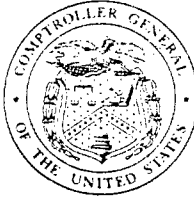


Proc. I

**DECISION**



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

9368

FILE: B-193065

DATE: March 7, 1979

MATTER OF: Hatcher Waste Disposal

**DIGEST:**

*[Protest Alleging Improper Determination of Nonresponsibility]*

VA contracting officer's determination of nonresponsibility based on preaward survey which concluded that small business concern otherwise in line for award does not have capacity to perform required work must be referred to SBA for consideration under certificate of competency program, since applicable law and regulations no longer allow exception to this requirement based on urgency.

Hatcher Waste Disposal (Hatcher) protests the award of a contract to Mobile Waste Controls (Mobile), doing business as Arkansas Waste Disposal, under invitation for bids (IFB) 598-17-79, issued by the Veterans Administration Medical Center (VA), Little Rock, Arkansas.

The IFB solicited bids for trash removal services to be performed at two VA hospitals in the Little Rock area and at the Little Rock National Cemetery. Bidders could offer to perform these services for a 1-year or 3-year period beginning on October 1, 1978. The IFB was mailed to four prospective bidders with bid opening scheduled for September 21, 1978. However, due to the issuance of amendment No. 1, the date for bid opening was changed to September 26, 1978. Three bids were received, and Hatcher, a small business, offered the low bid to provide the required services for the two VA hospitals for a period of 3 years. Mobile was second low bidder on this item and low bidder for the services to be provided the Little Rock National Cemetery.

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On September 28, 1978, the VA conducted a pre-award survey of both Hatcher and Mobile. While the survey team found Mobile to be an efficient and well-run company, it questioned whether Hatcher could be ready to perform if awarded the contract. Specifically, the survey team did not believe that Hatcher either owned or had readily available sufficient equipment and facilities to permit it to begin performance on October 1, 1978. Based upon these findings, the contracting officer telephoned Hatcher on September 29, 1978, to indicate that a letter was being sent to it rejecting its bid on the grounds that the lack of equipment on hand was a major deficiency. In other words, Hatcher was determined to be nonresponsible. On that same day, Hatcher filed a protest with our Office.

Hatcher argues that the brief period of time allowed between bid opening and the date for performance is prejudicial to a small business, such as itself, which has to make arrangements to obtain additional equipment. Moreover, Hatcher contends that the preaward survey team chose to disregard all the information it was given explaining the steps Hatcher was taking to get itself ready to begin performance on October 1, 1978, and that this is reflected in its report which is inaccurate and incomplete. Finally, Hatcher maintains that as a small business it had the right to apply for a certificate of competency (COC) from the Small Business Administration (SBA), but was never given the opportunity. This, Hatcher argues, is in violation of the Small Business Act, as amended by Pub. L. No. 95-89.

The VA candidly admits that there were too few days between bid opening and the time performance was to begin and has stated that steps have been taken to avoid this problem in the future. The VA also admits that the contracting officer failed to request a COC from SBA, but excuses this failure on the grounds that if a referral to SBA had been made the two hospitals would have suffered a disruption in their trash removal services while waiting for SBA to make its determination. The VA points out that attempts were made to negotiate a short term contract for 30 days in order to allow more

time for such things as SBA determinations, but that these proved fruitless. Thus, due to the potential health hazard which would result from a disruption of trash services, the VA believes that an emergency existed and that the contracting officer was justified in bypassing SBA and awarding the contract to the second low bidder, Mobile. While conceding, therefore, that there has been a violation of the SBA Act, the VA again states that steps have been taken to avoid this in the future. Finally, in regard to the accuracy of its preaward survey, the VA believes that Hatcher's allegations of incomplete and incorrect findings are not supported by the facts.

The controlling factor in this protest is the contracting officer's failure to refer the question of Hatcher's responsibility to the SBA as required by the Small Business Act, 15 U.S.C. § 637(b)(7) (1976), as amended by Pub. L. No. 95-89, 91 Stat. 557, effective August 4, 1977. Under this act, the SBA is empowered to certify conclusively to Government procurement officials with respect to all elements of responsibility. See Com-Data, Inc, B-191289, June 23, 1978, 78-1 CPD 459.

From the record presented, the VA appears to be arguing that the urgency of maintaining continuous trash removal services for its two hospitals permits an exception to this statutory requirement so long as a level above that of the contracting officer concurs in the decision to make the award to other than the low bidder. Until recently, the Federal Procurement Regulations (FPR) permitted just such an exception. See FPR § 1-1.708-2(a)(1) (1964 ed. amend. 174). However, the Small Business Act, as amended by Pub L. No. 95-89, makes no exception for urgency as a ground for not referring the question of a small business' responsibility to SBA. Therefore, effective June 14, 1978, FPR was amended to eliminate the urgency exception it had previously allowed. See FPR § 1-1.708-2(a)(1) (1964 ed. amend. 192).

Clearly, then, VA had no basis for not referring the question of Hatcher's responsibility to SBA and has violated the Small Business Act in failing to do so.

We have been notified that the VA has recently referred this matter to SBA for possible issuance of a COC, but that SBA has deferred consideration pending our decision. We request, therefore, that SBA proceed in its consideration of whether issuance of a COC is appropriate in this case. If a COC is issued, and Hatcher accepts award for the balance of the contract term, the current contract with Mobile should be terminated for the convenience of of the Government. If a COC is not issued or Hatcher refuses such an award, no further action is required.

By letters of today, we are informing the Administrators of Veteran Affairs and SBA of our recommendation.

Accordingly, the protest is sustained.



Deputy Comptroller General  
of the United States