



Comptroller General
of the United States

Washington, D.C. 20548

Moe 14720

Decision

Matter of: Cleveland Telecommunications Corporation

File: B-247964.3

Date: July 23, 1992

Michael Waller and David J. Williams for the protester.
Darleen A. Druyan and Paul Brundage, Esq., National
Aeronautics and Space Administration, for the agency.
Behn Miller Moe, Esq., Office of the General Counsel,
participated in the preparation of the decision.

DIGEST

Protest challenging agency's selection of a Standard
Industrial Classification code size standard is dismissed
where protest was filed after agency's award decision;
protests against apparent solicitation improprieties must be
filed prior to the time set for receipt of proposals.

DECISION

Cleveland Telecommunications Corporation (CTC) protests the
award of a contract to Ozanne, Inc., under request for
proposals (RFP) No. 3-445708, issued by the National
Aeronautics and Space Administration (NASA) for various
services, including road and grounds maintenance, at the
NASA Lewis Research Center in Cleveland, Ohio. The procure-
ment was conducted competitively pursuant to section 8(a) of
the Small Business Act, 15 U.S.C. § 637(a) (1988).¹ In its
protest, CTC contends that NASA assigned an improper size
standard to this procurement in an effort to steer the
contract award to Ozanne, which--according to CTC--is not
eligible to compete under the correct size standard.

We dismiss the protest.

¹Section 8(a) of the Small Business Act authorizes the Small
Business Administration (SBA) to enter into contracts with
government agencies and to arrange for performance through
subcontracts with socially and economically disadvantaged
small business concerns. See Federal Acquisition Regulation
(FAR) § 19.804; 13 C.F.R. § 124.311 (1992). Under certain
circumstances, an acquisition under the 8(a) program is to
be awarded on the basis of competition among eligible 8(a)
firms. See FAR § 19.805.

By letter dated July 26, 1991, NASA offered this requirement to SBA for competition under the 8(a) program. See FAR § 19.803(c). SBA accepted the requirement into the 8(a) program on August 1. The RFP was issued on October 21, and identified Standard Industrial Classification (SIC) code 8744 as the designated SIC code for this requirement; as issued, the solicitation stated that the size standard for this SIC code "is [not applicable]." On October 22, the agency issued a "Purchase Source List" which modified the RFP by advising all offerors that the applicable size standard for this procurement was \$13.5 million.

By the November 29 closing date, four proposals were received; after reviewing each offeror's proposal, the Source Selection Evaluation Committee selected Ozanne for contract award. By letter dated March 26, 1992--1 day after being notified by the agency of Ozanne's selection--CTC filed this protest with our Office. As explained below, we find the protest to be untimely.

The government uses a classification system, published in the SIC Manual, in order to determine what size firms will qualify as small businesses for a particular procurement.² The SIC Manual classifies and defines activities by industry categories and indicates either a maximum number of employees or annual receipts allowed for a concern to be considered small within that particular industry; the industry size standards are also set out in FAR § 19.102(g). In this case, the SIC code selected (8744) lists the following two size options:

	<u>in millions</u>
Facilities Support Management Services	\$ 3.5
Base Maintenance	13.5

According to the FAR, a procurement is to be classified under the Facilities Support Management Services \$3.5 million size standard where the solicitation calls for the

²Sections 3(a) and 5(b)(6) of the Small Business Act, 15 U.S.C. §§ 632(a) and 634(b)(6), authorize SBA to determine which business enterprises are to be designated "small business concerns" within any industry. The authority to set size standards (i.e., the size specification of "small"), and the authority to determine which concerns fall within these standards rests exclusively with SBA. 13 C.F.R. § 121.201(a). Our Office will only review protests against an allegedly improper SIC code designation where the protesting party presents convincing evidence that the SIC code was selected in bad faith. See Tri-Way Sec. & Escort Serv., Inc.--Recon., B-238115.2, Apr. 10, 1990, 90-1 CPD ¶ 380.

acquisition of three or more personnel services, such as secretarial services, typists, and financial management. Alternatively, if the procurement calls for the acquisition of three or more separate services or special trade construction related activities, (i.e., custodial services, fire prevention, and grounds maintenance), then the requirement is to be classified under the Base Maintenance \$13.5 million size standard. Because this RFP calls for the acquisition of custodial maintenance, roads maintenance, and grounds maintenance, NASA selected the Base Maintenance \$13.5 million size standard for this procurement.

As stated above, although initial proposals were due on November 29, 1991, CTC did not file its protest until March 26, 1992, after being notified that award had been made to Ozanne. In its initial filing, CTC stated:

"On March 12, in going through the [FAR] . . . we discovered the wrong size standard had been assigned, and that the applicable size standard for this procurement is \$3.5 million and not \$13.5 million . . .

We proceeded to discuss this matter, in depth, with SBA officials."

Our Bid Protest Regulations require protests against apparent solicitation improprieties--such as this allegedly incorrect \$13.5 million size standard--to be filed prior to the time set for receipt of proposals. 4 C.F.R. § 21.2(a)(1) (1992). The purpose of this timeliness rule is to enable the procuring agency or our Office to decide an issue while it is still most practicable to take effective action against such defects. See Hersha Enters. Ltd., t/a Quality Inn - Riverfront, B-244863, July 25, 1991, 91-2 CPD ¶ 93.

In its comments on the agency report, CTC argues that its protest to this Office is timely even though it was not filed until almost 4 months after initial proposals were due because the allegedly incorrect size standard was not apparent from the RFP as originally issued; in this regard, CTC contends that it never received a copy of the October 22 purchase source list which identified the designated size standard. According to its comments, CTC did not receive the purchase source list until an SBA official facsimiled this document to CTC on March 16, 1992.³

³In its initial protest filing, CTC stated that it was orally advised of the \$13.5 million size standard on March 12 during a conversation with an SBA official which took place after CTC's "discovery" that day that the

We find it difficult to reconcile the protester's statements that (1) on March 12, it concluded that the incorrect size standard had been applied, yet (2) it was unaware of the size standard assigned until it received a facsimile copy of the purchase source list from SBA on March 16; that is, we fail to see how CTC concluded, on March 12, that the incorrect size standard had been assigned, without knowing what size standard had been selected. Even without regard to when CTC became aware that a size standard of \$13.5 million had been assigned, however, the protest nevertheless is untimely.

CTC's claim is based solely on the agency's use of a size standard which invited a larger field of competition; in arguing that the \$3.5 million size standard should have been applied, CTC essentially contends that the field of 8(a) competition for this procurement should have been restricted to those firms meeting the \$3.5 million size limit. As noted above, SIC code 8744 and its two corresponding size standards is published in the FAR; CTC thus was on constructive notice of this provision because it is published in the Federal Register and in the Code of Federal Regulations. See I T Roads, Inc., B-244357, June 20, 1991, 91-1 CPD ¶ 587; Questek, Inc., B-232290, Aug. 19, 1988, 88-2 CPD ¶ 166. If in fact CTC did not receive the purchase source list, and therefore--in reliance on the original RFP clause--presumed that no size standard limit applied to this procurement, CTC knew or should have known from the original RFP--and thus prior to the November 29 closing date--that the agency had assigned no size standard, and accordingly, a firm whose size was in excess of the \$3.5 million size standard set forth in the FAR would be eligible to compete for this award.

The time limits set out in our Bid Protest Regulations reflect our attempt to balance what we recognize are often conflicting considerations: resolving bid protests expeditiously without unduly disrupting or delaying the procurement process, and affording protesters a fair opportunity to present their cases. Bollinger Machine Shop & Shipyard, Inc.--Recon., B-245702.2, Jan. 16, 1992, 92-1 CPD ¶ 87. To that end, we require that allegations of procurement irregularities must be raised when corrective action, if necessary, is most practicable and thus least burdensome on the conduct of the procurement. Id. Here, the record demonstrates that CTC knew or should have known well before the solicitation's closing date that, at a minimum, competition

incorrect size standard had been applied. However, in its comments on the agency report, CTC states "emphatically that until SBA facsimiled a copy of [the purchase source list, CTC] had no evidence of the size standard."

under this procurement could include 8(a) firms whose size exceeded the smaller \$3.5 million limit set forth in the FAR; since CTC did not protest the agency's failure to designate this procurement under that size standard until almost 4 months after the solicitation's November 29 closing date, its protest is untimely.⁴

In its comments on the agency report, CTC for the first time challenges the agency's technical evaluation of its proposal. Since this ground of protest was not raised within 10 days of March 11, when the protester states that it was notified that its proposal was rejected, and in any event was raised in a piecemeal fashion, it is untimely. See 4 C.F.R. § 21.2(a)(2); Star Brite Constr. Co., Inc., B-241741, Feb. 1, 1991, 91-1 CPD ¶ 105.

The protest is dismissed.

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⁴In any event, our review of the solicitation's statement of work clearly indicates that at least three separate maintenance tasks are being procured under the instant solicitation; specifically, the successful awardee is required to (1) provide custodial maintenance services for 2 million square feet of building space; (2) provide roads and grounds maintenance for 55 parking lots; and (3) provide landscaping maintenance for 83 acres of lawn. Moreover, in response to a March 16 inquiry from CTC, SBA officials examined the instant solicitation and determined--by letter dated April 7--that the \$13.5 million size standard classification for this procurement is appropriate.