

DECISION



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

118272

FILE: B-205093.2

DATE: May 5, 1982

MATTER OF: The Wenninger Company, Inc.

DIGEST:

1. Protest concerning the protester's small business size status and the small business size standard used in the contracting agency's solicitation is dismissed. The Small Business Administration (SBA), exclusively authorized by statute to conclusively decide those matters, determined that the protester is not a small business for purposes of the procurement under the size standard specified in the solicitation. SBA's determination is not subject to review by GAO.
2. Claim for bid preparation costs is denied where the contracting agency's decision not to award to the protester was properly based on the Small Business Administration's decision that the protester was not a small business and therefore not eligible for award.

The Wenninger Company, Inc. (Wenninger), protests the award of a contract to any other bidder under invitation for bids (IFB) No. 695-71-81, issued by the Veterans Administration (VA), for a thermal recovery system at the VA Medical Center, Wood, Wisconsin.

We conclude that the protest concerns matters for final resolution by the Small Business Administration (SBA), and will not consider the merits of the protester's contentions.

The IFB, a total small business set-aside, was the subject of our decision in Honeywell, Inc., B-205093, March 16, 1982, 82-1 CPD 248. During the course of that protest, which was unrelated to the current protest, one of the bidders challenged Wenninger's status as a small business concern, and

the contracting officer requested a size standard review by the SBA. See Defense Acquisition Regulation § 1-703(b)(1)b and (E)(2) (Defense Acquisition Circular No. 76-19, July 27, 1979). The SBA regional office determined that Wenninger was not a small business for purposes of the procurement, rendering the protester ineligible for award under the IFB. Wenninger unsuccessfully appealed the decision to the SBA Size Appeals Board, and its request for reconsideration of that decision is pending with the Board.

In the interim, Wenninger extended the acceptance period of its bid several times at the VA's request. However, after our Honeywell decision was issued, the VA informed Wenninger that it intended to award the contract to the next low bidder.

Wenninger contends that it does qualify as a small business under the only reasonable interpretation of the size standard stated in the IFB, and that any ambiguity in the standard should be construed against the VA and should not bar award to Wenninger. Wenninger argues, in the alternative, that due to the allegedly defective size standard, the IFB should be voided and that the VA's requirements should be solicited. Finally, Wenninger asserts that the VA's rejection of its bid under these circumstances was arbitrary and capricious and that it, therefore, is entitled to recover the costs incurred in preparing its bid.

Under 15 U.S.C. § 637(b)(6) (1976), SBA is empowered to determine conclusively matters concerning a bidder's small business size status for purposes of Federal procurements and sales. Therefore, our Office does not consider protests relating to size status, and SBA's determinations are not subject to our review. Alliance Properties, Inc., B-205253, November 10, 1981, 81-2 CPD 398. We have held that SBA's statutory authority to determine bidders' size status and SBA regulations which provide procedures for appealing a contracting officer's determination of the size standard to be used in a procurement clearly establish SBA as the sole adjudicator of size standard issues. Alliance Properties, Inc., supra; Pacific Diving Industries, Inc., B-195404, August 1, 1979, 79-2 CPD 72.

Because the SBA determinations were final and binding on the contracting agency, the VA properly rejected Wenninger's bid. 53 Comp. Gen. 435 (1973). Consequently, there is no basis for our Office to grant bid preparation costs.

We dismiss the protest and deny the claim.

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel