

Delgado-Vega



The Comptroller General
of the United States

Washington, D.C. 20548

136272

Decision

Matter of: Astrodyne, Inc.--Request for Reconsideration
File: B-231509.2
Date: July 7, 1988

DIGEST

1. The General Accounting Office does not consider whether a bidder qualifies as a manufacturer under the Walsh-Healey Act. By law such a matter is for review by the contracting agency in the first instance, subject to review by the Small Business Administration if a small business is involved, and by the Secretary of Labor.
2. Since Small Business Administration has conclusive statutory authority to determine small business status for federal procurement purposes, General Accounting Office does not consider size status protests.
3. The certificate of competency use procedure is not limited to consideration of the issues raised by the contracting officer. The Small Business Administration's conduct of an independent evaluation, including an assessment of the firm's eligibility for COC consideration, reasonably may result in the refusal to issue a COC for a different reason.

DECISION

Astrodyne, Inc., requests reconsideration of our notice dated May 23, 1988, in which we dismissed Astrodyne's protest of the Small Business Administration's (SBA) determination that Astrodyne was ineligible for certificate of competency (COC) consideration because Astrodyne was bidding as a nonmanufacturing concern offering end items that were not manufactured or produced in the United States. We dismissed the protest because, under our Bid Protest Regulations, our Office does not review the SBA's refusal to issue a COC under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), absent a showing of possible fraud or bad faith on the part of government officials, or of SBA's failure to follow its own regulations or consider material information. 4 C.F.R. § 21.3(m)(3) (1988). We affirm the dismissal.

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Astrodyne argues that it is a manufacturer under the Walsh-Healey Act and, therefore, it is not required to entirely produce the end items of this procurement in the United States in order to be eligible for COC consideration. Astrodyne further argues that even if it is a nonmanufacturer, it meets the eligibility requirements under SBA's rules. 13 C.F.R. § 125.5(c) (1987). Finally, Astrodyne contends that SBA should not have considered its eligibility for a COC, but should have limited consideration to the particular issue of responsibility raised by the contracting officer, and SBA should have found Astrodyne responsible.

Regarding Astrodyne's status under the Walsh-Healey Act, our Office does not consider whether a bidder qualifies as a manufacturer under the act. By law this matter is for determination by the contracting agency subject to review by the SBA if a small business is involved, and by the Secretary of Labor. See 4 C.F.R. § 21.3(m)(9); General Motors Corp., B-228388, Oct. 23, 1987, 87-2 CPD ¶ 389.

Concerning Astrodyne's argument that it meets the eligibility requirements under 13 C.F.R. § 125.5(c), Astrodyne contends that the regulation requires only that 50 percent of a small business's product be manufactured by a small business concern in the United States. SBA construed that regulation as requiring, under a small business set-aside, that all end items to be furnished by the bidder be produced or manufactured by a small business concern in the United States. SBA determined Astrodyne ineligible for COC consideration because various end items which Astrodyne included in the drafting equipment set which it offered were not domestically produced or manufactured.

We generally regard a finding of ineligibility by SBA as tantamount to an affirmation of the procuring agency's determination of nonresponsibility and, therefore, not subject to our review absent a prima facie showing of fraud or bad faith. Bio-Tek, Inc.--Reconsideration, B-224740.2, Oct. 21, 1986, 86-2 CPD ¶ 440; Ridgecrest Office Supplies, B-223213, July 7, 1986, 86-2 CPD ¶ 39.

To the extent that Astrodyne is challenging the SBA's determination that it is not a small business, the SBA has conclusive authority under 15 U.S.C. § 637(b)(6) to determine matters of small business size status for federal procurement purposes. Accordingly, our Office will not consider size status protests. See 4 C.F.R. § 21.3(m)(3); Allied Sales and Engineering, Inc., B-224345, June 26, 1986, 86-2 CPD ¶ 13. In this case, since the procurement in

question is a small business set-aside, SBA's determination that Astrodyne does not qualify as a small business conclusively establishes that Astrodyne is ineligible for award as well.

Finally, Astrodyne argues that under the Federal Acquisition Regulation, 48 C.F.R. § 19.602-2(a)(2) (FAC 84-12), the SBA should have limited its consideration to the issue of non-responsibility raised by the contracting officer, and Astrodyne's eligibility to receive a COC should not have been raised by the SBA. Astrodyne misconstrues the regulation which limits the scope of the SBA's investigation team review, but not SBA's ultimate finding. F.W. Morse & Co., B-227995, Oct. 26, 1987, 87-2 CPD ¶ 396. Moreover, Astrodyne's interpretation of the regulation would undermine the COC process by requiring the issuance of a COC to a bidder that should not have even been considered by SBA because it was not eligible for award.

The dismissal is affirmed.


James F. Hinchman
General Counsel