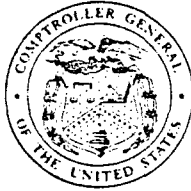


DECISION

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

60774

FILE: B-185028

DATE: April 19, 1976

MATTER OF: E.I.L. Instruments, Inc.

99047

DIGEST:

1. Where contracting officer forwards protest against low bidder's size status to SBA and makes contract award only after being notified of SBA decision and prior to notice of appeal, action is consistent with provisions of FPR which contemplate possibility of award between issuance of SBA decision and filing of appeal; further, action is not contrary to FPR § 1-2.407-8(b)(4), since SBA "resolved" matter with decision and contracting officer at that time knew nothing of intent by protester to protest classification and size standard applied to procurement.
2. Average annual receipts requirement for concern to be considered small business and Standard Industrial Classification to be applied to solicitation are not for GAO consideration, since conclusive authority over such questions is vested by statute in SBA which has promulgated regulations for resolution having force and effect of law.
3. Protest after bid opening against contracting officer's failure to designate applicable size standard and classification in invitation is untimely, since omission was apparent prior to bid opening; however, recommendation is made that in future designation be placed in invitation in compliance with SBA regulations.

Invitation for bids No. P-15028-5001-0 was issued by the Supply and Procurement Department of the United States Coast Guard Curtis Bay Yard for the furnishing of all labor and material necessary for the performance of maintenance, testing, and minor repairs to high and low voltage distribution equipment. The invitation called for contract completion 30 days after the notice to proceed. The invitation was in the standard form used for a construction contract, was set aside totally for small business, and contained the following Representation and Certification clause:

"HE IS , IS NOT , A SMALL BUSINESS CONCERN. (FOR THIS PURPOSE A SMALL BUSINESS CONCERN IS A BUSINESS CONCERN, INCLUDING ITS AFFILIATES, WHICH (a) IS INDEPENDENTLY OWNED AND OPERATED, (b) IS NOT DOMINANT IN THE FIELD OF OPERATION IN WHICH IT IS BIDDING ON GOVERNMENT CONTRACTS, AND (c) HAD AVERAGE ANNUAL RECEIPTS FOR THE PRECEDING 3 FISCAL YEARS NOT EXCEEDING \$7,500,000 IF BIDDING ON A CONSTRUCTION CONTRACT; NOT EXCEEDING \$1,000,000 OR \$2,000,000 DEPENDING UPON THE TYPE OF SPECIAL TRADE CONTRACTOR WHEN BIDDING ON A SPECIAL TRADE CONTRACT; \$5,000,000 IF BIDDING ON A DREDGING CONTRACT.) * * *"

Further, the notice of set-aside in the invitation stated:

"* * * IF THE REQUIREMENTS OF THE CONTRACTS ARE CLASSIFIED IN AN INDUSTRY SET FORTH IN THIS PARAGRAPH IT IS SMALL IF IT DOES NOT EXCEED THE SIZE STANDARD ESTABLISHED THEREIN FOR SUCH INDUSTRY * * *:"

Following the statement, there was a list of special trade contractors and the SIC (Standard Industrial Classification) numbers and annual sales size standards applicable. There was no designation in the invitation as to the specific classification that applied to the procurement.

After bid opening, the second low bidder protested to the contracting officer that the low bidder, E.I.L. Instruments, Inc. (E.I.L.), did not meet the small business requirements of the invitation. The contracting officer forwarded the protest to Region III of the Small Business Administration (SBA), advising concurrently that the SIC code for the procurement was 1731 (Electrical Work--Special Trade Contractors) and that the maximum size standard was \$2,000,000. The SBA determined that the contracting officer's classification of the work was correct and that E.I.L., who did not meet the \$2,000,000 requirement, was ineligible for award. After being informed of this determination on July 28, the contracting officer made award to the second low bidder on July 31, 1975. E.I.L. appealed the determination to the SBA. The appeal was dismissed as untimely, since E.I.L. had not protested the size requirement prior to bid opening as provided in the SBA regulations. The E.I.L. position was that the procurement was for a construction contract and that the \$7,500,000 limitation should, therefore, be applicable.

E.I.L. protested to our Office the failure of the contracting officer to suspend the procurement action in accordance with sections 1-1.703-2(e) and 1-2.407-8(b)(4) of the Federal Procurement Regulations (FPR) (1964 ed. amends. 134 and 68, respectively). It requested originally that the award be rescinded until the SBA ruled on its appeal. In view of the adverse action taken by the SBA, E.I.L. questioned the dismissal of the appeal as untimely on the basis that it could not appeal a matter not known before bid opening. E.I.L. noted that the SBA regulations require the contracting officer to set forth the classification and size standard in the invitation. E.I.L. continued to express doubt about the validity of the classification and standard assigned to the procurement.

The provisions in the FPR sections cited by the protester were not misapplied by the contracting officer. Section 1-1.703-2(e) provides that the contracting officer shall suspend the procurement action until, with exceptions, the SBA has been able to rule on a protest timely filed by a bidder or offeror against the small business status of another bidder or offeror. In this instance, the contracting officer did suspend the procurement action until advised by the SBA that E.I.L. did not qualify for award. Award to the second low bidder was made only after the SBA notification was received and prior to the notice of appeal. FPR § 1-1.703-2(e) envisions a procurement suspension while an SBA decision is pending, but the suspension does not necessarily continue after the decision is issued. FPR § 1-1.703.2(d) contemplates the possibility of an award between the issuance of the decision and the filing of an appeal. The section states:

"* * * If an award has been made prior to the time the contracting officer receives notice of the appeal, the contract awarded shall be presumed to be valid * * *."

Regarding FPR § 1-2.407-8(b)(4), that section provides that, where a protest is received prior to award, no award shall be made, subject to certain exceptions, prior to a resolution of the protest. Inasmuch as the protest against award to E.I.L. was "resolved" prior to the award by the SBA determination--in view of the FPR sections, supra, dealing with the type of protest in issue--and inasmuch as the contracting officer had no knowledge at that time regarding an appeal or protest, or intent to file, by E.I.L. against the classification and size standard, the contracting officer was not acting other than in accordance with the FPR in making award.

As regards E.I.L.'s doubt that the correct small business classification and standard were assigned to the procurement, we have held that the average annual receipts requirement for a concern to be considered small business and the SIC to be applied to a solicitation are not for consideration by our Office, since conclusive authority over such questions is vested by 15 U.S.C. 637(b)(6) in the SBA which has promulgated regulations for their resolution having the force and effect of law. Virginia Research Incorporated, B-181371, June 25, 1974, 74-1 CPD 344; National Electrical Contractors Association, B-181511, July 15, 1974, 74-2 CPD 29.

We agree that the contracting officer should have stated in the invitation which size standard and classification applied to the procurement, although this failure did not preclude any bidder from inquiring about that information. In this connection, the instructions to bidders, paragraph 1, stated:

"1. Explanations to Bidders. Any explanation desired by a bidder regarding the meaning or interpretation of the invitation for bids, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach bidders before the submission of their bids. Any interpretation made will be in the form of an amendment of the invitation for bids, drawings, specifications, etc., and will be furnished to all prospective bidders. * * * Oral explanations or instructions given before the award of the contract will not be binding."

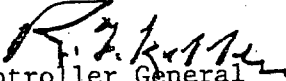
Further, as regards the failure by the contracting officer to follow the SBA regulations (13 CFR 121.3-8 (1975)) requiring the designation of the applicable classification and size standard, this failure was apparent prior to bid opening and, consequently, since the matter was not protested prior to bid opening any subsequent protest to our Office would be untimely and not for consideration. See § 20.2(b)(1), Bid Protest Procedures, 40 Fed. Reg. 17979 (1975).

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Notwithstanding the above, we are recommending to the Secretary of Transportation that appropriate steps be taken to ensure that in the future there is compliance with the SBA regulations pertaining to the designation in the invitation of the applicable size standard and classification. Such a course of action should reduce the possibility that an appeal from a classification and size standard will be untimely under existing SBA regulations.

The protest is denied.

Deputy


Comptroller General
of the United States