

DECISION



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DL-11  
ms. Eaton

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

FILE: B-195084

DATE: February 5, 1980

MATTER OF: Southeastern Enterprises,  
Incorporated

DIGEST:

1. SBA Size Appeals Board determination that family relationship and prior employment are not sufficient to warrant finding of present identity and control between small business and large business is not reviewable by GAO.
2. When procuring agency, acting on SBA Regional Office's determination that questioned bidder is small business, makes award, and contracting officer is not notified of appeal from SBA determination, resulting contract is presumed valid.
3. Bidder is not prejudiced by SBA's failure to notify it of determination that awardee was small where bidder was informed of determination by contracting officer and SBA Size Appeals Board, in considering firm's size in connection with another procurement, ultimately found awardee to be small.

Acco 6628  
DLG00135  
Southeastern Enterprises, Incorporated (Southeastern) protests the award of a contract for food services at Wright-Patterson Air Force Base, Ohio, to S&G Services, Inc. (S&G) under a total small business set-aside [Protest Against]

Southeastern alleges, among other things, that the Air Force improperly made award to S&G after that firm had been found to be other than small by the Atlanta Regional Office of the Small Business Administration (SBA). Southeastern also alleges that SBA failed to follow its own procedures with regard to a protest of

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S&G's size status, depriving Southeastern of an opportunity to appeal an earlier determination that S&G was small. After carefully reviewing the chronology of this procurement, we conclude that the Air Force properly awarded the contract to S&G.

The record indicates that at bid opening on April 30, 1979, S&G was the low bidder and Southeastern was the second-low bidder on solicitation No. F33601-79-B-0045. On May 4, the contracting officer asked the Atlanta Regional Office, SBA, for a determination of S&G's size status, since the firm had been included on a March 19 list issued by the SBA of firms suspected of being large. On the same date, May 4, Southeastern challenged S&G's size status in a letter to the contracting officer. The contracting officer received this letter on May 7, acknowledged it, and forwarded it to the Atlanta Regional Office, SBA.

On May 8, responding to the contracting officer's original inquiry, the Atlanta Regional Office, SBA, wrote the Air Force that it had investigated S&G earlier in the year and found that although it was affiliated with Dyneteria of North Carolina, the combined receipts of the two firms were within the size limits for a small business for food services.

On May 10, the record indicates, the Atlanta Regional Office, SBA, received Southeastern's challenge to S&G's size status; however, it took no action, assuming that on the basis of its May 8 letter, the contracting officer would inform Southeastern that S&G qualified as a small business. The contracting officer actually did so by letter of May 15.

According to the Air Force, nothing further was heard from Southeastern; on June 5, the Air Force awarded the contract to S&G. Meanwhile, on June 4, as a result of a more detailed protest of S&G's size status (filed by another firm in connection with another procurement), the Atlanta Regional Office, SBA, had reversed itself and found that S&G was other than small because it was

affiliated with Dyneteria, Inc., a large business. The Air Force states that the contracting officer did not learn of this determination until after the protested award.

The Air Force argues that despite the June 4 determination by the Atlanta Regional Office, SBA, with regard to S&G's size status, under Defense Acquisition Regulation (DAR) § 1-703(d)(3) (DAC 76-19, July 27, 1979) the contract was properly allowed to stand. The Air Force also notes that S&G and Dyneteria, Inc. appealed the June 4 decision to the SBA Size Appeals Board, which on August 27 determined that S&G was in fact small.

The issue for our consideration is whether the Air Force and the SBA followed proper procedures with regard to this procurement. The Size Appeals Board decision that S&G is in fact a small business is not reviewable. 15 U.S.C. § 637(b)(6) (1976); National Ambulance Service of Louisiana, Inc., B-193447, January 22, 1979, 79-1 CPD 40. However, because Southeastern also has questioned whether a representative of S&G or of Dyneteria, Inc. signed the bid on the protested contract, it may be useful to summarize the Size Appeals Board decision. 62600102

Three firms are involved: S&G, Dyneteria of North Carolina (DNC), and Dyneteria, Inc. Dyneteria, Inc., is a large business controlled by Robert P. Rupert; S&G and DNC are controlled by Robert E. Rupert; the two individuals are father and son. The Atlanta Regional Office, SBA, ultimately concluded that there was an identity of interest between the concerns. The Size Appeals Board, however, found that Robert E. Rupert was not controlled by his father, although he had once been employed by him, and had no business contacts or relationships with him. Citing several of its own decisions for the proposition that family relationship and prior employment are not sufficient to warrant a finding of present identity, the Size Appeals Board found that S&G and DNC were small, since their annual receipts for the preceding three fiscal years did not exceed \$5.5 million. -03836  
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We requested and received from the Air Force a copy of the bid on the protested contract, and find

that it was signed by Robert E. Rupert, representing S&G. The regulation relied on by the Air Force, DAR 1-703(d)(3), states that following notification by the SBA District Director of the small business status of a questioned bidder, an award may be made on the basis of that determination. The determination is final unless (1) it is appealed and (2) the contracting officer is notified of the appeal before award. Moreover, if award is made before the contracting officer receives notice of any appeal, "the contract shall be presumed to be valid."

We therefore conclude that the Air Force acted properly. The contracting officer, at the time of making award, did not know that the Atlanta Regional Office had reversed its initial determination that S&G qualified as a small business, and Southeastern had not filed an appeal.

As for whether the SBA acted properly, Southeastern argues that it lost its right to appeal because SBA failed to respond directly to it. SBA regulations require a written appeal from a size determination to be filed with the Size Appeals Board within five days of receipt of a decision by a regional director; unless such an appeal is received, the appellant is deemed to have waived its rights. 13 C.F.R. § 121.3-6(b)(3)(i) (1979). Since Southeastern had actual knowledge of the Atlanta Regional Office's determination when it received the contracting officer's letter of May 15, it could have filed an appeal.

The record contains an acknowledgment by the Administrator, SBA that it should have responded to Southeastern's May 4 protest. However, in view of the ultimate finding of the Size Appeals Board that S&G was in fact small, we do not believe Southeastern was prejudiced by SBA's failure to respond.

The protest is denied.



For The Comptroller General  
of the United States



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

B-195084

February 5, 1980

The Honorable Christopher J. Dodd  
Member, U.S. House of Representatives  
94 Court Street  
Middletown, Connecticut 06457

Dear Mr. Dodd:

You recently expressed interest in the protest of Southeastern Enterprises, Incorporated, regarding a contract for food services at Wright-Patterson Air Force Base, Ohio.

By decision of today, copy enclosed, we have denied the protest.

Sincerely yours,

A handwritten signature in cursive script, reading "Milton J. Arnold", is written over the typed name.

For The Comptroller General  
of the United States

Enclosure