

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

60253

FILE: B-184392

DATE: November 28, 1975

MATTER OF: Coronis Carpentry Co., Inc.

97644

DIGEST:

Award of small business set-aside contract 2 working days after bid opening to bidder subsequently determined to be other than small by SBA following size protest filed within 5 working days of bid opening was improper as contracting officer exceeded authority in that ASPR § 1-703(b)(5) precludes award prior to expiration of 5 working days after bid opening in absence of urgency determination. However, as contract has been completed no corrective action is possible.

On June 13, 1975, invitation for bids No. DAKF31-75-B-0096, a 100-percent small business set-aside, was issued by the United States Army, Fort Devens, Massachusetts, for the construction of a roof replacement for the United States Army Reserve Center, Waterbury, Connecticut. Bids were opened on June 26, 1975, and the low bid was submitted by New England Masonry Company (New England).

New England certified itself in its bid to be a small business concern. The contracting officer accepted this certification at face value in the absence of a size protest and on June 28, 1975, award was made to New England.

On June 30, 1975, Coronis Carpentry Co., Inc. (Coronis), protested the size status of New England to the contracting officer. In accordance with section 1-703(b)(1)(c) of the Armed Services Procurement Regulation (ASPR) (1974 ed.), the contracting officer forwarded the protest to the Small Business Administration for a size determination of New England. ASPR § 1-703(b)(1)(c) reads as follows:

"(c) Action on Protests Received After Award -
A protest received by a contracting officer after award of a contract shall be forwarded to the Small Business Administration district office serving the area in which the protested concern is located with

a notation thereon that award has been made. The protestant shall be notified that award has been made and that his protest has been forwarded to SBA for its consideration in future actions."

On July 23, 1975, SBA Regional Office, Boston, Massachusetts, determined New England to be other than a small business because it exceeded the size standard applicable to the instant procurement, i.e., average annual receipts of the preceding 3 fiscal years could not exceed \$1 million.

Coronis argues that its written protest was received within 5 days of bid opening and since the contracting officer did not make the required written finding that award must be made without delay to protect the public interest pursuant to ASPR § 1-703(b)(5) (1974 ed.), the contract could not be awarded prior to the expiration of the 5-day filing period, and therefore, its protest must be considered timely.

ASPR § 1-703(b)(5) reads, in part, as follows:

"(5) Award of Set-Aside Procurements.

Except as provided in 3-508.1 or when the contracting officer determines in writing that award must be made without delay to protect the public interest, award will not be made prior to (i) five working days after the bid opening date for procurements placed through small business restricted advertising * * *."

A review of the record before our Office confirms Coronis' contentions that the contracting officer did not make the written determination as required above prior to award.

Since ASPR § 1-703(b)(5) is specific and mandatory that, in the absence of an urgency determination "award will not be made" prior to 5 working days after bid opening, we find the contracting officer exceeded his authority in making an award prior to the

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expiration of the required period. Coronis Carpentry Co., Inc., B-184389, November 11, 1975, 55 Comp. Gen. _____. Further, the size protest by Coronis was made within a few days after bid opening and was sustained thereafter by SBA. Although the Army contends the size protest is untimely based upon ASPR § 1-703(b)(1)(c), we believe that provision reasonably contemplates a situation where the award has been made in accordance with, and not in disregard of, ASPR § 1-703(b)(5). Coronis, supra. In that regard, it is understood that the SBA considered the size protest to bear upon the immediate IFB rather than being restricted to future procurements.

As the contract with New England has been completed, our Office is unable to recommend any corrective action. However, we are advising the Secretary of the Army that steps should be taken to assure that ASPR § 1-703(b)(5) be complied with in the future to prevent a recurrence of this situation.


Acting Comptroller General
of the United States