

DECISION



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

10,770

FILE: B-194318

DATE: July 17, 1979

MATTER OF: Comprehensive Health Services, Inc.

DLG02145

DIGEST:

1. Oral protest to agency is permissible if intent to protest is clear. Intent to protest withdrawal of small business set-aside is not evident by protester's statement prior to bid opening merely expressing displeasure with withdrawal. Therefore, protest filed with GAO after bid opening objecting to withdrawal of set-aside is untimely and not for consideration on the merits.
2. Contracting officer's withdrawal of small business set-aside without notifying Small Business Administration (SBA) liaison representative, thereby denying SBA its right to appeal withdrawal to head of procuring agency, was contrary to regulation and to purpose and intent of Small Business Act. GAO recommends post-award referral of set-aside withdrawal to SBA with view toward possible termination of contract for convenience of the Government and resolicitation.

Protest Concerning

Comprehensive Health Services, Inc. (Comprehensive), a small business, protests the withdrawal of a small business set-aside by the Department of Commerce. Comprehensive alleges that the Department should not have removed the set-aside restriction and did not comply with the regulatory provisions and Departmental guidelines applicable to such withdrawals.

Although we find the first allegation to be untimely, we sustain the protest on the second ground.

The record shows that invitation for bids (IFB) BA-79-SA-C-00150 was originally issued as a total small business set-aside, but that an IFB amendment was issued

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to remove the restriction after the ~~Department~~ received a protest from another firm. Comprehensive alleges that it then filed an oral protest with the agency prior to bid opening and that its subsequent protest to this Office, filed after bid opening, is consequently timely.

However, an oral protest -- permissible under Federal Procurement Regulations (FPR) 1-2.407-8(a) (1964 ed. amend. 139) -- must be stated in such a fashion that the intent to lodge a protest is clear. Joule Technical Corporation, B-192125, May 21, 1979, 58 Comp. Gen. ____, 79-1 CPD 364. Here, the contract specialist advises that after the amendment was issued Comprehensive's representative orally expressed his displeasure regarding the withdrawal of the small business set-aside. While the contract specialist acknowledges that the protester "complained" about the withdrawal, she did not conclude that Comprehensive was protesting this fact. According to the contract specialist, Comprehensive's representative ended this conversation by stating that the firm would submit a bid. The protester does not dispute this. In our opinion, an intent to protest is not evidenced by the mere expression of displeasure. For example, we have held that an offeror's mere assertion that a wage determination is incompatible with a solicitation does not reflect an intent to protest. Joule Technical Corporation, supra.

Under the circumstances, we believe Comprehensive's initial protest was that filed with GAO after bid opening. Since the removal of the set-aside by the IFB amendment relates to the solicitation itself, we view the protester's general objections to the removal as going to an alleged solicitation defect, which under our Bid Protest Procedures must be protested prior to bid opening. See 4 C.F.R. 20.2(b)(1) (1979). Since we cannot conclude that Comprehensive protested prior to bid opening, we find the protester's general objections to the set-aside withdrawal as untimely and therefore we will not consider them on the merits.

Comprehensive's second basis for protest, the Department's alleged failure to follow applicable regulations, is not related to a solicitation defect, however, and we view that portion of the protest as timely. We also find the record supports Comprehensive's allegations.

FPR 1-1.706-3(b) provides that A contracting officer shall initiate a withdrawal of a small business set-aside by giving notice to the Small Business Administration (SBA) representative. If that representative does not agree to the withdrawal, the matter ultimately may be appealed to the head of the agency. Such notice was not given to the SBA representative in this case.

The Small Business Act, 15 U.S.C. 631 et seq. (1976), reflects a national policy of furthering the interests of small business concerns and in awarding a fair proportion of procurement contracts to such concerns. The SBA, created by the Act, is charged with promoting policies and taking actions to assure that small businesses receive their fair share of Government procurement awards. To carry out this responsibility, SBA assigns representatives to procurement activities. These representatives are expected to screen agency decisions not to set aside procurements for small business and to process appeals to the agency head if SBA does not concur with negative decisions. See FPR 1-1.706-1, 1-1.706-2, and 1-1.706.3.

Those FPR sections, envisioning SBA participation in the set-aside decision process, implement the Small Business Act provision which authorizes the SBA to appeal to the procuring agency head a set-aside matter on which there is disagreement. See 15 U.S.C. § 644. Obviously, if the SBA representative is not properly notified of set-aside decisions, the SBA is denied the right to appeal in contravention of the statute. See 53 Comp. Gen. 58, 60 (1973). Here we think it is clear that the Department's failure to notify the SBA liaison representative of the set-aside withdrawal denied SBA that right and was inconsistent with the purpose and intent of the Act.

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 We are recommending that the contracting officer immediately refer the case to the SBA liaison representative so that he may pursue the matter as contemplated by the FPR. If a final determination is made that the set-aside should not have been withdrawn, the contract awarded to another firm (a large business) should be terminated for the convenience of the Government and the requirement resolicited as a set-aside.

Federal Procurement Regulations.

SEN 00300
This decision contains a recommendation for corrective action to be taken. Therefore, we are furnishing *SEN 0660* copies to the Senate Committees on Governmental Affairs and Appropriations and the *HSE 07500* House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

R. J. K. H.
Deputy Comptroller General
of the United States