

DECISION



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

FILE: B-207973.2

DATE: September 30, 1982

MATTER OF: Putnam Mills Corporation

DIGEST:

1. Awardee's restriction on disclosure of its supplier does not excuse protester's failure to protest awardee's small business size status within 5 working days of bid opening, as required by applicable regulation, where protester has neither alleged nor shown that solicitation prohibited bidders from restricting the disclosure of their suppliers.
2. Protest that contracting officer abused his discretion in not protesting awardee's size status to Small Business Administration is summarily denied because the protester has neither alleged nor shown that information that would reasonably impeach the awardee's self-certification was available to the contracting officer. DAR § 1-703(b)(2).

Putnam Mills Corporation (Putnam) protests a contracting officer's refusal to consider Putnam's protest against H. Landau & Co.'s (Landau) size status for the purposes of the present procurement. The contract has been awarded to Landau under invitation for bids (IFB) No. DLA100-82-B-0583, a small business set-aside issued by the Defense Logistics Agency, Defense Personnel Support Center (DLA).

Putnam filed a June 25, 1982, size status protest with the contracting officer after filing the same size status protest, dated June 18, with our Office. Putnam's size status protest alleged that Landau is not a small business because its source of supply is Duro Finishing & Printing Corp. (Duro).

We dismissed the June 18 protest because it concerned small business size status, which is by law a matter to be determined by the Small Business Administration (SBA). Putnam Mills Corporation, B-207973, July 6, 1982, 82-2 CPD 25. The contracting officer dismissed Putnam's June 25

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protest on the ground it was untimely under Defense Acquisition Regulation (DAR) § 1-703(b)(1) (Defense Acquisition Circular No. 76-19, July 27, 1979) because it was filed more than 5 days after the May 4 bid opening. The contracting officer referred the matter to the SBA for purposes of future procurements. See DAR § 1-703(b)(1)(b).

On July 8, 1982, 2 days after we had dismissed Putnam's June 18 protest, Putnam sent a letter to our Office protesting the contracting officer's refusal to consider Putnam's size status protest for the purposes of the present procurement. It is apparent that Putnam had not received our July 6 decision by July 8 because its July 8 letter does not request reconsideration, but rather alleges new grounds to supplement its June 18 protest.

We have reopened this case as a new protest rather than a request for reconsideration of our July 6 decision because Putnam's July 8 letter, unlike its June 18 letter, raises an issue that our Office does review. See Computer Sciences Corporation, B-190632, August 9, 1979, 79-2 CPD 102. Under DAR § 1-703(b)(1), size protests are to be filed with the contracting officer for referral to SBA. Ridg-U-Rak, Inc., B-207837, July 26, 1982, 82-2 CPD 78. However, our Office does review the timeliness of size protests filed with a contracting officer. See M & H Concrete Structure, Inc., B-206276, April 15, 1982, 82-1 CPD 348; R. E. Brown Co., Inc., B-193672, August 29, 1979, 79-2 CPD 164; NASCO Products Co., 46 Comp. Gen. 342, 345 (1966). We also consider whether a contracting officer abused his discretionary authority under DAR § 1-703(b)(2) to question the small business status of a bidder. See Keco Industries, Inc., 56 Comp. Gen. 878, 881-82 (1977), 77-2 CPD 98.

We will not request an agency report in this case because it is clear from Putnam's July 8 letter that both grounds of protest are without merit. Therefore, the protest is summarily denied.

A protest against the small business status of a bidder must be filed within the 5-day period under DAR § 1-703(b)(1), which provides that:

"* * * Any bidder, offeror, or other interested party may, in connection with a contract involving a small business set aside or otherwise involving small business preferential consideration, challenge the small business status of any bidder or offeror by sending or delivering a protest to the contracting officer responsible for the particular acquisition. * * * In order to apply to the acquisition in question, such protest must be filed with and delivered to the contracting officer prior to the close of business on the fifth day exclusive of Saturday, Sunday, and legal holidays after bid opening date for formally advertised and small business restricted advertised acquisitions. * * *"

Putnam's first ground of protest is that the contracting officer improperly determined that its protest was untimely because it was not filed within 5 working days of bid opening. Putnam contends it could not file within 5 days because Landau had concealed its supplier.

Apparently, the subject solicitation contained no prohibition against restricting the disclosure of suppliers. In the absence of such a provision, it is not improper for a bidder which certifies that its supplier will be a small business to conceal the identity of its supplier in the competitive atmosphere of DLA Defense Personnel Support Center procurements. See Uffner Textile Corporation, B-205050, December 4, 1981, 81-2 CPD 443, in which we denied a protest involving an awardee which restricted the disclosure of its subcontractor. See also Unit Portions Inc., B-202783, October 14, 1981, 81-2 CPD 308. Of course, whether the bidder complies with its certification is a matter of contract administration for the contracting agency.

Putnam did not file a protest against the small business status of Landau within the 5-day period. We find no basis for an exception to the timeliness requirement where the solicitation does not require that bidders be notified of their competitors' source of supply. See M & H Concrete Structures, Inc., supra, in which we denied a protest that the agency's failure to notify the third low bidder of disqualification of the low bidder for award and of the agency's intention to award to the second low bidder prevented the protester from objecting to the small business status of that bidder within the 5-day period since

DAR § 1-703(b)(1) specifically requires bidders to "challenge the small business status of any bidder or offeror" within the 5-day period.

Putnam contends that even if its protest was untimely, the contracting officer should have questioned Landau's size status under DAR § 1-703(b)(2). That regulation permits the contracting officer to question the size status of a bidder by filing a written protest with the SBA at any time.

The questioning of size status by a contracting officer under DAR § 1-703(b)(2) is a matter of discretion. Eller & Company, Inc., B-191986, June 16, 1978, 78-1 CPD 441; Evergreen Funeral Home, B-184149, November 6, 1975, 75-2 CPD 282. A contracting officer's exercise or nonexercise of discretion must be measured against a standard of reasonableness in the particular case. See Keco Industries, Inc., *supra*. Consistent with this standard, we have held the intent of DAR § 1-703(b)(2) is that if information is brought to the attention of a contracting officer which would reasonably impeach the self-certification of a bidder, the contracting officer must file a direct protest with the SBA in order to assure that the self-certification process is not being abused. Keco Industries, Inc., *supra*.

Although Putnam alleges the contracting officer should have questioned Landau's size status under DAR § 1-703(b)(2), it has neither alleged nor shown that the contracting officer was aware of information prior to award that would reasonably impeach Landau's self-certification. In the absence of such information (or a timely size status protest), a contracting officer may accept a small business size certificate at face value. Eller & Company, Inc., *supra*; Keco Industries, Inc., *supra*. Under these circumstances, the contracting officer's decision to refer Putnam's protest to SBA for purposes of future procurements, but not for the present procurement, will not be questioned by our Office. See Eller & Company, Inc., *supra*; Capital Fur Inc., B-187810, April 6, 1977, 77-1 CPD 237.

The protest is summarily denied.

for Harry R. Van Cleave
Comptroller General
of the United States