

PLM # *McGraw*
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DECISION



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

14735

[Protest Against Agency Determination of Nonresponsibility]

FILE: B-198141

DATE: August 26, 1980

MATTER OF: Sam's Machine & Tool Shop, Inc.

DLG05161

DIGEST:

Defense Logistics Agency contracting officer's failure to refer determination of nonresponsibility of small business to Small Business Administration (SBA), although consistent with existing applicable regulation which exempts referrals to SBA if proposed award does not exceed \$10,000, is contrary to Small Business Act which provides for no such exception. Contract award is not disturbed, however, since recent GAO decision sustaining similar protest applies only prospectively.

Sam's Machine & Tool Shop, Inc. (Sam), protests the rejection of its offer on request for proposals (RFP) No. DLA700-80-R-0273, issued by the Defense Logistics Agency, Defense Construction Supply Center, Columbus, Ohio (DLA), for failure to meet the minimum standards of responsibility under Defense Acquisition Regulation (DAR) section 1-903 (1976 ed.).

AGC00821

We sustain the protest.

The solicitation was issued to nine firms. Although the proposed and actual award was for less than \$10,000, DLA reports the solicitation was negotiated pursuant to DAR § 3-201.2(b)(ii)(A) (small business set-asides) rather than DAR § 3-203 (purchases not more than \$10,000) and the accompanying small purchase procedures of DAR section III, part 6.

Sam, the low offeror for a portion of the requirement, and two other small business concerns submitted offers. DLA's review of Sam's performance

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history on past and current Government contracts showed chronic delivery delinquency. The contracting officer found Sam nonresponsible due to delivery delays. DLA awarded the contract to another offeror without referring the determination of Sam's nonresponsibility to the Small Business Administration (SBA).

Sam's primary basis of protest is that the contracting officer violated Sam's rights as a small business concern by failing to refer the nonresponsibility determination to the SBA. Under section 8(b) of the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. I, 1977), as amended by section 501 of Pub. L. No. 95-89, effective August 4, 1977 (the act), no small business may be precluded from award because of a finding of nonresponsibility without referral of the matter to SBA for a final disposition under the certificate of competency (COC) program.

However, DAR § 1-705.4(c), (Defense Acquisition Circular No. 76-19, July 27, 1979), provides that a contracting officer's determination that a small business is nonresponsible need not be referred to the SBA if the proposed award is for \$10,000 or less. This DAR exception existed prior to the amendment of the Small Business Act in 1977 and was not eliminated by the July 1979 DAR amendments in response to the Small Business Act amendments.

This Office had declined in earlier protests to consider the reasonableness of a contracting officer's reliance on the DAR § 1-705.4 exception, in apparent conflict with the mandatory referral provision of the act, because the SBA had not yet issued appropriate implementing regulations. See What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179; Applied Control Technology, B-190719, September 11, 1978, 78-2 CPD 183; X-Tyal International Corp., B-190101, March 30, 1978, 78-1 CPD 248.

Since those decisions, SBA issued final rules effective October 19, 1979. These rules permit no exception to the referral requirements. 13 C.F.R. § 125.5 (1980).

This Office recently sustained a small business concern's protest that the Army, relying on the DAR § 1-705.4(c) exception, improperly failed to refer a determination of nonresponsibility to the SBA. We recommended 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 our decision. Z.A.N. Co., B-198324, August 6, 1980, 80-2 CPD. We noted there is no indication in the legislative history of the 1977 Small Business Act amendments that Congress intended to limit the COC 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.

In advocating denial of this protest, DLA advances several reasons why the referral exception should stand in the case of purchases under \$10,000 conducted in accordance with the relatively informal small purchase procedures. We need not reach this issue since the immediate procurement involves normal negotiation procedures rather than the small purchase procedures of DAR section III, part 6.

However, we do not disturb the Army's award since it predated our decision in Z.A.N. Co., supra, which applies only prospectively.

The protest is sustained.

Harry R. Jan Cleve

For the Comptroller General
of the United States