standards should be considered as controlling. In this regard, we believe that the case of Atkinson Dredging Company, 53 Comp. Gen. 904 (1974), 74-1 CPD 299, is helpful for it indicates that the Armed Services Procurement Regulation cannot impose a size standard differing from that promulgated by the SBA. As set forth in Atkinson, supra, we believe that SBA has an exclusive role in this size area as mandated by the Congress. At page 907 of the referenced decision we stated:

> "* * * In furtherance of this declared national policy [that a fair proportion of purchases and contracts for property and services for the Government be placed with small business], the Congress has countenanced the small business set-aside program as a valid restriction on competition (15 U.S.C. 644) and has delegated conclusive authority to SBA to determine matters of small business size for procurement purposes (15 U.S.C. 637(b)(6)).
>
> "In discharge of this responsibility, SBA has promulgated small business size regulations found at part 121, chapter I of title 13 of the Code of Federal Regulations, which have the force and effect of law. See 15 U.S.C. 634(b)(6); Otis Steel Products Corp., 161 Ct. Cl. 694 (1963); 53 Comp. Gen. 434 (1973). * * *"

Thus, since it would seem to us that the procuring agencies cannot by regulation impose a size standard differing from that established by the SBA, it would seem equally as impossible for the agency to do so by contract clause, for this function, even if by contract clause, would still amount to a usurpation of SBA's statutory function. Therefore, any situation which could be reasonably construed as being one in which the agency advocates the use of a size standard differing from that applicable under SBA regulation would amount to an encroachment whether intentional or unintentional on SBA's exclusive jurisdiction. We believe that to be the case here since the applicable SBA regulations were changed

prior to the opening and the IFB can be reasonably construed as setting forth a size standard differing from that of the SBA.

However, the inquiry then turns to the question of what impact did this seemingly unintentional encroachment on SBA's jurisdiction have upon competition. See Atkinson Dredging Company, supra.

Western argues that Enterprise, like all other potential bidders, was on constructive notice of the change in the applicable SBA size standard and thus irrespective of the fact that the Navy indicated a different size standard, competition was not adversely affected. We agree that under the applicable case law all parties are held to be on constructive notice of material contained in the Federal Register. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); DeWitt Transfer and Storage Company, 53 Comp. Gen. 533 (1974), 74-1 CPD 47. However, some degree of constructive notice would seem to apply to the procuring agency, especially so when the information contained in the Federal Register is such that it should have caused some action to be taken with regard to a pending procurement. This question aside, the matter at hand seems to be one of fundamental fairness and from a practical point of view to what extent is the agency obligated to fully apprise bidders of all factors of which it knew or should have known that could have a substantial impact upon competition.

In this regard, we note the decision of Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36, affirmed in Tombs & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332. In that case, the IFB and the resulting contract incorporated by reference the applicable provisions of the Service Contract Act (41 U.S.C. § 351 (Supp. II, 1972)). The IFB contained the Department of Labor's (DOL) Service Contract Act Wage Determination. On May 16, 1974, DOL issued revision 3 to this determination which increased the applicable hourly wage rate to be paid by the contractor in accordance with the act. This issuance occurred approximately 2 weeks after bid opening but almost 3 months before award. Our decision concluded that since the new wage rate would have a substantial impact upon the ultimately successful bidder, the IFB should have been canceled and a new IFB issued because competition was not served by assuming that the new wage rate would affect all bids equally.

We believe that the net effect of the agency's unintentional failure to bring its IFB size standard into line with the then newly issued SBA size determination could have had a substantial adverse effect on competition and in this regard we must conclude that the instant procurement was defective for want of an amendment bringing its stated size standard into line with that of the SBA's. However, in light of the fact that the contract in question has been substantially performed, our Office is not in a position to recommend that any corrective action be taken with regard to the instant procurement. Moreover, even if this were not the case, we are not sure that the harm to the competitive system generated by the agency's inadvertence would necessitate our concluding that the contract awarded to Western should have been terminated for the convenience of the Government.

We would suggest, however, that in the future the Navy be more responsive to SBA changes in size standards so long as it attempts to definitively spell out the applicable size standard in its IFB's or, on the other hand, the Navy should perhaps couch its size standard terminology as merely being the best information then available to the procuring activity with reference given to the SBA's regulations with an indication that they may be amended from time to time. In choosing this latter course, we would suggest that the agency also include a provision which would indicate that in the case of a conflict between the standards set out in the IFB and those in the SBA's regulations, the SBA's regulations as of the time of bid opening shall control.

Paul G. Dembling

Acting Comptroller General
of the United States