



**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** MTB Investments, Inc.

**File:** B-275696

**Date:** March 17, 1997

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J. Randolph MacPherson, Esq., Sullivan & Worcester, LLP, for the protester.  
Shari Weaver, Esq., Department of Housing and Urban Development, for the agency.  
David R. Kohler, Esq., John Klein, Esq., and John Silbermann, Esq., for the Small Business Administration.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Where contracting officer believed protester miscertified its size status in its quotation, rather than rejecting the quotation on that basis, under the applicable Federal Acquisition Regulation contracting officer was required to refer question of firm's size status to the Small Business Administration for a size determination.

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## DECISION

MTB Investments, Inc. (MTBI) protests the award of a contract under request for quotations (RFQ) No. H03Q96108700000, issued by the U.S. Department of Housing and Urban Development (HUD) as a small business set-aside for appraisal review services. MTBI contends that the agency improperly rejected the firm's low quotation based upon a concern about the firm's self-certification that it is a small business without referring the matter to the Small Business Administration (SBA) for a size determination.

We sustain the protest.

On June 24, 1996, the SBA issued a formal size determination (under a different HUD procurement, invitation for bids No. H03B96008200000) that MTBI was other than a small business under Standard Industrial Classification (SIC) Code 6531. MTBI filed a timely appeal of that adverse determination with the SBA Office of Hearings and Appeals (OHA) on July 10; the protester's request to SBA for recertification as a small business was delayed by SBA until the OHA ruled on MTBI's appeal. By decision of October 1, the OHA determined that the methodology followed by the SBA in finding MTBI to be other than small was erroneous. The OHA remanded the issue of MTBI's small business status back to the SBA area director for a new and complete size determination. In particular, the

OHA advised the area director to consider amended tax information recently filed by MTBI.

The current RFQ was set aside for small business concerns under the same SIC code as the procurement subject to the OHA decision of October 1 and established a closing date of October 17. MTBI forwarded a copy of the October 1 OHA decision to the HUD contracting office on October 4. On October 5, it submitted the low quote under this RFQ. MTBI's quotation included a self-certification that MTBI is a small business concern. By letter of November 5, the agency rejected the protester's quotation because the contracting officer believed that MTBI had miscertified its status in light of the SBA's adverse size determination of June 24 regarding the earlier procurement. Award was then made to Don Williams Associates, Inc., the firm that submitted the next low quotation.

MTBI filed a timely agency-level protest with HUD. HUD then contacted the SBA regional office that issued the adverse size determination. The acting area director advised that the size determination "is still in effect, in spite of the remand from the [OHA]." Relying on this response, the contracting officer denied MTBI's agency-level protest by letter of November 20. By letter of December 4, however, the same acting area director at SBA advised MTBI and the agency (as well as three other HUD contracting offices in various regions) that "[t]he remand of the subject case by the [OHA] vacated the initial size determination of this office, effective October 1, 1996." On December 5, MTBI filed a protest with our Office challenging the agency's rejection of its quotation without first referring the matter to the SBA for a size determination for this particular procurement.

The SBA has conclusive authority to determine size status matters for federal procurements. 15 U.S.C. § 637(b)(6) (1994). Federal Acquisition Regulation (FAR) § 19.301(b) provides that contracting officers shall accept small business self-certifications unless they have reason to question them. Questions concerning specific representations are to be referred to SBA in accordance with the protest procedures of FAR § 19.302. United Native Am. Telecommunications, Inc., B-260366; B-260465, May 30, 1995, 95-2 CPD ¶ 78. Thus, where a contracting officer has reason to believe that a firm has miscertified its size or is otherwise not a small business, the contracting officer is required to refer the matter to the SBA for a size determination. FAR §§ 19.301(b), 19.302(c).<sup>1</sup>

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<sup>1</sup>The cases cited by HUD in support of its rejection of the quotation without first referring the size issue to the SBA are factually distinguishable from the situation here--in those cases there was either an urgent need for award "to protect the public interest" pursuant to FAR § 19.302(h), or no timely challenge by the contractor to--or any material change of circumstances after--an adverse size determination.

MTBI self-certified in its quotation that it is a small business concern. Based on the contracting officer's knowledge of the previous size status determination and subsequent appeal, she rejected the quotation without referral of the matter to the SBA. While the contracting officer may have believed she had a legitimate basis to question MTBI's actual size status at the time of the firm's self-certification, she could not make the determination as to MTBI's status herself; under the FAR the contracting officer was required to refer the matter to the SBA for a size determination for this particular procurement.<sup>2</sup>

Accordingly, we recommend that the agency refer the issue of MTBI's size status to the SBA for a determination of whether MTBI is legitimately a small business concern for purposes of this procurement; given that the SBA has recently recertified the firm based on the earlier filed amended tax return, we expect a prompt review by SBA of MTBI's size status at the time of its self-certification here. Following the size determination by the SBA, the agency should proceed with the award consistent with SBA's determination. If MTBI is ultimately found to be small, the award to Don Williams Associates, Inc. should be terminated for the convenience of the government and award be made to MTBI. We also recommend that MTBI recover the costs of filing and pursuing its protest, including reasonable attorneys' fees. Bid Protest Regulations, section 21.8(d)(1), 61 Fed. Reg. 39039, 39046 (1996) (to be codified at 4 C.F.R. § 21.8(d)(1)). The protester should submit its claim for such costs directly to the agency. Bid Protest Regulations, section 21.8(f), 61 Fed. Reg. supra (to be codified at 4 C.F.R. § 21.8(f)).

The protest is sustained.

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<sup>2</sup>We note that prior to her decision to reject MTBI's offer, the contracting officer reasonably knew from the October 1 OHA decision that the protester had filed with the SBA amended tax information on July 24 which the OHA had decided could materially impact a size determination for the firm for this and other new procurements. The record contains documentation which shows that at least one other HUD contracting officer on a separate procurement rescinded her initial rejection of MTBI's offer in light of the OHA October 1 decision.