



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Hatco Corporation

File: B-270545

Date: March 21, 1996

Timothy S. Kerr, Esq., Elliott Reihner Siedzikowski & Egan, for the protester.

Mariette Naughton for Naughton Energy, the intervenor.

Amalia Evola, Esq., and Benjamin G. Perkins, Esq., Defense Logistics Agency, for the agency.

C. Douglas McArthur, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging awardee's eligibility for preferential consideration as a small disadvantaged business on the ground that the supplier proposed by the awardee is not a manufacturer is dismissed because the Small Business Administration is vested with conclusive authority to decide that issue.

DECISION

Hatco Corporation protests the award of a contract to Naughton Energy under request for proposals (RFP) No. SPO451-95-R-2181, issued by the Defense Logistics Agency, Defense General Supply Center (DGSC) for the manufacture and supply of synthetic lubricating oil. The protester contends that the agency improperly gave Naughton preferential consideration for award available under the RFP to small disadvantaged business (SDB) concerns.

We dismiss the protest.

On March 21, 1995, DGSC issued the RFP for award of a fixed-price requirements contract for a base year, with two 1-year option periods, to supply synthetic lubricating oil for use in aircraft turboshaft engines. The RFP provided for a partial small business set-aside, with preferential consideration for SDBs. The RFP required regular dealers claiming the preference as SDBs to agree to furnish only items manufactured or produced by small business concerns in the United States.

After awarding the non-set-aside portion to Mobil Oil Corporation, the agency conducted discussions with Naughton. Naughton agreed to accept an award at Mobil's price plus a 10-percent premium allowed for SDBs. The agency awarded a

contract to Naughton on November 8, and this protest followed. On November 28, Hatco filed a challenge of Naughton's status as a disadvantaged firm, which the agency forwarded to the Small Business Administration (SBA) for decision.

Naughton's offer indicated that in accordance with the RFP's qualification requirements, it was offering a product on the qualified products list manufactured by Technolube, a division of Lubricating Specialties Company. Naughton also identified Lubricating Specialties' plant in Vernon, California, as the place of performance.

It is Hatco's contention that Lubricating Specialties is not a "manufacturer" of the products to be provided under the contract and thus that Naughton does not qualify for the SDB preference.¹ Hatco contends that Lubricating Specialties merely mixes an additive defoamant obtained from Mobil with ester also provided by Mobil and that this effort is too insubstantial to qualify as manufacturing for the purpose of obtaining preferential consideration for award. Hatco describes the agreement between Mobil and Lubricating Specialties as a "thinly veiled" scheme to take advantage of the SDB program. Hatco argues that Naughton's proposal clearly disclosed its intention to purchase the lubricant from Lubricating Specialties; that Naughton therefore was not offering a product manufactured by a small business; and thus that Naughton was not entitled to preferential consideration for award.

With regard to Naughton, SBA has denied Hatco's protest that the awardee is not socially and economically disadvantaged. There is no allegation that either Naughton or Lubricating Specialties fails to meet the applicable size standard. Naughton itself is a regular dealer and not a manufacturer, and as noted above, is entitled to the preference so long as it supplies a product manufactured by another small business. The only issue for resolution is whether Lubricating Specialties, a small business, is the manufacturer of the lubricant. We conclude that this

¹The agency contends that Hatco is not an interested party to maintain the protest because Hatco itself would not be supplying the product of a small business. Specifically, the solicitation contained a qualification requirement; Hatco appears on the qualified products list only as a rebrander--a relabeler, in effect--of a Castrol product. Hatco points out, however, that it is the actual manufacturer of the Castrol product and would manufacture the lubricant to be provided here. While the agency does not dispute that Hatco manufactures the product for Castrol, it argues that the actual identity of the manufacturer is irrelevant because Hatco must offer a product on the qualified products list and Castrol is listed as the manufacturer there. We think this argument elevates form over substance, however, because it is undisputed that Hatco in fact is offering Hatco-manufactured lubricant.

constitutes a matter that, by statute, SBA--which advises that it routinely addresses the issue in precisely this context--is exclusively empowered to determine.

Congress has established for the Department of Defense (DOD) a goal of 5 percent of the contract funds obligated each fiscal year for the award of contracts and subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323 (1994). The DOD implementation of this legislation appears in part 219 of the Defense Federal Acquisition Regulation Supplement (DFARS). The regulation lists evaluation preferences for SDBs as one means of meeting this goal. See DFARS §§ 219.201, 252.219-7001.

The statute provides that section 8(d) of the Small Business Act, 15 U.S.C. § 637(d) (1994), and regulations issued under that section by SBA, govern the determination of whether a business is small and whether it is owned and controlled by socially and economically disadvantaged businesses. 10 U.S.C. § 2323(a)(1)(A). Similarly, 15 U.S.C. 636(j)(11)(F)(vii) explicitly vests SBA with authority to decide all protests regarding SDB eligibility, including those arising under the DOD SDB program. See Y.S.K. Constr. Co., Inc. v. U.S., 30 Fed. Cl. 449, 456 (1994). Thus, it is clear that Congress specifically granted SBA the power and the duty to define the bounds of the phrase "small business concerns . . . owned and controlled by socially and economically disadvantaged individuals" as used in the DOD SDB program. Id.

We think this authority encompasses the issue raised by Hatco here--whether the proposed small business supplier of a nonmanufacturer SDB is a manufacturer of the product to be provided. This conclusion is consistent with SBA's general regulatory scheme, which treats the identical issue, when raised in the context of a firm's eligibility for award under a small business set-aside, as a matter to be resolved as part of a size determination. See 13 C.F.R. § 121.906(b) (1995). This issue is routinely reviewed by SBA in that context, and our Office will dismiss protests raising the issue because SBA's determination is controlling. See Unholtz-Dickie Corp., B-235561, Aug. 30, 1989, 89-2 CPD ¶ 194. Similarly, as stated above, SBA routinely addresses protests of size status directed at the exact issue Hatco

raises: whether the small business supplier of a nonmanufacturer SDB is itself a manufacturer.²

In sum, given that the relevant statutes vest authority in SBA to decide eligibility for an SDB preference, any issue regarding Naughton's eligibility for the preference here based on the manufacturer status of Naughton's proposed supplier is for determination by SBA, not our Office.

The protest is dismissed.

Comptroller General
of the United States

²SBA, in deciding that issue, applies the same regulation applicable to set-aside issues cited above. It would, in our view, be incongruous in any case for our Office to preempt SBA and interpret that regulation for a protester that could have but did not bring the matter to SBA's attention with the rest of its eligibility concerns.