



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eastern Technologies, Incorporated
File: B-232198
Date: August 24, 1988

DIGEST

1. Protest concerning decision by Small Business Administration (SBA) that protester is not a small business will not be considered on the merits in view of SBA's conclusive statutory authority to determine size status matters.
2. There is no legal basis to object to contracting officer's decision to file a protest with the Small Business Administration challenging protester's size status based on issues raised in an untimely size status protest filed by another offeror.
3. Protester is not an interested party to challenge award to another offeror under solicitation set aside for small business where Small Business Administration determines that protester is not a small business and therefore would not be eligible for award even if its protest were upheld.
4. Protest based upon alleged improprieties apparent from the face of a solicitation is untimely where not filed until after due date for initial proposals.

DECISION

Eastern Technologies, Incorporated protests the award of a contract to Phillips Industrial Services Corporation under request for proposals (RFP) No. N00612-87-R-0108, issued by the Navy for sandblasting and painting services for ships and submarines at the Charleston Naval Shipyard. We dismiss the protest.

By letter dated March 11, 1988, the contracting officer determined that Eastern was the apparent low offeror under the RFP, a total small business set-aside, and advised the other offerors of their right to challenge Eastern's size status. Phillips then submitted a protest challenging

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Eastern's small business size status to the contracting officer, who forwarded it to the Small Business Administration (SBA). On May 2, SBA's Atlanta regional office issued a decision finding that Eastern is not a small business. Eastern appealed that decision to SBA's Office of Hearings and Appeals, which upheld the prior finding that Eastern is not a small business. Since SBA found that Phillips' protest was not timely filed with the contracting officer, however, the decision on Eastern's size status was held to apply prospectively only and not to the procurement at issue. See Federal Acquisition Regulation (FAR) § 19.302(d).

The contracting officer then filed her own protest challenging Eastern's size status and adopting the issues raised in Phillips' protest. (The contracting officer's protest was timely since a contracting officer may file a size status protest at any time. FAR § 19.302(d)(2).) SBA then upheld the contracting officer's protest on the grounds set out in its prior decision on Phillips' protest, and, because the contracting officer's protest was timely, applied its finding to the current procurement. Based on SBA's finding that Eastern is not a small business, the Navy awarded a contract under the RFP to Phillips, the offeror next in line for award.

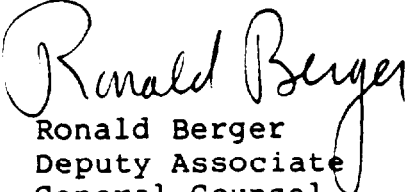
Eastern's principal complaints concern the size status protests filed with SBA by Phillips and the contracting officer. To the extent Eastern challenges SBA's finding that it is not a small business, the issue is not for our consideration. Under 15 U.S.C. § 637(b)(6) (1982), SBA has conclusive authority to determine matters of size status for federal procurement purposes. As a result, our Office will neither make nor review size status determinations. Bid Protest Regulations, 4 C.F.R. § 21.3(m)(2) (1988); Detroit Armor Corp.--Request for Reconsideration, B-227432.2, July 9, 1987, 87-2 CPD ¶ 25.

Eastern also challenges the timeliness of Phillips' size status protest and argues that the contracting officer acted improperly by filing her own size protest after SBA ruled on Phillips' protest. This contention is without merit. While, as SBA found, Phillips' protest was untimely, a contracting officer may file a size status protest at any time. FAR § 19.302(b) and (d)(2). SBA upheld Phillips' protest on the merits and did not apply its finding to the current procurement only because the protest was untimely. We see no basis to object to the contracting officer's decision to file her own protest on the same grounds as Phillips raised.

To the extent Eastern challenges the award to Phillips on other grounds, Eastern is not an interested party to raise these issues in view of SBA's finding that it is not a small business for purposes of this procurement and therefore not eligible for award even if its protest were upheld on these grounds. See 4 C.F.R. §§ 21.0(a), 21.1(a); Dragon Services, Inc., B-228912, Oct. 7, 1987, 87-2 CPD ¶ 344.

Finally, Eastern maintains that the RFP is defective in various respects, such as the failure to include the proper labor categories. These contentions concern alleged improprieties apparent from the face of the RFP; accordingly, any protest on these grounds had to be filed before the due date for initial proposals. 4 C.F.R. § 21.2(a)(1). Since the protest was not filed until after award was made, it clearly is untimely on these grounds.

The protest is dismissed.


Ronald Berger
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General Counsel