



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: DJW Services  
File: B-225587.2  
Date: September 29, 1987

### DIGEST

Contracting officer's award of a contract to the second low bidder following an initial determination by the Small Business Administration (SBA) that the low bidder was other than small, without waiting for the result of an appeal to the SBA's Office of Hearings and Appeals, was proper and did not constitute an abuse of the contracting officer's discretion even though the contracting officer was notified of the appeal prior to making the award.

### DECISION

DJW Services protests the award of a contract to Jantec, Inc., under invitation for bids (IFB) No. F64605-86-B-0112, issued by the Department of the Air Force as a total small business set-aside. The solicitation was for the operation of the Base Information Transfer System and Postal Service Center of Hickam Air Force Base, Hawaii. DJW protests that it was improper for the agency to award the contract while DJW was appealing a decision by the Small Business Administration (SBA) Regional Office that DJW was not a small business concern for purposes of this solicitation. The protester argues that in order to proceed with the award under these circumstances, the Air Force was required by regulation to show that the award was necessary to protect the public interest, and that the agency here did not satisfy this requirement because award to Jantec was at a higher cost to the government.

We deny the protest.

At bid opening, DJW's bid was third low. The first and second low bidders under the solicitation were ineligible for award for reasons unrelated to this protest. DJW's bid became the low bid, but the agency determined DJW to be nonresponsible based on a negative preaward survey and referred the matter to the SBA Regional Office for issuance

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of a certificate of competency (COC). In conjunction with the request for the COC, the Air Force expressed a concern that DJW might not meet the small business standard in the solicitation because of an alleged affiliation with another firm, and requested that the SBA perform a small business size determination. The SBA Regional Office found that the two firms were affiliated, and that DJW was large for purposes of this solicitation. On May 8, 1987, the SBA Regional Office therefore denied the request for a COC. On May 16, DJW filed an appeal with the SBA's Office of Hearings and Appeals; a copy of the appeal was sent to the contracting officer at that time. On June 5, while the appeal was pending, the contracting officer determined that it would not be in the public interest to delay the award further, and awarded the contract to Jantec. On July 1, 1987, the SBA determined that DJW was small.

Under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.302(h)(1) (1986), when a size status protest has been filed, a contracting officer may not make an award until the SBA Regional Office has issued a determination or until 10 working days after SBA's receipt of the protest, whichever occurs first. After the 10 days have expired, the contracting officer may--but is not required to--continue to withhold award. Id., § 19.302(h)(2). Although the regulations provide for an appeal from an SBA Regional Office's determination by any concern that has been adversely affected, there is no requirement that the contracting officer withhold award during the appeal period. Id., § 19.302(i); H. Angelo & Co., Inc., B-218573, May 9, 1985, 85-1 CPD ¶ 519. Although to make an award before the initial 10 days expire the contracting officer must make a finding that this must be done to protect the public interest, FAR 48 C.F.R. § 19.302(h)(1), there is no such requirement for justifying an award during the appeal period. JRR Construction Co., Inc., B-220592, Oct. 4, 1985, 85-2 CPD ¶ 383. Therefore, the protester's argument that the contracting officer's determination did not satisfy the public interest standard is irrelevant. Nevertheless, we have examined the circumstances prompting award notwithstanding the appeal and believe they justified the award. Bids had been opened on December 6, 1986, and it was not until 6 months later, June 5, 1987, that award was made. During the period between bid opening and award, the critical services were obtained on a month-to-month basis from the incumbent contractor and by reassigning agency personnel from their primary duties. It is reported that this method of acquiring the service was considered unsatisfactory as there were performance problems and security

violations. Thus, we believe the contracting officer's determination to proceed with the award was reasonable.

The protest is denied.

*for Seymour Spas*  
Harry R. Van Cleve  
General Counsel