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DECISION



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

FILE: B-190660

DATE: February 6, 1978

MATTER OF: Charles J. Dispenza and Associates

DIGEST:

Contracting officer followed applicable laws and regulations in finding that the protester did not qualify for award as a manufacturer or regular dealer and submitting that finding to the Department of Labor for review. Provision in Public Law 95-89 for referral of question to Small Business Administration, is not applicable because law became effective after contracting officer's referral to Labor, and SBA is not authorized to review Labor's determination.

Charles J. Dispenza & Associates (Dispenza) protests the contracting officer's decision that Dispenza does not qualify for award under Invitation For Bids No. N00104-77-B-0651, issued by the Navy Ships Parts Control Center.

The rejection of Dispenza's bid was based upon the contracting officer's determination, which was sustained by the Department of Labor (Labor), that Dispenza did not qualify as a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act (Walsh-Healey), 41 U.S.C. §§ 35-45 (1970). On July 7, 1977, the contracting officer advised Dispenza that it did not qualify as a manufacturer or regular dealer under the Walsh-Healey Act due to a lack of plant facilities, employees, warehouse and inventory. By letter of July 9, 1977, Dispenza protested the determination of the contracting officer that it was not a regular dealer. On July 27, 1977, the Navy, pursuant to Armed Services Procurement Regulation (ASPR) paragraph 12-604(a), requested a final determination from Labor regarding Dispenza's eligibility for award as a regular dealer within the meaning of the Walsh-Healey Act. Labor responded by letter of September 29, 1977, that Dispenza did not qualify for award as a regular dealer.

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Dispenza asserts that Labor had no authority, under 15 U.S.C. § 637(b)(7) (1970), as amended by Pub. L. 95-89, 91 Stat. 553, to consider the eligibility of Dispenza. Section 501 of Public Law 95-89, enacted on August 4, 1977, provides that:

"(B) If a Government procurement officer finds that an otherwise qualified small business concern may be ineligible due to the provisions of section 35(a) of title 41, United States Code (the Walsh-Healey Public Contracts Act), he shall notify the Administration in writing of such finding. The Administration shall review such finding and shall either dismiss it and certify the small business concern to be an eligible Government contractor for a specific Government contract or if it concurs in the finding, forward the matter to the Secretary of Labor for final disposition, in which case the Administration may certify the small business concern only if the Secretary of Labor finds the small business concern not to be in violation."

Dispenza argues that because Labor made its determination after the enactment of Public Law 95-89, it acted without jurisdiction and effectively usurped powers expressly delegated to the Small Business Administration (SBA). Consequently, Dispenza asserts that no award should be made unless and until the question of Dispenza's Walsh-Healey eligibility is referred to the SBA.

The Navy asserts that because the referral to Labor was made prior to the enactment of Public Law 95-89, and that Department decided the matter, the statute is not applicable to this referral.

The Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1970) 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

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manufacturer of or regular dealer in such supplies. The Act vests the Secretary of Labor with the responsibility of administering its provisions 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. 41 U.S.C. § 38 (1970).

At the time of the contracting officer's original determination that Dispenza was ineligible under the Walsh-Healey Act, the ASPR stated in paragraph 12-604(a) that:

- "(1) The initial responsibility for applying the eligibility requirements * * * rests with the contracting officer * * *. The Department of Labor does not conduct pre-award investigations or render final determinations until the contracting officer has initially determined whether the eligibility requirements have been met."

Prior to enactment of Pub. L. 95-89, this Office repeatedly stated that the responsibility for applying the Walsh-Healey Act's criteria was vested in the contracting officer, subject to final review by Labor. See Gull Airborne Instruments, Inc., B-188743, November 7, 1977, 77-2 CPD 344; CNC Company, B-188176, B-188441, March 29, 1977, 77-1 CPD 221; Trand Advertising Co., B-132212, February 19, 1975, 75-1 CPD 101.

The amendments to the Small Business Act in Public Law 95-89 have added to this statutory and regulatory scheme a role for the SBA. After the effective date of the Act, August 4, 1977, a contracting officer who finds that an otherwise qualified small business concern may be ineligible under the Walsh-Healey Act must refer the matter to the SBA. However, Public Law 95-89 did not eliminate the role of Labor or diminish the status of its determinations. Rather, it gives the SBA authority to review a contracting officer's proposed finding of ineligibility before that finding is made final by Labor. The SBA, if it finds the small business concern to be eligible under the Walsh-Healey Act, may certify the firm to be eligible

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for the particular contract, thus precluding further review. However, where the matter has been submitted to Labor pursuant to statute applicable at the time of such submission, the SBA may certify the small business concern only if the Secretary of Labor finds the small business concern not to be in violation. Public Law 95-89 does not envision review by the SBA of a Walsh-Healey determination made by Labor concerning a matter properly submitted to Labor. We therefore conclude that the contracting officer may act on Labor's determination and is not required again to submit the matter for further administrative review.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States