Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Wooten & Wilson Associates--Reconsideration

**File:** B-244527.3

**Date:** February 19, 1992

John E. Menechino, Jr., Esq., Smith, Currie & Hancock, for the protester.
Tania L. Calhoun, Mary G. Curcio, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

**DIGEST**

Request for reconsideration is denied where, despite the contracting officer's failure to follow regulation concerning referral of questions about an offeror's status as a small disadvantaged business to the Small Business Administration, the same contractor would have received the contract if the agency had followed proper procedure, and thus, the procedural irregularity did not result in prejudice.

**DECISION**

Wooten & Wilson Associates requests that we reconsider our November 7, 1991 dismissal of its protest of the small disadvantaged business (SDB) status of A.W. & Associates, Inc. The protest was in reference to invitation for bids (IFB) No. F08651-91-B-0003, a total SDB set-aside, issued by the Department of the Air Force for construction of laundry facilities at Elgin Air Force Base, Florida.

We deny the request for reconsideration.

The bid opening for this solicitation was March 26, 1991, and the initial award was made on May 9 to the low bidder, M.K. Consultants. Wooten & Wilson protested the award to the Air Force on May 16, challenging the SDB status of both M.K. and A.W., the second low bidder. Although the contracting officer found the protest to be untimely, she contacted the Small Business Administration (SBA) and determined that M.K. was not an SDB. The Air Force terminated the contract with M.K. on June 12.

The contracting officer also learned that SBA had determined in March that A.W. did not qualify as an SDB for the purposes of a different solicitation; SBA upheld this determination in April. On the basis of this information, the contracting officer concluded that A.W. was not an SDB eligible to receive the contract award. Subsequently, in a letter dated August 9, the Air Force notified Wooten & Wilson of its intent to award the contract to Wooten & Wilson, the third low bidder. On August 28, A.W. arguing that it was an SDB eligible to receive the award, protested the award decision to the Air Force. The Air Force forwarded the protest to SBA for an SDB status determination. On October 21, SBA determined that A.W. was an SDB. As a result, the Air Force notified Wooten & Wilson that it would terminate Wooten & Wilson's contract and reaward to A.W.

Wooten & Wilson protested to our Office on November 8. Wooten & Wilson's protest to our Office expressly challenged SBA's determination of A.W.'s SDB status. We dismissed the protest because SBA has issued final regulations which provide for SBA to make a final and conclusive determination concerning SDB status. See 13 C.F.R. § 124.601 et seq. (1991). Accordingly, we have taken the position that we generally will not review a protest challenging a firm's SDB eligibility. See Caltech Serv. Corp., B-234424, May 1, 1989, 89-1 CPD ¶ 414.

Wooten & Wilson now argues that the basis of its protest was not A.W.'s SDB status, but that the contracting officer did not follow the proper procedure in assessing A.W.'s SDB status. Specifically, Wooten & Wilson notes that under Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 219.302-70(b) (1991), the contracting officer can protest the status of an alleged SDB at any time. Wooten & Wilson therefore asserts that the contracting officer should have referred A.W.'s SDB status to SBA for a final determination after Wooten & Wilson filed its agency protest and she learned that A.W. previously had been judged to be a non-SDB.

Further, Wooten & Wilson asserts that under 13 C.F.R. § 124.609(h)(2), a concern that was determined to be a non-SDB by SBA can certify that it is an SDB if there have been changed conditions. In this situation, however, the firm must inform the contracting officer of the prior determination. Then, if the firm is in line for award, the contracting officer must treat the certification as a protest of the firm's disadvantaged status and forward it to SBA for resolution. Here, A.W. certified in its bid that it was an SDB. A.W., however, did not notify the Air Force that in March and April SBA determined that A.W. was a non-SDB. As a result, asserts Wooten & Wilson, the contracting

officer did not refer A.W.'s status for a determination by SBA. Wooten & Wilson concludes that since the contracting officer did not refer A.W.'s status for a determination by SBA earlier, the subsequent status determination in October should not be used to permit an award to A.W.

We find that the contracting officer did not properly follow the regulations governing the determination of SDB status. Specifically, A.W.'s SDB status should have been referred to SBA in May when the contracting officer learned that SBA already had determined that A.W. was not an SDB. This would have avoided the subsequent termination of the contract with Wooten & Wilson and the reaward to A.W. Further, A.W. should have informed the contracting officer of the prior SBA decision finding that A.W. was not an SDB. Notwithstanding these irregularities, however, there is no basis to sustain Wooten & Wilson's protest. The awardee, A.W., was ultimately found to be an SDB by SBA. If the contracting agency had referred A.W.'s status for a determination to SBA earlier, the same determination would have been made earlier. Thus the same result would have been reached, that is, A.W. would have received the award. While the earlier determination of A.W.'s status would have avoided the contract award to Wooten & Wilson and the subsequent termination of that contract, the fact is that A.W. was the proper awardee. In this regard, when the contracting officer learned that the SBA had earlier determined that A.W. was not an SDB, she had no authority to reject A.W.'s bid. Rather, she was required to forward the issue to the SBA for a final SDB status determination of A.W. See 13 C.F.R. § 124.601 et seq., supra; DFARS § 219.302-70(b). We also note that since Wooten & Wilson did not receive a notice to proceed on the contract and in fact did not proceed, Wooten & Wilson suffered no harm.

Accordingly, the request for reconsideration is denied.

Robert M. Strong
Associate General Counsel