



## Decision

**Matter of:** Steiner Construction Company, Inc.

**File:** B-421254.9; B-421254.10

**Date:** December 4, 2023

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Gabriel D. Soll, Esq., Department of Homeland Security, for the agency.

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### DIGEST

Protest challenging an agency's decision to continue with performance of a contract where the Small Business Administration (SBA) Area Office's initial determination that the awardee was an eligible small business for purposes of the procurement was subsequently vacated is dismissed for failure to state a valid basis of protest where the protest relies on an inapplicable Federal Acquisition Regulation (FAR) section and fails to demonstrate that the agency has violated a procurement statute or regulation.

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### DECISION

Steiner Construction Company, Inc., a small business of Bayou La Batre, Alabama, protests the continued performance of a contract awarded to Birdon America, Inc. under solicitation No. 70Z02321RPRT00300, issued as a small business set-aside by the Department of Homeland Security, United States Coast Guard (USCG) for the design and production of 27 vessels for its waterways commerce cutter program. The protester contends that USCG's decision to permit Birdon to continue performance of the contract is unreasonable and violates Federal Acquisition Regulation (FAR) requirements to either terminate the contract or not exercise further contract options.

We dismiss the protest because it is legally insufficient and fails to state a valid basis of protest.

The jurisdiction of our Office is established by the bid protest provisions of the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-3557. Our role in resolving bid protests is to ensure that the statutory requirements for full and open competition are met. *Cybermedia Techs., Inc.*, B-405511.3, Sept. 22, 2011, 2011 CPD ¶ 180 at 2. To achieve this end, our Bid Protest Regulations require that a protest include a detailed statement of the legal and factual grounds for the protest, and that the grounds stated be legally sufficient. 4 C.F.R. §§ 21.1(c)(4) and (f). These requirements contemplate that protesters will provide, at a minimum, either allegations or evidence sufficient, if uncontradicted, to establish the likelihood that the protester will prevail in its claim of improper agency action. *Midwest Tube Fabricators, Inc.*, B-407166, B-407167, Nov. 20, 2012, 2012 CPD ¶ 324 at 3.

Our Office previously denied Steiner's protest challenging the award of the contract to Birdon. See *Master Boat Builders, Inc.; Steiner Const. Co., Inc.*, B-421254 *et al.*, Feb. 8, 2023, 2023 CPD ¶ 56. In that protest, the record showed that on October 4, 2022, the Small Business Administration (SBA) Area Office issued a size determination finding that Birdon America, Inc. was an eligible small business and manufacturer for the procurement. *Id.* at 4 n.4. On October 5, 2022, USCG awarded the contract to Birdon. *Id.* at 4. Steiner appealed the SBA Area Office's size determination and on March 15, 2023, the SBA Office of Hearing and Appeals (OHA) vacated the decision and remanded it back to the SBA Area Office. Protest at 8. The SBA Area Office subsequently found Birdon not to be an eligible small business for this procurement because it could not be considered a manufacturer. See *Master Boat Builders, Inc.; Steiner Constr. Co., Inc.*, SBA No. SIZ-6209, Apr. 27, 2023, 2023 WL 3611731 at \*9 ("The question here is whether Birdon is eligible to be considered the manufacturer; and the answer is no because Birdon cannot establish that it will manufacture the cutters in its own facilities."). On appeal, the SBA OHA affirmed the Area Office's decision on September 8, 2023. Protest at 8.

The protester argues that termination of the contract awarded to Birdon is required because OHA vacated, rather than reversed, the SBA Area Office's determination of eligibility for award. Resp. to Req. for Dismissal at 3-7. Specifically, the protester argues that "[v]acating an order makes it a legal nullity," and consequently, "[i]n the absence of an SBA decision on Birdon's eligibility, the Agency's October 5, 2022[,] award to Birdon could only have been permissible with a written justification under FAR 19.302(g)(1) or (2)." *Id.* at 4, 5. In this regard, the protester argues the facts here are distinguishable from a prior decision by our Office finding that a contracting agency was not required to terminate a contract awarded following the SBA Area Office's finding of eligibility despite a subsequent reversal of that decision by OHA. Resp. to Req. for Dismissal at 5 n.1, citing *ONS21 Security Servs.*, B-403067, Sept. 16, 2010, 2010 CPD ¶ 218.

The agency requests that we dismiss the protest because, contrary to the protester's arguments, USCG's actions do not violate the FAR. The agency states: "USCG waited for a formal size determination from [SBA] before making the award," and that it did not execute any written determinations in accordance with FAR 19.302(g)(1) or (2)

“because USCG received a size determination from the Area Office before making award.” Req. for Dismissal at 4. The agency argues that the protester has misinterpreted the FAR and incorrectly seeks to impose inapplicable regulatory restrictions and requirements. *Id.* at 2-6. We agree with the agency.

As relevant to the allegations, with respect to size protests filed with the SBA and their impact on an agency’s award of a contract, the FAR states:

Award may be made to a protested concern after the SBA Area Office has determined that either the protested concern is an eligible small business or has dismissed all protests against it. If SBA’s Office of Hearings and Appeals (OHA) subsequently overturns the Area Office’s determination of eligibility or dismissal, and contract award has not been made, the contracting officer may apply the OHA decision to the procurement in question.

FAR 19.302(f)(2)-(3); see *also* 13 C.F.R. § 121.1009(g)(1). In circumstances where the agency determines it cannot wait until the SBA Area Office makes its determination, the FAR permits a contracting officer to proceed with award of a contract while a size protest is pending if to do so would be in the public interest:

After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until the SBA has made a size determination or 15 business days have expired since SBA’s receipt of a protest, whichever occurs first; however, award shall not be withheld when the contracting officer determines in writing that an award must be made to protect the public interest.

If SBA has not made a determination within 15 business days, or within any extension of time granted by the contracting officer, the contracting officer may award the contract after determining in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will be disadvantageous to the Government.

FAR 19.302(g)(1)-(2). The FAR further states:

If a post-award appeal is submitted to OHA within the time limits specified in Subpart C of 13 CFR 134, the contracting officer shall consider suspending contract performance until an SBA Judge decides the appeal. SBA will inform the contracting officer of its ruling on the appeal. SBA’s decision, if received before award, will apply to the pending acquisition. If the contracting officer has made a written determination in accordance with (g)(1) or (2) of this section, the contract has been awarded, the [SBA’s ruling] is received after award, and OHA finds the protested concern to be ineligible for award, the contracting officer shall terminate the contract unless termination is not in the best interests of the

Government, in keeping with the circumstances described in the written determination. However, the contracting officer shall not exercise any options or award further task or delivery orders.

FAR 19.302(h). Here, as noted, upon receipt of the SBA Area Office's initial determination that Birdon was an eligible small business for this procurement, USCG awarded the contract to Birdon. This action was permissible in accordance with FAR section 19.302(f)(2).

As noted above, the protester argues that termination of the contract awarded to Birdon is required because OHA vacated, rather than reversed, the SBA Area Office's determination of eligibility for award, and that in the absence of an SBA decision, the agency had to make a written justification under FAR section 19.302(g)(1) or (2) in order to make the award. Resp. to Req. for Dismissal at 3-7. The protester maintains that under FAR section 19.302(h), the agency therefore had to terminate the contract and is prohibited from exercising any options.

The protester's argument for making a distinction between OHA's vacation, rather than reversal, of an SBA Area Office's determination as requiring a written justification under FAR section 19.302(g)(1) or (2) to proceed with award is unsupported by any regulatory authority or case precedent. Here, as permitted by FAR section 19.302(f)(2), after the SBA Area Office's initial decision the agency made award to Birdon on October 5, 2022. USCG could not have known that OHA would subsequently vacate, on March 15, 2023, the SBA Area Office's October 4, 2022, determination that Birdon was an eligible small business and manufacturer and therefore would have had no reason to prepare a written justification to proceed with award.

Thus, contrary to the protester's argument, FAR section 19.302(h) is inapplicable here. As noted above, FAR section 19.302(h) applies "[i]f the contracting officer has made a written determination in accordance with (g)(1) or (2) of this section, the contract has been awarded, the [SBA's ruling] is received after award, and OHA finds the protested concern to be ineligible for award" and requires the contracting officer to terminate the contract. The award to Birdon was not made prior to the SBA Area Office's decision pursuant to a written determination by the contracting officer in accordance with FAR section 19.302(g)(1) or (2), *i.e.*, award must be made in order to protect the public interest because waiting until the SBA Area Office makes its determination will be disadvantageous to the Government. Rather, the agency permissibly made award after the SBA Area Office's initial determination that Birdon was an eligible small business and manufacturer and the relevant FAR sections relied on by the protester do not require the agency to terminate the contract because OHA subsequently vacated the initial determination. *ONS21 Security Servs., supra; Service Resources, Inc., B-240975, Sept. 5, 1990, 90-2 CPD ¶ 187.*

Accordingly, this protest relies on an inapplicable FAR section and does not include sufficient information to establish the likelihood that the agency in this case violated

applicable procurement laws or regulations, and thus fails to state a valid basis of protest. See 4 C.F.R. § 21.5(f).

The protest is dismissed.

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