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A. P. ...  
Proc II

**DECISION**



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

**FILE: 3-191259**

**DATE: May 1, 1978**

**MATTER OF: H. Webb Hayes & Associates, Inc.**

**DIGEST:**

1. Decision as to whether procurement should be set aside for small business is within province of administrative agency.
2. There is no legal principle on the basis of which award may be precluded merely because low bidder submitted below-cost bid. Protest concerning affirmative responsibility determination of low bidder will not be reviewed by GAO absent allegations of fraud or misapplication of definitive responsibility criteria.

This protest by H. Webb Hayes & Associates, Inc. (Hayes), is the second which has arisen out of efforts by the Department of Agriculture, Forest Service, Albuquerque, New Mexico, to lease fixed wing aircraft.

In May 1977, after competitive bidding, Hayes was awarded a contract for the furnishing of such aircraft. As the result of a protest filed by another bidder, it was discovered that a mathematical error had been made in the abstract of bids and that in fact Hayes was not the low bidder. Our Office held that the Forest Service should not exercise two one-year options in Hayes' contract, but should resolicit on a competitive basis any requirement it may have for the aircraft after the expiration of Hayes' current contract. Ruidoso Aviation, Inc., B-189956, December 12, 1977, 77-2 CPD 455. Bid opening under the resolicitation, IFB No. R3-78-14, was held on January 6, 1978.

Hayes protests the failure of the Forest Service to set aside IFB R3-78-14 for small business concerns and also contends that the low bidder offered an unreasonably low price. While there is a dispute as to the

timeliness of this protest, we do not consider this issue since Hayes, in any event, has not alleged substantive matters which are properly for resolution by our Office.

With regard to the first basis of Hayes' protest, we have held that while it is the policy of the Government to award a fair proportion of purchases of supplies and services to small business and labor surplus area concerns, there is nothing in the Small Business Act or applicable regulations which mandates that there be set aside for small business or labor surplus area concerns any particular procurement. The decision whether a procurement should be set aside is within the authority and discretion of the contracting agency. The Small Business Administration, Najol, Inc., B-128141, February 11, 1977, 77-1 CPD 104; Groton Piping Corporation and Thames Electric Company (Joint Venture), B-185755, April 12, 1976, 76-1 CPD 247. Accordingly, we believe no useful purpose would be served by our consideration of this matter.

Hayes also alleges that the successful bidder, Aerodyne, Inc., will incur a loss at its bid price and therefore should not have received an award. As we stated in Edward E. Davis Contracting, Inc., B-190055, September 29, 1977, 77-2 CPD 245:

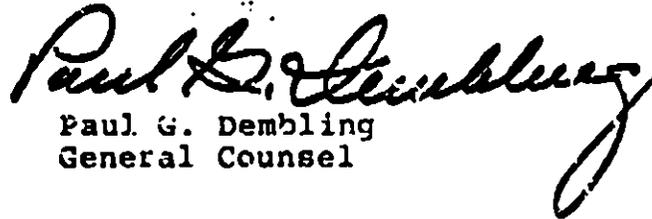
"\* \* \* We are not aware of any legal principle on the basis of which an award may be precluded merely because the low bidder submitted a below-cost bid. Karadis Bros. Painting Co., Inc., B-187542, November 22, 1976, 76-2 CPD 440; Parsons Custom Products, Inc., B-185104, November 14, 1975, 75-2 CPD 331.

"Proper rejection of a bid as unreasonably low would require a determination that the bidder is not responsible. B-175262, January 12, 1972. \* \* \* [O]ur Office no longer reviews protests concerning affirmative determinations of responsibility absent a showing

of fraud or when the solicitation contains definitive responsibility criteria which allegedly have not been applied. Vi-Mil, Inc., B-188171, February 23, 1977, 77-1 CPD 132; DOT Systems, Inc., B-187994, February 18, 1977, 77-1 CPD 123; Central Metal Products, 54 Comp. Gen. 66 (1974), 74-2 CPD 64.\*

Since Hayes has not alleged that the contracting officer's determination that Aerodyne was responsible resulted from fraud or that definitive criteria of responsibility were in the IFB and were misapplied, we will not review the award to Aerodyne.

In view of the above, the protest is dismissed.

  
Paul G. Dembling  
General Counsel