

DECISION



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

[Protest of Nonresponsibility Determination]

FILE: B-198324

DATE: August 6, 1980

MATTER OF: Z. A. N. Co.

DIGEST:

Army contracting officer's failure to refer determination of nonresponsibility of small business to Small Business Administration, although consistent with applicable regulation, is contrary to Small Business Act. While contract award is not disturbed, GAO recommends that Defense Acquisition Regulation § 1-705.4(c), covering Certificate of Competency procedures, be promptly revised to eliminate exception to referral requirement for proposed awards not exceeding \$10,000, since amended Small Business Act provides for no such exception.

The Z.A.N. Co. (ZAN) protests the award of a contract by the U.S. Army Troop Support and Aviation Materiel Readiness Command (TSARCOM), St. Louis, Missouri, for a total of 477 each ring assembly, engine, for the UH-1 helicopter. We are sustaining the protest.

The invitation for bids, No. DAAJ09-80-B-0009 (PFR), issued January 29, 1980, with an opening date of February 29, 1980, was a total small business set-aside. ZAN, offering to provide the rings for \$19.90 each or a total of \$9,492.30, was the low bidder; the L.O.M. Corporation (LOM), at \$34.91 each for a total of \$16,656.84, was second-low.

Although ZAN's bid was responsive, due to a poor performance record and a negative pre-award survey of ZAN's plant which had been performed during January in connection with another TSARCOM procurement, the contracting officer determined that the firm was not responsible. He therefore awarded the contract to LOM without referring the question of ZAN's responsibility to the Small Business Administration (SBA) or requesting another pre-award survey.

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ZAN's primary basis of protest is the Army's failure to refer the matter to SBA. ZAN disputes the nonresponsibility finding, arguing that it was based on a pre-award survey conducted without its participation and knowledge, and states that it has twice manufactured the identical item for the Government.

Section 8(b) of the Small Business Act, 15 U.S.C. 637(b)(7)(Supp. I 1977), was amended by Section 501 of Public Law 95-89, effective August 4, 1977, to empower the SBA to certify "all elements of responsibility, including but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity" of any small business seeking to receive and perform a specific Government contract. Under the Act, a contracting officer may not, for any of the above reasons, preclude a small business from award "without referring the matter for a final disposition" to the SBA.

Defense Acquisition Regulation (DAR) § 1-705.4(c) (DAC No. 76-19, July 27, 1979), however, states that the Certificate of Competency (COC) procedure applies only to proposed awards exceeding \$10,000. For this reason, the Army maintains that its finding of nonresponsibility without referral to the SBA was proper. In addition, the Army notes that our Office previously has denied protests based on failure to refer questions of responsibility to the SBA when the regulations provided an exception.

The Army relies primarily on Sigma Industries, Inc., B-195377, October 5, 1979, 79-2 CPD 242, a case which the Army states involved the same contracting officer, the same Command, and the same fact situation as the instant case. In Sigma, the contracting officer found the low bidder nonresponsible on the basis of a negative pre-award survey completed a month before bid opening in connection with a different procurement.

We agree that the case stands for the proposition that a contracting officer may reasonably rely on such a survey; it is distinguishable, however, since in Sigma

the SBA had refused to issue a COC four days before bid opening, in effect confirming the determination of non-responsibility. In the instant case, there is no indication that the question of ZAN's responsibility was ever referred to or decided by the SBA.

The Army also cites Orlotronics Corporation, B-180340, May 14, 1974, 74-1 CPD 254, and Solar Laboratories, Inc., B-179731, February 25, 1974, 74-1 CPD 99, in which we held that under DAR (then the Armed Services Procurement Regulation), the procuring agency was not required to obtain a COC when proposed awards did not exceed \$10,000. These cases, however, were decided before the effective date of the Small Business Act amendments, and we do not believe they are controlling here.

In two recent decisions involving Forest Service procurements, our Office has sustained protests based on failure to refer when proposed awards did not exceed \$10,000. See J.L. Butler, 59 Comp. Gen. 144 (1979), 79-2 CPD 412, involving a procurement conducted according to the small purchase procedures; The Forestry Account, B-193089, January 30, 1979, 79-1 CPD 68. In the latter case, we recommend that the contracting officer immediately refer the matter to appropriate SBA officials, and if a COC was issued and the protester was still willing to accept award under the invitation for bids, that the contracts otherwise awarded be terminated for the convenience of the Government. In both cases we noted that the Federal Procurement Regulations (FPR), Subpart 1-3.6 (1964 ed. amend. 153), had been amended to reflect the Small Business Act amendments and to require the contracting officer to refer all questions of responsibility to the SBA.

In the three years since the effective date of Pub. L. 95-89, the DAR also has been revised in part to reflect those amendments. Defense Acquisition Circular (DAC) 76-18, March 12, 1979 at 26, for example, deleted the urgency exception previously provided by DAR § 1-705.4(c)(iv). But the exception for proposed awards of \$10,000 or less has not been removed.

(The SBA has issued final rules, effective October 19, 1979, which cover the COC procedure. They require contracting officers to notify SBA of nonresponsibility determinations, and indicate that the SBA will conclusively determine all elements of responsibility by issuing or refusing to issue a COC. 13 C.F.R. § 125.5 (1980). These regulations permit no exception to the referral requirements.)

The record in this protest includes correspondence which indicates that SBA regards the current DAR as contrary to statute. As we have informed the Army, by letter dated November 23, 1979, the SBA advised our Office that it concurred with our decision in The Forestry Account, supra, stating:

" * * * We know of nothing in either the Small Business Act * * * , as amended * * * , or legislative history which suggests exempting Government small purchases of less than \$10,000 from the SBA COC Program."

This same position had been expressed by the SBA in a June 4, 1979, letter to the DAR Council in which the SBA recommended eliminating the \$10,000 exception from § 1-705.4 (c), stating:

" * * * Denying COC consideration to many small firms by arbitrarily establishing a \$10,000 threshold cannot be justified."

In an August 17, 1979, letter to the Department of Defense (DOD), the Deputy Administrator of the Small Business Administration stated:

" * * * [W]hen a small business concern is to be denied the award because the contracting officer has found the concern is not responsible, said concern has a legal right to request referral of the matter to the Small Business Administration regardless of the monetary value of the contract. * * * " (Emphasis added.)

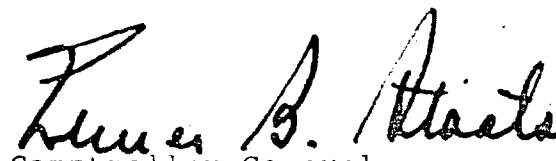
The August letter, however, indicated that SBA might agree to preclude the use of COC procedures on DOD procurements of \$10,000 or less where the relatively informal small purchase procedures were used. This matter is not in issue here since this procurement was conducted pursuant to normal formal advertising procedures.

We have independently reviewed the legislative history of the 1977 Small Business Act amendments, and we agree that there is no indication that Congress intended to limit the authority of the SBA to proposed awards of more than \$10,000. See H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 18 (1977); H. Conf. Rep. No. 95-535, 95th Cong., 1st Sess. 21 (1977), reprinted in [1977] U.S. Code Cong. & Ad. News 838, 851.

The protest is therefore sustained.

We believe this decision should apply only prospectively, however, since the contracting officer acted reasonably and in good faith and in reliance on the existing DAR provision and on decisions of our Office which indicated that the SBA was primarily responsible for clarifying apparent conflicts between the statute and the regulation. See, for example, What Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179. We are, by letter of today to the Secretary of Defense, recommending that DAR § 1-705.4(c) be promptly revised to eliminate the exception to the COC procedure for proposed awards of \$10,000 or less, and that in the interim, contracting activities be advised to follow the holding of this decision.

Since this decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1976), which requires the submission of written statements by the agency to the House Committee on Government Operations, Senate Committee on Governmental Affairs, and House and Senate Committees on Appropriations concerning the action taken with respect to our recommendation.


Luther B. Attala
Comptroller General
of the United States