



**Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Flexible Service Company

**File:** B-239037

**Date:** June 11, 1990

Steve Swanson, for the protester.  
Col. Herman A. Peguese, Department of the Air Force, for the agency.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq.,  
Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

1. Under General Accounting Office (GAO) Bid Protest Regulations, where a protest is initially filed with the contracting agency, a subsequent protest to GAO must be filed within 10 working days after the protester learns of the initial adverse agency action.
2. Protest of awardee's small business size determination by the Small Business Administration (SBA) is not for consideration by the General Accounting Office, since the SBA is vested with conclusive authority over this matter.

### **DECISION**

Flexible Service Company protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. F07603-90-B-6000, issued as a total small business set-aside by the Department of the Air Force for crating and moving services at Dover Air Force Base. The Air Force rejected Flexible's bid because it failed to comply with the minimum bid acceptance period required by the IFB.

We dismiss the protest.

The IFB, issued on November 15, 1989, contained Federal Acquisition Regulation (FAR) § 52.214-16, "Minimum Bid Acceptance Period," pursuant to which Flexible indicated its agreement to the required minimum bid acceptance period of 90 calendar days. However, Flexible also noted in item 12 of standard form 33, "Solicitation, Offer and Award," that it was offering a 60-day minimum bid acceptance period. At

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bid opening on December 21, three bids were received. On December 29, the contracting officer rejected Flexible's bid as nonresponsive because she determined that the two different minimum bid acceptance periods in Flexible's bid created an ambiguity that rendered its bid nonresponsive. On January 3, 1990, the contracting officer awarded the contract to Berry Van Lines, Inc., as the low responsive, responsible bidder.

On January 9, the Air Force received a protest from Flexible objecting to the rejection of its bid as nonresponsive, and challenging the validity of the awardee's parent company and affiliates representation.<sup>1/</sup> By letter dated January 18, received by Flexible on January 22, the Air Force denied the protest, and informed Flexible that, in accordance with FAR § 19.302(d)(1), its challenge to the awardee's small business size representation was untimely, since it was not received by the contracting officer within 5 business days after bid opening. The Air Force nevertheless forwarded Flexible's challenge to the awardee's small business size representation to the Small Business Administration (SBA). On February 28, SBA determined that Berry is a small business.

Flexible then filed its protest in our Office on March 27, objecting to the rejection of its bid as nonresponsive, and challenging the small business size determination.

Under our Bid Protest Regulations, a protest initially filed with the contracting agency is untimely if it is not filed with our Office within 10 working days after the protester has actual or constructive knowledge of initial adverse agency action. 4 C.F.R. § 21.2(a)(3) (1990). Flexible received the Air Force's letter denying its protest on January 22. Thus, Flexible had 10 working days from receipt of that letter to protest the rejection of its bid. Since Flexible did not file its protest in our Office until March 27, its protest on that ground is untimely.

Flexible also challenges award to Berry on the grounds that Berry is not a small business and deliberately misrepresented its status in its bid. Under our Regulations, a party must be "interested" before we will consider its

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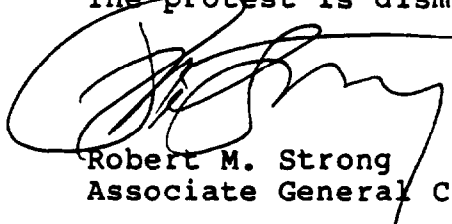
<sup>1/</sup> The IFB contained FAR § 52.214-8 "Parent Company and Identifying Data," which required bidders to self-certify whether they were owned or controlled by a parent company; and FAR § 52.214-17, "Affiliated Bidders," which required bidders to submit an affidavit with their bids stating whether they had any affiliates.

protest on the merits. A party generally will not be deemed interested where it would not be in line for award if its protest were sustained. East Indianapolis Venture, B-234433, Mar. 15, 1989, 89-1 CPD ¶ 276. Here, since Flexible's bid was rejected as nonresponsive, and the protest challenging the rejection is untimely, Flexible would not be in line for award even if its protest challenging award to Berry were sustained. Accordingly, Flexible is not an interested party to raise this issue.

In any event, to the extent Flexible challenges SBA's finding that Berry is a small business, the issue is not for our consideration. Under 15 U.S.C. § 637(b)(6) (1988), SBA has conclusive authority to determine matters of size status for federal procurement purposes. Consequently, our Office will neither make nor review size status determinations. 4 C.F.R. § 21.3(m)(2).

Flexible also contends that in the affidavit regarding its business affiliations submitted pursuant to FAR § 52.214-17, Berry misrepresented its status by failing to list all the companies with which it is affiliated; based on this allegedly deliberate misrepresentation, Flexible argues that Berry should not have received award. Berry's affidavit stated only that it was not affiliated with any other bidders under the IFB; this statement was accurate. While the affidavit did not also list Berry's affiliates which were not bidders under the IFB, there is no evidence that the failure to do so was the result of a deliberate misrepresentation by Berry of its status. Further, there is no indication that Berry's affidavit misled or otherwise affected SBA's consideration of Berry's size status; rather, as part of its review, SBA fully examined the issue of Berry's affiliations, identified numerous companies with which Berry is affiliated, and ultimately determined that Berry met the size status standard under the IFB even taking into account its affiliates.

The protest is dismissed.



Robert M. Strong  
Associate General Counsel