

DECISION

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

60118

FILE: B-183843

DATE: November 4, 1975

MATTER OF: Zac Smith & Company, Inc.

97576

DIGEST:

SBA determination of size status of small business may not be reviewed absent prima facie showing that action was taken fraudulently or with such wilful disregard of facts as to necessarily imply bad faith. In any event, since the material allegations of protester had been considered and rejected by court of competent jurisdiction, matter is not for review.

Zac Smith & Company, Inc. has protested the award of a construction contract to Harrington Construction Corporation for construction of a ranger training complex at Eglin Air Force Base. The protester alleges that Harrington, the apparent low bidder, is ineligible for the total small business set-aside award since Harrington, in Zac Smith's view, is affiliated with a large business concern.

Zac Smith initially protested to the contracting officer, who forwarded the protest to the Small Business Administration (SBA), Atlanta for a size determination. By letter dated March 18, 1975, SBA determined Harrington to be a small business for purposes of receiving Government construction contracts. Zac Smith filed a timely appeal of this determination to the Small Business Administration, Size Appeals Board, Washington, D.C. On May 2, 1975, the Size Appeals Board denied the appeal of Zac Smith and affirmed the determination of the SBA, Atlanta Regional Office.

Zac Smith filed civil action No. C75-908 in the United States District Court, Northern District of Georgia, Atlanta Division, requesting the Court to declare the SBA action erroneous as a matter of law. By order entered May 29, 1975, the Court concluded that the SBA findings should not be overturned.

Counsel for Zac Smith requests that GAO review the SBA determination on the following grounds: First, the Court did not have the administrative record of the SBA before it--the Court considered a limited record which did not include either the regional appeal

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file or the SBA Size Appeals Board file. Second, a review of the material which was not before the Court shows, in the opinion of Zac Smith, that Mercury Construction Corporation, a large business concern, will share equally in the profits of this contract which is set aside exclusively for small business concerns.

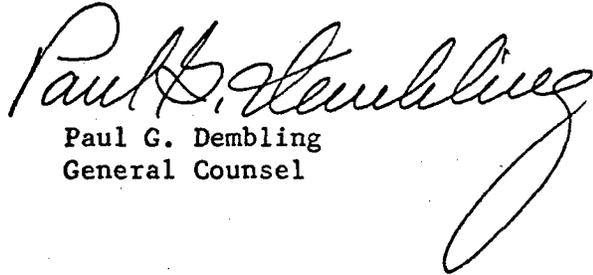
Counsel for Zac Smith notes that this Office has reviewed the SBA administrative process to determine whether such actions are in conformity with applicable SBA regulations (49 Comp. Gen. 702 (1970)) and to determine whether a decision by the SBA Size Appeals Board is arbitrary, capricious or not supported by the evidence (B-173504, November 26, 1971). More recently, however, in Suburban Industrial Maintenance Company, B-181980, August 30, 1974, we held that an SBA size determination or issuance of a certificate of competency is not subject to review by our Office as a bid protest since under 15 U.S.C. 637(b)(6) certification by SBA regarding the size status of a concern or the competency of a small business to perform is conclusive. See also 53 Comp. Gen. 434, 438 (1973); 53 id. 344, 346 (1973); and Fort Vancouver Plywood Company, B-179737, May 13, 1974.

Although we still retain our audit function over SBA activities, and notwithstanding the prior decisions cited by counsel for Zac Smith, questions concerning the propriety of SBA size determinations are not properly for consideration by our Office under our Bid Protest Procedures, 40 Fed. Reg. 17979 (1975), absent a prima facie showing of fraud on the part of Government officials or such wilful disregard of the facts as to necessarily imply bad faith. See the rationale in Dyneteria, Inc., 55 Comp. Gen. ____ (1975), B-178701, July 15, 1975, 75-2 CPD 36.

In any event, the Court's order of May 29, 1975, constitutes a final adjudication of the issue raised in this protest. Such a final adjudication is conclusive of the rights of the parties not only as to matters which were decided, but also res judicata as to all questions which might have been litigated, provided the basic wrongful acts pleaded appear to be the same. Engelhart v. Bell & Howell Co., 327 F. 2d 30 (8th Cir. 1964). Such court action bars further consideration by this Office of a request for review since the Court's action takes precedence over any action of this Office and we could not recommend remedial action contrary thereto. Nartron Corporation, B-178224, B-179173, March 29, 1974, and November 11, 1974. See also B-171917, May 4, 1971, where we dismissed a protest without deciding the merits since the material allegations had been considered and rejected by a court of competent jurisdiction.

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Accordingly, the request for review of the SBA size determination is denied.



Paul G. Dembling
General Counsel