

17716

GAO

United States General Accounting Office
Washington, DC 20548

Office of
General Counsel

In Reply Refer to: B-202345

[Protest of GSA Contract Award]

April 7, 1981

The Honorable Carl Levin^M
United States Senate

Dear Senator Levin:

This is in response to your inquiry concerning the complaint of Mr. James Henry of Town Center Security Corporation in regard to the award of a contract to Per Mar, Inc. (Per Mar), under solicitation No. GS-05B-42074 issued by the General Services Administration (GSA) for security services at GSA facilities in the Detroit area.

Mr. Henry alleges that Per Mar, a large business concern, was improperly awarded the referenced contract, which was a small business set-aside and requests that the contract be terminated and award made to his company, which was the next low eligible bidder. Mr. Henry asserts that Per Mar misrepresented itself as a small business for the purposes of this procurement, and that the contracting officer should have ascertained that Per Mar had so misrepresented itself.

The solicitation in question had an April 30, 1980, bid opening date. The contract was awarded to Per Mar on June 27, 1980, and on July 31, 1980, Mr. Henry first contacted the contracting officer to allege that Per Mar was not a small business. The contracting officer advised Mr. Henry at that time that while the size status protest was untimely and was made after award, and thus could not have any effect on the procurement in question, GSA would request a determination from the Small Business Administration (SBA) regarding Per Mar's size status.

By letter dated September 16, 1980, the SBA Kansas City regional office determined Per Mar to be other than a small business. Per Mar filed an appeal with the SBA Size Appeals Board, which apparently rendered



016492

a final determination dismissing the appeal and sustaining the finding that Per Mar was not a small business.

GSA has declined to terminate the contract with Per Mar, apparently on the grounds that under Federal Procurement Regulations (FPR) § 1-1.703-2(d) (1964 ed. amend. 134), it is not obligated to do so in the present circumstances, and the SBA size determination need only be considered for purposes of future procurements. While GSA initially indicated that it would review its position after the final determination by the SBA Size Appeals Board, we have been informally advised by GSA that it believes the award was valid and does not propose to take any termination action.

With respect to GSA's decision not to terminate Per Mar's contract, GAO generally views the determination whether a contract should be terminated for the convenience of the Government as an administrative decision which does not rest with our Office. However, it would be appropriate for our Office to review the propriety of the procedures leading to the award of the contract to Per Mar. Service Industries, Inc. et al., 55 Comp. Gen. 502, 505 (1975), 75-2 CPD 345 (copy enclosed).

Under FPR § 1-1.703-1 (1964 ed. amend. 106), a contracting officer is generally required to accept at face value for the particular procurement involved a certification by the bidder that it is a small business concern unless a challenge is received from another bidder concerning the size status of the apparently successful bidder or offeror, or the contracting officer has cause to question the veracity of a self-certification and submits the question to the SBA for determination. Under FPR § 1-1.703-2 (1964 ed. amend. 134), a size protest by a bidder or offeror, in order to apply to the procurement in question, must be submitted to the contracting officer within 5 working days after bid opening.

Under 15 U.S.C. § 637(b) (1976), the SBA is empowered to conclusively determine matters of small business size status for Federal procurement and sales purposes. A & R Window Cleaning & Janitorial Services

Inc., B-197612, March 28, 1980, 80-1 CPD 231 (copy enclosed). In this case, the SBA has rendered a final determination that Per Mar is not a small business. However, under FPR § 1-1.703-2(b)(1), supra, this determination would have been given effect with respect to the procurement at issue only if the size status protest by Town Center Security Corporation had been filed within 5 working days of the bid opening--which it was not. Thus, under the circumstances, GSA is correct in its view that the SBA decision may be afforded prospective effect only and does not mandate termination of Per Mar's existing contract. See R. E. Brown Co., Inc., B-193672, August 29, 1979, 79-2 CPD 164; Superior Asphalt Concrete Company, B-184337, December 5, 1975, 75-2 CPD 372 (copies enclosed).

We note that GSA has informally advised our Office that, because of the SBA size determination, it will not exercise its renewal options with Per Mar under this contract.

You also inquire as to what other options are available to Mr. Henry. We have been informally advised by the GSA Inspector-General's Office that it has an open investigation pending on this case. Also, in view of the fact that Mr. Henry asserts that the person who signed Per Mar's bid fraudulently misrepresented that Per Mar was a small business for the procurement, constituting a violation of 18 U.S.C. § 1001 (1976), it may be appropriate for Mr. Henry to request the Department of Justice to investigate the matter.

We hope that this answers your questions.

Sincerely yours,

Harry R. Van Cleve

Harry R. Van Cleve
Acting General Counsel

Enclosures - 4