

10/913

DECISION



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

FILE: B-194279
B-194284

DATE: August 1, 1979

MATTER OF: Dyneteria, Inc; Jets, Inc.

DIGEST:

[Protests against award of small business set-aside contract] will not be considered because material issues involved are before or may be considered by court of competent jurisdiction, and court has not expressed interest in GAO decision.

CAB 00103
DLB 00067
DLB 02414
DLB 02415
DLB 02416

Dyneteria, Inc. (Dyneteria), and Jets, Inc. (Jets), have protested against the award of a small business set-aside contract by the Department of the Navy, Naval Facilities Engineering Command (Navy), to P&B Services, Inc. (P&B), for base operating services at the Naval Submarine Support Base, Kings Bay, Georgia, under request for proposals (RFP) No. N62467-78-R-0694.

Following the determination of the Seattle Regional Office of the Small Business Administration (SBA), that P&B was a small business, Dyneteria and Jets protested to our Office against the proposed award to P&B and appealed the SBA size determination. In addition, Dyneteria filed suit in the United States District Court for the District of South Carolina (Dyneteria, Inc. v. Boyer, Civil Action No. 79-425), seeking to enjoin award under the RFP until its protest and appeal were resolved. After a hearing on March 19, 1979, at which the injunctive relief was denied, the Navy made a Determination and Findings of urgency pursuant to Defense Acquisition Regulation §§ 1-703(b)(3)(iv) and 2-407.8(b)(3) (1976 ed.), on the basis of which award was made to P&B on March 21, 1979. The action was dismissed upon motion of the plaintiff by order of the court dated April 20, 1979.

The protesters essentially contend that P&B was not eligible for award, that the award was therefore improper, and that the Navy should terminate P&B's contract. The

Contractor eligibility
Small business set-aside
Contract award protests
Small business contract

00603+

protesters assert that P&B is affiliated with Pan American World Airways (Pan Am), a large business concern; that the Navy considered Pan Am's experience, capability and financial capacity in evaluating P&B's proposal; that P&B was advised of and given an opportunity to correct deficiencies in its proposal, although the protesters were not given the same information and opportunity; and that the bond submitted with P&B's proposal was defective, requiring rejection of the proposal.

During the course of the protests, the SBA Size Appeals Board reversed the Regional Office in a decision of May 11, 1979, holding that P&B is engaged in a joint venture with Pan Am on the proposal, that the firms are affiliated for the procurement, and that P&B is therefore other than small for the purpose of the procurement in question. The Board denied P&B's request for reconsideration of the decision.

The Navy subsequently advised the protesters that notwithstanding the SBA Size Appeals Board's decision, it was not obligated to terminate P&B's contract. Dyneteria then sought judicial relief from the dismissal order on the basis of SBA's May 11 decision and representations made by the Navy to the court at the March 19 hearing. The court vacated the dismissal order and restored the case to the trial calendar on May 31, 1979. At a hearing held on July 2, 1979, the court granted Jets' motion to intervene and the plaintiffs' motion to file an amended complaint; the defendants have 60 days to answer the amended complaint.

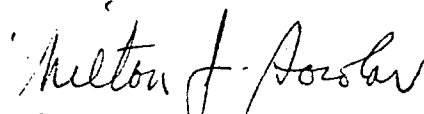
The plaintiffs' amended complaint recites the fact that their protests to our Office allege, inter alia, that P&B was ineligible for the contract awarded because the firm's bond was defective and because P&B was engaged in a joint venture with Pan Am. The complaint further asserts that contrary to the parties' agreement at the March 19 hearing that in the event our Office and/or SBA determined P&B was ineligible for award, the Navy would immediately terminate the contract and award a contract to the next low responsive, responsible bidder, the Navy has not done so. The plaintiffs' seek injunctive relief requiring the Navy to terminate P&B's contract, declaratory judgment as to their rights concerning the award of

a contract for the work, and such other relief as the court deems proper.

The principal issues now before the court, whether P&B by reason of its size status or bond was ineligible for award and whether the Navy must terminate P&B's contract, are essentially the same as those raised by the parties in their protests. It is our policy not to render a decision where the material issues involved are before a court of competent jurisdiction, unless the court expresses an interest in receiving our decision. 4 C.F.R. § 20.10 (1979); KET, Incorporated, B-191949, January 18, 1979, 79-1 CPD 28. While the issues concerning evaluation of P&B's proposal have not been specifically submitted to the court, we believe that the issues before the court are so intertwined with those raised here and the relief sought is so similar that this might result in the court's consideration of the matter. Roger J. Au & Son, Inc., B-193030, April 25, 1979, 79-1 CPD 287; see Frontier Science Associates, Inc.--Reconsideration, B-192654, December 26, 1978, 78-2 CPD 433. These issues may, however, be appropriate for future consideration by this Office depending upon the outcome of the protesters' suit. U.S. Eagle, Inc., B-188330, July 18, 1977, 77-2 CPD 34. Cf. Roger J. Au & Son, Inc., supra.

In light of the above and in consideration of the fact that the court has not indicated an interest in our views and the amended complaint does not request relief pending resolution of the protests by our Office, we will take no further action on the matter.

The protests are dismissed.


Milton J. Socolar
General Counsel