



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Market & Johnson, Inc.--Reconsideration

File: B-228350.2

Date: November 3, 1987

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### DIGEST

1. Protest which could only be reasonably read as challenging small business size status of low bidder properly was dismissed as for review by the Small Business Administration (SBA). Although initial protest did not specifically dispute contracting officer's conclusion that size status protest filed with him was untimely, and General Accounting Office (GAO) therefore did not err in failing to resolve that issue, facts obtained from contracting agency indicate that the protester did not file a size status protest with the contracting officer within 5 days after bid opening as required by applicable regulations.
2. GAO jurisdiction to determine timeliness of small business size status protest does not confer authority to retain primary jurisdiction while referring matter to SBA for determination, because SBA has conclusive statutory authority to determine small business size status for federal procurement purposes.

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### DECISION

Market & Johnson, Inc. (M&J), requests reconsideration of our dismissal of its protest against the award of a contract to Elmstar Electric Corporation (Elmstar), under invitation for bids (IFB) No. 676-032, issued by the Veterans Administration (VA) for "modernization" of two buildings at the VA Medical Center, Tomah, Wisconsin.

We affirm our dismissal.

M&J submitted the second low bid in response to the IFB. In its original protest, M&J complained that the low bidder, Elmstar, did not qualify as a small business, in accordance with the Small Business Administration (SBA) regulations, because of Elmstar's alleged affiliation with a large business concern. We dismissed the protest on the basis that a challenge to size status of a particular firm is

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reviewed solely by the SBA. 15 U.S.C. § 637(b)(6) (1984); 4 C.F.R. § 21.3(f) (1987).

In its request for reconsideration, M&J maintains that, notwithstanding our lack of jurisdiction to consider the size status protest, we do have jurisdiction to determine whether the original size status protest filed with the VA was timely. M&J also urges us to retain "primary jurisdiction" if we find the protest timely, and to simply refer the size status issue to the SBA.

M&J's initial protest to our Office was almost wholly devoted to describing those affiliations and activities of Elmstar which should result in a determination that Elmstar does not qualify as a small business concern. We think the only reasonable reading of the protest is that it was a challenge to Elmstar's small business size status and, as such, was properly dismissed for the reason stated in our notice.

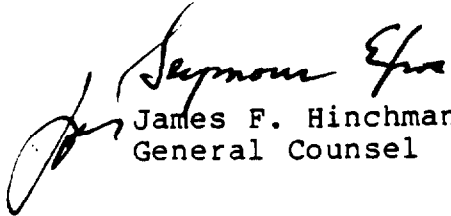
Whether the contracting officer properly concluded that the size status protest filed with him was untimely was not an issue raised in the initial protest. The only reference to that issue was through the fact that one of the five enclosures to the protest was a contracting officer's letter in which he asserted that M&J's size status protest was untimely filed. The protester apparently is of the belief that the enclosure of this letter was sufficient to present the timeliness issue for our consideration. It was not. Even now, the protester has not advanced any facts to suggest that the contracting officer's conclusion was wrong; M&J simply asserts that the timeliness of its size status protest is an issue which we should review.

Since our dismissal of the initial protest was appropriate, we do not believe that at this point it is incumbent upon us to decide the timeliness issue. We do note, however, that while we will not make or review small business size status determinations, we ordinarily will review the timeliness of size protests filed with a contracting officer. Putnam Mills Corporation, B-207973.2, Sept. 30, 1982, 82-2 C.P.D. ¶ 301. See also Barrier Construction Company, 65 Comp. Gen. 825 (1986), 86-2 C.P.D. ¶ 248; T.S. Head & Associates, Inc., B-220316, Sept. 30, 1985, 85-2 C.P.D. ¶ 368. To affect a specific solicitation, however, a protest concerning the small business size status of any offeror must be received by the contracting officer by the close of business of the 5th business day after bid opening. Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.302(d)(1) (1986); 13 C.F.R. § 121.9(a). We have been advised by the VA that bid opening was on August 11, 1987. Since M&J did not contact the VA until August 24, 1987, and the VA did not receive the

protest until August 25, 1987, it would appear that M&J's size status protest was untimely and that the VA acted correctly in forwarding M&J's protest to the SBA for its consideration in future solicitations. FAR, 48 C.F.R. § 19.302(j); 13 C.F.R. § 121.9(a).

Even were we to determine the timeliness issue, this would not confer on us the authority to retain jurisdiction over the size status protest. SBA has conclusive statutory authority to determine such matters. 15 U.S.C. § 637(b)(6); 4 C.F.R. § 21.3(f).

Accordingly, our dismissal of the prior protest is affirmed.

  
James F. Hinchman  
General Counsel