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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Planned Systems International, Inc.

**File:** B-292319.7

**Date:** February 24, 2004

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Jonathan D. Shaffer, Esq., Smith Pachter McWhorter & Allen, for the protester.  
Robert K. Tompkins, Esq., Patton Boggs, for Advanced Management Technology, Inc., an intervenor.

David T. Truong, Esq., National Science Foundation, and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Mary G. Curcio, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Award of delivery order under small business set-aside procurement was legally unobjectionable—despite Small Business Administration’s (SBA) determination in response to timely-filed size protest that awardee was not a small business concern—where agency delayed the award as required by the Federal Acquisition Regulation, and award was made before SBA’s determination was finally issued.

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## **DECISION**

Planned Systems International, Inc. (PSI) protests the award of a delivery order to Advanced Management Technology, Inc. (AMTI) under request for quotations (RFQ) No. DACS-03-0032, issued by the National Science Foundation (NSF) for information technology (IT) services. PSI argues that AMTI is ineligible for award because the Small Business Administration (SBA) determined that AMTI was other than a small business for purposes of this procurement.

We deny the protest.

NSF conducted the procurement using the General Services Administration (GSA) Federal Supply Schedule (FSS), and limited the competition to small businesses with a contract under Schedule 70, Special Item Number 132-51. Following the submission and evaluation of quotations, on July 25, 2003, NSF selected AMTI for award and notified PSI of the award decision. On July 30, PSI filed a size status protest with NSF, arguing that AMTI was not a small business, and therefore was

ineligible for award. PSI also filed protests against the award decision with our Office on August 1, August 28, and September 15 (B-292319.3, B-292319.4, B-292319.5). Actual award to AMTI was stayed pending our decision on the matter. On August 20, NSF denied PSI's size status protest based on AMTI's self-certification as a small disadvantaged business concern. However, since SBA has conclusive authority to determine small business size status, on August 26 NSF forwarded the size status protest to SBA.

On September 12, SBA sent NSF an e-mail requesting additional information. In that e-mail, SBA also indicated that it would require at least 10 additional days to decide the protest. On October 30, we issued a decision denying PSI's protests (Planned Sys. Int'l, Inc., B-292319.3 et al., Oct. 30, 2003, 2003 CPD ¶ 198). Thus, as of that date, the stay of award was lifted, and on October 31 NSF issued a delivery order to AMTI. Thereafter, on November 10, NSF received a copy of a November 6 SBA determination that AMTI was other than a small business. Agency Report (AR) at 5. NSF has declined to cancel AMTI's delivery order.

Noting that SBA has exclusive authority to determine size status, PSI asserts that, since it timely filed its size protest and SBA has determined that AMTI is not a small business for this procurement, the agency is required to cancel AMTI's delivery order and make award to PSI.

We find that the award to AMTI was legally unobjectionable. The Federal Acquisition Regulation (FAR), the principal regulation governing federal procurements, provides as follows regarding situations where a protest challenging the proposed awardee's size status has been filed:

After receiving a protest involving an offeror being considered for award, the contracting officer shall not award the contract until (i) the SBA has made a size determination or (ii) 10 business days have expired since SBA's receipt of a protest, whichever occurs first . . . .

FAR § 19.302(h)(1). While SBA's regulations provide that a size determination based on a timely filed size status protest applies to the procurement in question, 13 C.F.R. § 121.1004 (2003), those regulations also recognize the 10-day period provided for in the FAR, stating that "SBA will make a formal size determination within 10 working days, if possible." 13 C.F.R. § 121.1009.

PSI's timely protest of AMTI's size status was received in the appropriate office at SBA on August 28. Thus, according to its own regulations, if possible, SBA was to render a decision on the size protest within 10 business days thereafter, that is, by September 12; SBA's subsequent request to NSF that this time be extended 10 days moved the due date for SBA's decision to September 24. SBA did not issue the size determination by the September 24 due date. Indeed, SBA did not issue its decision until November 6. This was inconsistent with SBA's regulations; there is no indication--and SBA does not assert--that it was not possible to issue the

determination by September 24. NSF did not make award until more than 1 month after the size determination due date, on October 31, the day after our decision on PSI's protest was issued and the stay of award was lifted. Under these circumstances, since NSF delayed the award as required by the FAR, and SBA had not issued the size status determination as of the award date, the award to AMTI was proper and the delivery order need not be canceled. See Systems Research and Applications Corp.; Infotec Dev., Inc., B-270708 et al., Apr. 15, 1996, 96-1 CPD ¶ 186 at 6; Priscidon Enters., Inc., B-230035, Mar. 18, 1988, 88-1 CPD ¶ 290 at 2.

PSI and SBA note that, because the procurement was stayed pending GAO's decision on PSI's protests, and the statutory deadline for issuance of the decision was November 10, SBA believed that it had until November 10 to decide the size status protest, and thus reasonably delayed issuing its determination with that date in mind. This argument does not establish that the award was improper. First, the statutory deadline SBA and PSI cite was the last day a decision could be issued; there was no basis to assume that a decision would not be issued prior to that date. (We note that SBA never contacted our Office for information as to the status of the protest.) Moreover, the propriety of the award has nothing to do with PSI's protest to our Office and the attendant stay. Rather, the FAR provisions discussed above (which are reflected in SBA's regulations) speak directly to the facts of this case, and the award here was proper under those provisions.

The protester and SBA suggest that NSF's delay in referring the size protest to SBA until approximately 1 month after it was filed with NSF was the cause of the delay in issuance of the size determination, and that, but for NSF's delay, the determination would have been issued 1 month earlier. However, it is not apparent, and SBA does not explain, how NSF's initial delay in referring the protest reasonably could have affected the time SBA took after the referral to issue its determination. SBA's assertion is especially weak given that, after SBA received the size protest, it allowed 10 business days to pass before it even made its request to NSF for additional information and the 10-day extension. Rather, since it appears that SBA saw no urgency to decide the matter in advance of the deadline for our Office's decision on PSI's protests, there is every reason to believe that SBA would have delayed its decision even had the size protest been referred at an earlier date.

SBA asserts that it informed the contracting officer of SBA's unfamiliarity with the issue underlying AMTI's small business size status, advised her that an additional extension of time could be needed to issue a decision, and asked her to keep SBA informed of any decision by our Office. The contracting officer denies that SBA informed her that an additional extension might be required, or requested that she notify SBA of any GAO decision. However, we need not resolve this factual dispute. First, whether or not SBA informed the NSF contracting officer that a further extension might be needed, SBA does not claim (and there is no indication) that it did request an additional extension, or that NSF agreed to one. In any case, as of the October 30 issuance of our decision, SBA had not reached a decision on AMTI's size status. Thus, even if NSF had informed SBA on October 30 that our decision had

been issued, there is no reason to believe that a size determination would have been issued before NSF made award on October 31.

The protest is denied.

Anthony H. Gamboa  
General Counsel