JCW1 PL-I

30368

DECISION

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

FILE: B-217264.2 **DATE:** February 5, 1985

MATTER OF: Ralph Construction, Inc.

DIGEST:

1. Determination of size status of a business for purposes of set-aside eligibility is a matter for decision by the Small Business Administration, and GAO will not consider a size status protest in the absence of a showing that the contracting officer has failed to follow regulations in referring the protest to the SBA.

2. Since GAO has no authority to order withholding of award pending determination of low bidder's small business size status by the SBA, protest requesting such relief is dismissed.

3. Protest requesting award of a contract under an advertised procurement to a woman-owned business on the basis of a "constructive" tie bid has no basis in law and is, therefore, summarily denied.

Ralph Construction, Inc. (Ralph), protests the award of a contract to Saxon, Inc., under invitation for bids No. DAKF24-85-B-0014, a small business set-aside, issued by the Army Contracting Division, Fort Polk, Louisiana, for family housing maintenance.

Ralph contends that Saxon, the apparent low bidder, does not qualify as a small business concern, on the basis of the number of Saxon's employees and the amount of its annual earnings. Ralph requests that the award be delayed until the issues raised by its protest are resolved.

The Small Business Administration (SBA) has conclusive authority to determine the size status of a business for purposes of eligibility for set-aside awards. 15 U.S.C. § 637(b)(6) (1982). Under the applicable regulations, a protest of a bidder's size status must be filed with the contracting officer, who is then to forward the matter to

031155

the SBA for resolution. Custodial Guidance Systems, Inc., B-213920, Dec. 28, 1983, 84-1 C.P.D. ¶ 36. Defense Acquisition Regulation (DAR) § 1-703, reprinted in 32 C.F.R. pts. 1-39 (1984); Federal Acquisition Regulation (FAR) § 19-302, 48 Fed. Reg. 42,102 (1983) (to be codified at 48 C.F.R. § 19-302). The General Accounting Office does not consider size status protests in the absence of a showing that the contracting officer has failed to follow the regulatory procedures for referring size status protests to the SBA. See 4 C.F.R. § 21.3(g)(2) (1984). Also, the General Accounting Office has no authority to order the withholding of an award. Biospherics, Inc., 63 Comp. Gen. 478 (1984), 84-2 C.P.D. ¶ 36. Accordingly, we will not consider this protest issue.

The protester also asserts that the solicitation contains a woman-owned business representation clause as provided by FAR § 52.219-3, and that it should receive the award since Ralph is a woman-owned business, as that term is defined in the regulations, and since its bid (which is $3,266.28 higher than Saxon's bid) is tantamount to a tie bid when the cost to the government for cancellation of the allegedly improper award to Saxon is taken into consideration. This argument is based on a statement allegedly made by the contracting officer that the woman-owned business representation is only relevant in the resolution of a tie bid.

It appears that the protester contemplates the existence of some form of a "constructive" tie bid as a basis for its contention that it should be given preference for the award. However, the regulations that apply to tie bids apply when the low bids received are "equal in all respects." See DAR § 2-407.6; FAR § 14.407-6. Regardless of what consideration the contracting agency gives to women-owned businesses, this is not a case of an equal low bid. Further, we are aware of no authority that provides for award preference on the basis that the offeror is a woman-owned business.

The protest is denied in part and dismissed in part.

for Seymour Efros
Comptroller General
of the United States