

DECISION

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

26113

FILE:

B-210710

DATE: August 29, 1933**MATTER OF:**

United Aircraft and Turbine Corporation

DIGEST:

1. Protest against agency failure to provide a preaward notice of nonresponsibility (which was based on protester's lack of facilities and fact that protester had only been in business for one month) is without merit since there is no requirement for such notice prior to making a responsibility determination. Decisions regarding procedural due process and de facto debarment are distinguishable and inapplicable.
2. Contracting Officer has discretionary authority regarding referral of negative determination of responsibility to SBA of a contract valued at less than \$10,000. Contracting officer did not abuse his discretion when he did not refer negative determination because the procurement was urgent and valued at only \$130.80-\$144. Negative determination was not unreasonable. Record does not support protester's contention that determination was based on Walsh-Healey Act, which is inapplicable to this (less than \$10,000) procurement.
3. Procuring agency is not required to conduct preaward survey when the agency is in possession of information sufficient to make a responsibility determination.

United Aircraft and Turbine Corporation (UATC) protests the award of a contract by the Defense Industrial Supply Center (DISC), Defense Logistics Agency (DLA), to Jamaica Bearing Co., Inc., at a price of \$144 for 40 steel sleeve bushings. The bushings were procured under the

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SAMMS Automated Small Purchase System (SASPS II). UATC submitted the low quotation of \$130.80, but was rejected as nonresponsible based on information contained in DISC's UATC vendor file. UATC protests that the nonresponsibility determination was improper because it was: (1) made without providing a preaward notice and opportunity to be heard; (2) not referred to the Small Business Administration (SBA); (3) based on the Walsh-Healey Act, which does not apply to contracts under \$10,000; and (4) made without conducting a preaward survey.

The protest is denied.

The contracting officer based his nonresponsibility determination on the following statements from an Inter-Office Memorandum contained in UATC's vendor file:

"Subject contractor has been in business one month, does not have warehouse facilities nor do they intend to carry on business with commercial customers. * * *

"The above conditions do not qualify the contractor as a regular dealer under the Walsh-Healey Public Contracts Act and, as such, do not make the contractor eligible for purchases over \$10,000. Although the Walsh-Healey Act does not apply to purchases under \$10,000, the conditions noted in paragraph 1 should be considered while making a determination of responsibility on purchases below that dollar level."

A preaward survey was not considered necessary because the purchase request reflected an urgent priority, and the dollar value of the procurement was small (\$130.80 quoted by UATC and \$144 by Jamaica). The nonresponsibility determination was not referred to SBA for a certificate of competency determination.

Due Process and De Facto Debarment

UATC contends that it was entitled to preaward notice as a matter of procedural due process guaranteed by the Fifth Amendment of the Constitution. UATC relies on Old Dominion Dairy Products, Inc. v. Secretary of Defense,

631 F.2d 953, 968-69 (D.C. Cir. 1980); Related Industries, Inc. v. The United States, No. 237-83C, Cl. Ct., May 26, 1983, 1 FPD 134; and 43 Comp. Gen. 140 (1963).

Our Office has held that a contracting officer may base an initial determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence. 43 Comp. Gen. supra, at 141; Mayfair Construction Company, B-192023, September 11, 1978, 78-2 CPD 187; Howard Ferriell & Sons, Inc., B-184692, March 31, 1976, 76-1 CPD 211. Although Defense Acquisition Regulation (DAR) § 2-408.1 (1976 ed.) requires prompt notification to unsuccessful bidders that their bids have not been accepted, there is no requirement that bidders be notified in advance of award. Howard Ferriell & Sons, Inc., supra.

This case is distinguishable from both Old Dominion Dairy Products, Inc., supra, and Related Industries, Inc., supra, because it does not involve a constitutional interest to be free from governmental defamation of reputation which has an immediate and tangible effect on the ability to do business. Instead, the negative responsibility determination was based on UATC's lack of warehouse facilities and demonstrated ability. This determination did not affect a Constitutional interest and, therefore, did not trigger due process requirements. See Bell & Howell; Topper Manufacturing Corporation, 61 Comp. Gen. 596, 601 (1982), 82-2 CPD 224; Navajo Food Products, Inc., B-202433, September 9, 1981, 81-2 CPD 206.

Concerning the alleged de facto debarment, we have recognized that a bidder can only be debarred or suspended from competing for Government contracts through the procedures set forth in DAR § 1-600, et seq (1976 ed.). See Opalack & Company, 58 Comp. Gen. 728 (1979), 79-2 CPD 112; Mashburn Electric Company, Inc., et al., B-189471, April 10, 1978, 78-1 CPD 277. It is improper for a procuring agency to subject a bidder to a de facto debarment that avoids those procedures by repeated determinations of nonresponsibility, or even a single negative determination if it is a part of a long term disqualification attempt. Howard Electrical Company, 58 Comp. Gen. 303, 304, (1979), 79-1 CPD 137; Kahn's Bakery Inc., B-185025, August 2, 1976, 76-2 CPD 106; 43 Comp. Gen. supra, at 141-42. However, this is not a case of de facto debarment because DISC has not excluded UATC from contracting with it or any other Government

agency. Macro Systems, Inc.; Richard Katon & Associates, Inc., B-195990, August 19, 1980, 80-2 CPD 133, p. 10. See Computer Data Systems, Inc.--Reconsideration, 61 Comp. Gen. 545, 550, (1982), 82-2 CPD 75; Fermont Division, Dynamics Corporation of America, B-199159, July 15, 1981, 81-2 CPD 34, p. 5. In fact, documents furnished by DISC clearly demonstrate that DISC has actively solicited UATC's quotations and, as of March 31, 1983, UATC had open (ordered, but not yet shipped) purchase orders which total \$119,337.67. The only thing that UATC has been denied in this case is an opportunity to perform a particular contract. See Myers & Myers, Inc., 527 F 2d 1252, 1258, (2nd Cir. 1975); J.P. Mascaro & Sons, Inc. v. Township of Bristole, 497 F. Supp. 625, 628, (E.D. Penn. 1980); Howard Electric Company, supra, at 304. Cf. Related Industries, Inc., supra, at 18, in which the contracting officer stated his intention to not only deny the particular contract to Related, but to deny contracts to Related on a continuing basis.

Negative Responsibility Determination

Procuring agencies are generally required to refer determinations that a small business is nonresponsible to the SBA. Our Office has held that an agency may not avoid this requirement on the basis of either "urgency" or DAR § 1-705.4(c) (Defense Acquisition Circular 76-24, August 28, 1980), which provides that referral shall not be made where, as here, small purchase procedures are used. See Metal Services Center, 62 Comp. Gen. 134, 137-38, (1983), 83-1 CPD 58; Z.A.N. Co., 59 Comp. Gen. 637 (1980), 80-2 CPD 94. However, recently enacted SBA regulation 13 C.F.R. § 125.5(d) (1983) provides that it is within the contracting officer's discretion to determine whether a negative determination involving a contract valued at less than \$10,000 should be referred to the SBA. See Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 CPD 246. We do not find, given the urgency¹ and \$130.80 to \$144 value of this procurement, that the contracting officer abused this discretion.

¹Although "urgency" is irrelevant where the contract value is not less than \$10,000 and referral is nondiscretionary, Metal Services Center, supra, we consider it a relevant factor in determining whether a nonresponsibility determination involving a contract valued less than \$10,000 should be referred to the SBA.

Where, as here, the contracting officer does not refer, pursuant to his discretionary authority under 13 C.F.R. § 125.5, a negative determination of nonresponsibility to the SBA, our Office will review the negative determination. However, we will not question it unless the protester can demonstrate bad faith by the procuring agency or a lack of any reasonable basis. Anco Tool & Die Co., supra; see Amity Precision Springs Co., Inc., B-210949, 210949.2, July 27, 1983, 83-2 CPD 133.

UATC contends that its quotation was rejected because it failed to qualify as a regular dealer under the Walsh-Healey Act. 41 U.S.C. § 35 (1976). We disagree. The Inter-Office Memorandum advised contracting officers to evaluate UATC quotations not covered by the Walsh-Healey Act on the basis of the conditions noted in the first paragraph, namely, UATC (1) had been in business 1 month; (2) does not have warehouse facilities; and (3) does not intend to carry out business with commercial customers. These statements (the accuracy of which UATC does not contest) reasonably relate to UATC's demonstrated ability and capacity to perform the contract. We also find that they reasonably support DISC's determination that UATC was nonresponsible to perform this contract. See S.A.F.E. Export Corporation, B-209491; B-209492, August 2, 1983, 83-2 CPD _____, in which we denied a protest involving a preaward survey which found that the protester lacked adequate facilities.

UATC's final ground of protest is that DISC failed to conduct a preaward survey. A preaward survey is an evaluation by a contract administration office of a prospective contractor's capacity to perform under the terms of a proposed contract, DAR § 1-905.4 (Defense Acquisition Circular 76-42, February 28, 1983), and is used to determine responsibility. However, there is no requirement that a preaward survey be conducted in all cases. Paramatic Filter Corporation, B-210138, February 24, 1983, 83-1 CPD 187. For example, a preaward survey need not be conducted where, as here, the information available to the purchasing office (the memorandum in UATC's vendor file) was sufficient to enable the contracting officer to make a responsibility determination. DAR § 1-905.4(b); Hopper Holmes, Inc., B-209193.2, December 22, 1982, 82-2 CPD 568; Struthers Electronics Corporation, B-182967, May 23, 1975, 75-1 CPD 309. Moreover, DAR § 1-705.4(c) provides that a

preaward survey need not be conducted where small purchase procedures are used.

The protest is denied.

for *Milton F. Fowler*
Comptroller General
of the United States