

DECISION

95328
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548
50521

FILE: 182212

DATE: February 19, 1975

MATTER OF: Trand Advertising Company

DIGEST:

1. Firm protesting Navy determination that it did not qualify as "regular dealer" under Walsh-Healey Public Contracts Act, 41 U.S.C. 35 et seq. (1970), is advised that such determination may not be disturbed by GAO since responsibility for determining whether bidder is qualified as "regular dealer" rests in first instance with agency and such determination is subject to review by Secretary of Labor and not by GAO.
2. Although contracting officer may under applicable regulation properly award contract immediately after notifying bidder of ineligibility as "regular dealer" under Walsh-Healey Act, 41 U.S.C. 35 et seq., GAO recommends amendment to ASPR 12-604 (a)(2) to require that award be withheld, in absence of urgency, until bidder's intention concerning review of ineligibility determination is ascertained.

Trand Advertising Company (Trand) protests the determination by the Naval Regional Procurement Office, Washington, D. C., pursuant to invitation for bids (IFB) No. N00600-74-B-0191, that it did not qualify as a regular dealer within the meaning of the Walsh-Healey Public Contracts Act (41 U.S.C. §§ 35-45 (1970)). Trand also protests against the determination by the contracting officer to award the contract under this IFB to another bidder prior to the Department of Labor review of his decision.

By letter of August 29, 1974, Trand was informed that it did not meet the ASPR definition of a regular dealer and as such was ineligible for a contract award. Trand was instructed that if it wished to protest the determination of ineligibility, it should submit certain evidence establishing its eligibility as a regular dealer by September 10, 1974. Trand was further advised that absent timely submission of such evidence, the agency would conclude that Trand concurred with the adverse determination. However, on August 30, 1974, award was made to the next lowest bidder. Subsequent thereto, the Department of Labor sustained the Navy's determination.

The Walsh-Healey Act provides that, with certain exceptions not here material, every contract exceeding \$10,000 in amount entered into

by any Government agency for the procurement of supplies shall contain a stipulation that the contractor is a manufacturer of, or regular dealer in, such supplies. The responsibility of administering the provisions of the Act and the authority to prescribe rules and regulations, to conduct hearings, and to make findings of fact and decisions thereon necessary to enforce the provisions of the Act are placed specially in the Secretary of Labor. In implementation of the Act, the Department of Labor has published the "Walsh-Healey Public Contracts Act Rulings and Interpretations No. 3." Section 29 of the Rulings and Interpretations provides:

"The responsibility of determining whether or not a bidder is qualified as a manufacturer or as a regular dealer under the Public Contracts Act rests in the first instance with the contracting agency. However, any decision which the contracting officer might make is subject to review by the Department of Labor which is charged with the administration of the Act. The Department of Labor may determine the qualifications of a bidder in the first instance in the absence of any decision by the contracting officer."

Thus, responsibility for applying the criteria of the Walsh-Healey Act is vested in the contracting officer and the Department of Labor. Our Office is not authorized to review determinations as to whether particular firms are regular dealers or manufacturers within the purview of the Walsh-Healey Act, and we have denied jurisdiction in this area because such determinations rest with the contracting officer subject to final review of Labor. Matter of Corbin Sales Corp., B-181454, July 10, 1974; B-179509, 179518, November 6, 1973.

Further, section 5 of the Walsh-Healey Act, 41 U.S.C. 39, provides for a hearing by the Secretary of Labor, or a representative designated by him, for "any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions" of the Act. Additionally, section 10(c) of the Act, 41 U.S.C. 43a(c), provides that "any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to * * * the interpretation of * * * regular dealer."

Regarding Trand's complaint that the subject contract was awarded to another bidder prior to the Department of Labor review of its qualifications, the administrative report indicates

that the contracting officer and legal counsel for the procuring activity interpreted Armed Services Procurement Regulation (ASPR) § 12-604(a)(2) (1974 ed.) as not preventing award of a contract immediately after notification to an ineligible bidder. Furthermore, it is reported that award was made to the next low bidder on August 30, 1974, in accordance with ASPR § 12-604(a)(5)(i) and (iii) on the basis that:

- "(1) The Key Chains were urgently needed as part of the Navy Recruiting Program.
- "(2) An exorbitant amount of time (4 months) had already been expended since bid opening without award of a contract.
- "(3) Bidders had been requested to extend their bids on two occasions - latest extension through 31 August 1974 - despite the rising cost of plastic material."

Although ASPR § 12-604(a)(2) requires that the contracting officer notify an ineligible bidder of an adverse determination and of the availability to him of review of such determination by the contracting officer and by the Department of Labor in the event the contracting officer's determination is still adverse, present procedures do not explicitly provide for award to be held in abeyance pending a disqualified bidder's notice to the contracting officer of his intention with respect to such review. Moreover, ASPR § 12-604(a)(5) requires that award be held in abeyance, with certain exceptions related to instances of urgency and undue delay, only when the contracting officer has forwarded the case to the Department of Labor for review. Consequently, there was nothing legally wrong with the contracting officer's awarding the contract immediately after notifying Trand of the decision concerning its ineligibility.

However, we believe that the notification to an ineligible bidder of his right to appeal an adverse Walsh-Healey Act determination, followed the next day by award to another bidder, is contrary to the spirit of the competitive bid system in the absence of an urgent or compelling reason for an immediate award. See 47 Comp. Gen. 793, 796 (1968). In order to preserve the integrity of the competitive bidding system by insuring that each bidder has his bid and eligibility fairly and completely considered, we are suggesting to the Secretary of the Department of Defense that consideration be given to amending ASPR § 12-604(a)(2) to require that, in the absence of an urgency determination, award be held in abeyance pending ascertainment of a disqualified bidder's intention concerning review of the adverse decision.

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In view of the foregoing, there is no basis upon which our Office may properly disturb the contract awarded to Charles G. Stott Company.

R. F. Kelley
Deputy Comptroller General
of the United States