

DECISION

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

FILE: B-184389

DATE: November 11, 1975
60134

MATTER OF: Coronis Carpentry Co., Inc.

*97764***DIGEST:**

LM107121

1. Where small business size protest is received 1-1/2 hours after award made on bid opening date, last day of fiscal year, termination of contract is recommended, since SBA subsequently sustained protest; contracting officer has indicated that procurement would have been referred to SBA under standard operating procedure if received before award; and contracting officer exceeded authority in that ASPR § 1-703(b)(5) precludes small business set-aside award prior to expiration of 5 working days after bid opening in absence of urgency determination.
2. Bid which contained \$3,000 certified check, instead of 20-percent bid guaranty of \$106,092 bid, was properly rejected, since failure to submit sufficient bid bond renders bid nonresponsive.

Coronis Carpentry Co., Inc., has protested the award of a contract under invitation for bids (IFB) No. DAKE31-75-B-0091 by the United States Army, Fort Devens, Massachusetts, for the installation of vinyl asbestos flooring in 41 buildings. The IFB was a 100-percent small business set-aside and Coronis contends that the award was made to other than a small business and that it is the low responsive, responsible bidder.

The bid opening was June 30, 1975, at 2:30 p.m. At that time, the following bids were opened:

Mari & Sons Flooring Co.	\$102,891
Cut-Rate Floor Covering, Inc.	106,092
H.F.M. Construction Corporation	112,742
Coronis Carpentry Co.	148,484
Bromley Contracting Co., Inc.	198,843
Thomas Construction Corp.	205,372

At 4:15 p.m. on June 30, 1975, award was made to Mari. At 5:47 p.m. on the same day, Coronis protested the size status of Mari and H.F.M. to the contracting officer. The contracting officer

treated the protest as one falling under the provisions of the Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(c) (1974 ed.) and handled it accordingly. 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, the SBA Regional Office, Boston, Massachusetts, found that Mari was "other than a small business" because it had failed to respond to the request for information from SBA and to establish itself as a small business.

Coronis has filed Civil Action No. 75-3357-F in the United States District Court, District of Massachusetts, against the Department of the Army and the three low bidders seeking a temporary restraining order and preliminary injunction against further performance under the contract. We have been advised by the Army that as of October 24, 1975, the installation of flooring had been completed by Mari in 22 buildings and was partially finished in 3 buildings. On that date, the court issued a preliminary injunction enjoining Mari from starting work in any more buildings, but allowing it to finish in those buildings where the work has commenced.

The court noted in its order that a protest currently was before our Office and stated that our decision on the protest would be accorded considerable weight in the ultimate disposition of the case. Ordinarily, our Office will not render a decision on the merits of a protest where the matter is before a court of competent jurisdiction. However, this practice is subject to the exception that we will render a decision where the court expresses an interest in receiving our decision. 52 Comp. Gen. 706 (1973) and Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44. Therefore, we will consider the protest on the merits.

Initially, Coronis protests the decision of the contracting officer that its size protest against Mari was untimely. ASPR § 1-703(b)(1) states that any bidder may question the small business status of the apparently successful bidder by filing a written protest with the contracting officer within 5 working days following bid opening. Coronis contends that it filed an oral size protest with the contracting officer at bid opening and that this protest was followed by the above-mentioned written protest received an hour and a half after the award to Mari. The filing of the oral protest is disputed by the contracting officer. However, this factual disagreement need not be resolved because even if Coronis did file an oral protest, it is without effect because ASPR § 1-703(b)(1) requires that the protest be in writing. E. H. Morrill Company, B-181778, October 17, 1974, 74-2 CPD 213.

The above notwithstanding, Coronis further argues that its written protest was received within 5 days of bid opening and as the contracting officer did not make the required written finding that award must be made without delay to protect the public interest under 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 shows that the contracting officer did not make the written determination as required above at the time of award.

While the Army has stated, in its report to our Office on the protest, that the award had to be made without delay to protect the public interest in order to avoid losing the fiscal year funds involved, the contracting officer's report indicates that if the size protest had been received before award no urgency determination would have been made. In that regard, the contracting officer's report stated, "If such a [size standard] protest had been received, the Procurement Division would have followed its standard operating procedure of referring the procurement to the Small Business Administration." This statement, we believe, negates the claim of urgency.

As 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, the contracting officer exceeded his authority in making an award prior to the expiration of the required period. Further, the size protest by Coronis was made within a few hours 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). 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. Accordingly, it is recommended that the contract with Mari be terminated.

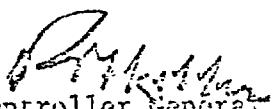
Another point of protest raised by Coronis is the nonresponsiveness of the \$106,092 bid of Cut-Rate, the second low bidder. The IFB in paragraph 13 required that a bid bond of 20 percent of the bid price or \$3,000,000, whichever was less, be submitted with the bid. Twenty percent of the Cut-Rate bid is \$21,218.40. Cut-Rate submitted a \$3,000 certified check with the bid because it claims that it misread the \$3,000,000 figure as \$3,000. While the submission of the \$3,000 check may have been caused by an inadvertent misreading of the IFB, there is still for application the principle that the failure to comply with the bid guaranty provisions requires the rejection of the bid as nonresponsive and the failure may not be waived as a minor informality. E. Sprague, Batavia, Inc., B-183062, April 2, 1975, 75-1 CPD 194.

Finally, as regards the third low bidder, H.F.M. Construction Corporation, Coronis filed a size protest against that firm with the contracting officer at the same time that the size protest against

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Mari was filed. On July 23, 1975, the SBA Boston Regional Office ruled that H.F.M. was other than small for the purposes of this procurement for failing to submit information necessary to establish its small business status. While subsequently, on August 25, 1975, SBA ruled that H.F.M. was a small business based on information the firm submitted after the July 23 determination, this ruling specifically stated that it was for use in future procurements and did not rescind the prior determination under IFB DAKF31-75-B-0091. Therefore, H.F.M. is ineligible for award under this solicitation.

Since Coronis would be next in line for award, our Office would have no objection if it is awarded the remaining requirements under the solicitation provided its bid is otherwise acceptable.


Deputy Comptroller General
of the United States