

DECISION

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

FILE: B-218201.5 **DATE:** July 1, 1985
MATTER OF: Appletown Food Service and Management
Corporation--Reconsideration

DIGEST:

1. Where a small business concern is found nonresponsible, the contracting officer must refer the matter to the Small Business Administration (SBA); however, there is no regulation requiring the contracting officer to notify the bidder of the referral. Rather, this is SBA's responsibility.
2. Failure of a procuring agency to notify an unsuccessful bidder that a contract has been awarded is merely a procedural deficiency and does not affect the validity of an otherwise proper award.
3. Unless new information concerning a small business bidder's responsibility is presented to the contracting officer after the Small Business Administration (SBA) has refused to issue a certificate of competency to the bidder but before the contract is awarded, the contracting officer may not reverse the SBA's finding of nonresponsibility.

Appletown Food Service and Management Corporation requests reconsideration of its protest, which we dismissed on May 30, 1985, because our Office does not generally review the Small Business Administration's refusal to issue a certificate of competency (COC). We affirm that dismissal.

The protest involved invitation for bids No. DAAG60-85-B-0145, covering food services at the United States Military Academy, West Point, New York. Appletown, the apparent low bidder, was found nonresponsible, and the contracting officer referred the matter to the SBA under the COC procedures. On May 5, Appletown submitted an

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application to the SBA; however, by letter dated May 21, the SBA notified Appletown that it would not issue a COC.

Appletown protested the SBA decision to our Office on May 30, and we dismissed the protest the same day pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.3(f) (1985). In its request for reconsideration, Appletown implies that we misunderstood its protest and states that it was not protesting the SBA's decision but, rather, was protesting the contracting agency's subsequent decision not to award the contract to it. Appletown asserts that the contracting officer improperly failed to notify it of the nonresponsibility determination, of the referral to the SBA, or of the fact that Appletown was no longer being considered for award.

Under the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.602-1(a), upon determining and documenting that a small business lacks certain elements of responsibility, the contracting officer must (1) withhold award and (2) refer the matter to the cognizant SBA regional office. The regulations are silent with respect to notification of the bidder by the contracting officer, but indicate that it is the SBA's responsibility to notify the bidder and provide it with an opportunity to apply for a COC. 48 C.F.R. § 19.602.2(a)(1). This was obviously done here. Upon a negative determination of competency, SBA's regional administrator is to notify both the contracting officer and the bidder that the COC has been denied. Id. § 19.602(3)(b). The SBA so notified Appletown by letter dated May 21.

Since there is no duty on the part of the contracting officer to notify a nonresponsible bidder when a referral is made to the SBA, and since the SBA followed the required procedures with regard to its determination, we find no merit in Appletown's request for reconsideration on this basis.

With respect to Appletown's assertion that the contracting officer failed to notify it when he determined that Appletown would not be considered for award, the regulations require the contracting officer promptly to notify unsuccessful bidders that their bids were not accepted. See 48 C.F.R. § 14.408-1(a)(1). This notice obviously cannot be extended until the contracting officer has finally accepted one bid and rejected all

others. Appletown's request for reconsideration was dated June 4. The contracting officer informs us that the contract was awarded on June 12. Consequently, notice before that date was not required, and we find Appletown's request for reconsideration on this basis also without merit.

In any event, an agency's failure to notify an unsuccessful bidder that an award had been made is merely a procedural deficiency and does not affect the validity of an otherwise proper award. See Technical Fiberglass, Inc., B-213940, Feb. 1, 1984, 84-1 CPD ¶ 137.

Finally, Appletown asserts that under 48 C.F.R. § 19.602-4(a), the contracting officer can, and should, award the contract to Appletown, notwithstanding the SBA's refusal to issue a COC. The regulation states:

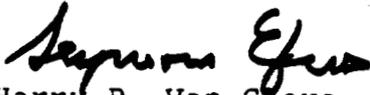
"If new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible to perform the contract, and award has not already been made . . . , the contracting officer shall reverse the determination of nonresponsibility, notify the SBA of this action, withdraw the referral, and proceed to award the contract."

The operative language of this provision is "If new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible. . . ." This is consistent with prior decisions of our Office. For example, in Tomko Inc., 63 Comp. Gen. 218 (1984), 84-1 CPD ¶ 202, we stated that our Office generally will not question a nonresponsibility determination absent a showing that government officials failed to consider vital information bearing on the small business bidder's responsibility. See also Reuben Garment Int'l. Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191 (denial of COC not dispositive where, after denial but before contract award, information probative of bidder's responsibility comes to light for first time). In all other cases, the SBA's determination as to the small business bidder's lack of responsibility is final. See 15 U.S.C. § 637(b)(7) (1982).

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Here, there is no indication that Appletown presented new information to the contracting officer between the time when the SBA denied its application for a COC and the time when the contract was awarded. Therefore, the regulation cited by Appletown is not applicable.

Our original dismissal is affirmed.

for 
Harry R. Van Cieve
General Counsel