



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Discount Machinery & Equipment, Inc.

File: B-240525

Date: November 23, 1990

Joseph Press for the protester.
Albert J. Joyce, III, Esq., Panama Canal Commission, for the agency.
David R. Kohler, Esq., for the Small Business Administration.
Behn Miller and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Contracting agency is required to refer its finding that small business bidder is nonresponsible to the Small Business Administration (SBA) for consideration under certificate of competency procedures despite the fact that agency is located outside the United States, since statutory requirement for referral to SBA is unrelated to agency's location.

DECISION

Discount Machinery & Equipment, Inc. protests the award of a contract to any other bidder under invitation for bids (IFB) No. P-90-18, issued by the Panama Canal Commission for a brake machine.

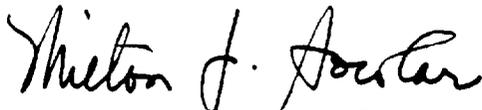
We sustain the protest.

The IFB was issued as an unrestricted solicitation on February 12, 1990, with a scheduled bid opening date of April 11. In its bid, Discount certified that it was a small business and that all end items to be furnished under the contract would be manufactured by a small business concern in the United States. At bid opening, Discount was found to be the low responsive bidder; however, in reviewing Discount's responsibility, the Commission noted that the company had been terminated for default on an earlier Commission contract on July 26, 1988.^{1/} Because of this prior default, the agency

^{1/} Apparently, Discount was terminated because of its failure to comply with the contract's delivery schedule.

protest. 4 C.F.R. § 21.6(d). Based on our finding, by letter of today we are recommending to the FAR Council that FAR § 19.000(b) be amended to reflect the requirements of the Small Business Act in this respect.

The protest is sustained.

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States

and Small Disadvantaged Business Concerns part of the FAR as follows:

"This part applies only inside the United States, its territories and possessions, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia."

According to the Commission, this provision prohibits SBA review of any federal procurement if the procuring agency is located outside the United States. Based on our review of the Small Business Act and the applicable regulations, we find that the location of the contracting agency has no bearing on the applicability of SBA's COC program.

Nothing in the Small Business Act imposes any geographical limitation regarding a contracting agency's location which would exempt procurements from the Act's coverage. Rather, the factor which determines whether a small business concern qualifies for SBA's COC proceedings is the nationality of the small business. As defined by the SBA regulations:

"A business concern eligible for assistance as a small business is a business entity organized for profit, with a place of business located in the United States and which makes a significant contribution to the U.S. economy through payment of taxes and/or use of American products, materials and/or labor." 13 C.F.R. § 121.403(a) (1990).

In order to qualify for a COC, all products furnished by a nonmanufacturing small business concern such as Discount must be produced by a small business concern in the United States. 13 C.F.R. § 125.5(c). Requiring a small business concern to maintain a nexus with the United States fosters the underlying policy of the Small Business Act to benefit American rather than foreign small business concerns. Thus, under the regulations implementing the Small Business Act, geographic location is significant only with regard to whether a small business qualifies as an American concern; the location of the procuring agency has no bearing on the applicability of the COC program.^{4/}

^{4/} We note that the SBA agrees with our position that the COC program applies regardless of the location of the contracting agency. According to the SBA, Discount's nonresponsibility determination should have been referred to the SBA since the brake machine required under the contract is being manufactured by a small business concern located in the United States.