



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Valley Construction Company
File: B-234292
Date: February 8, 1989

DIGEST

Protest of agency's award of a contract while protest challenging the size status of the awardee was still pending is dismissed where the Small Business Administration had determined that the awardee is a small business concern for this procurement pursuant to a size challenge by another bidder.

DECISION

Valley Construction Company protests the award of a contract to ACC Construction Company under invitation for bids (IFB) No. DACA21-89-B-0061, a small business set-aside issued by the Army Corps of Engineers. Valley contends that it was improper for the Army to make award to ACC while Valley was appealing a decision by the Small Business Administration (SBA) regional office that ACC was a small business concern for purposes of the solicitation.

We dismiss the protest.

On the December 28, 1988, bid opening, Valley's bid was third low. Valley protested the size status of ACC and the second low bidder, Conner Harben Construction. The SBA determined on January 20, 1989, that Conner was other than small. The SBA had not ruled on Valley's protest of ACC, but determined on January 11, pursuant to a size protest by Conner, that ACC was a small business for purposes of this procurement. Valley appealed this decision on January 27. However, the Army had already awarded the contract to ACC on January 19.

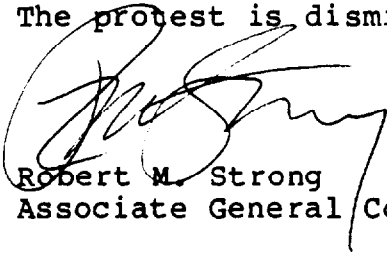
Valley argues that the Army should not have made the award while Valley's size protest of ACC was pending or while Valley's appeal is pending before the SBA's Office of Hearings and Appeals.

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Under the Federal Acquisition Regulation (FAR) § 19.302(h)(1) (FAC 84-12), when a size status protest has been filed, a contracting officer may not make an award until the SBA Regional Administrator has issued a determination or until 10 working days after SBA's receipt of the protest, whichever occurs first. The SBA acknowledged receipt of Valley's protest of ACC's size status by letter dated January 9; thus the Army made the award within the 10-working day period. Valley was not prejudiced, however, by the SBA's failure to expressly respond to its protest, even assuming this was violative of FAR § 19.302(h)(1), because the SBA had issued a determination that ACC was a small business, albeit in response to another firm's protest. Where the SBA determines that a firm is small for the purpose of a particular procurement, a protest to this office alleging procedural deficiencies in connection with the size status protest will be dismissed. Service Engineering Co., B-225623, Apr. 28, 1987, 87-1 CPD ¶ 442.

Moreover, although the regulations provide for an appeal from an SBA regional office's size determination by any concern that has been adversely affected, there is no requirement that the contracting officer withhold award during the appeal period. FAR § 19.302(i); DJW Services, B-225587.2, Sept. 29, 1987, 87-2 CPD ¶ 312. Further, a SBA ruling on the appeal does not affect the award of a contract if it is received by the contracting officer after award. FAR § 19.302(i).

The protest is dismissed.



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