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Jessica Botsford  
Proc. I

**DECISION**



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

**FILE: D-187829**

**DATE: April 8, 1977**

**MATTER OF: BMR Fabricators, Inc.**

**DIGEST:**

1. Contracting officer's determination of nonresponsibility based on negative pre-award survey report on production facilities, personnel, material commitments and experience was not unreasonable.
2. Contracting agency was only required to notify SBA and not resident SBA representative of certification that procurement was urgent and would not permit delay associated with SBA certificate of competency procedure.
3. Public exigency purchases are not limited to situations resulting from fire, flood, explosion or similar disasters.

BMR Fabricators, Inc. (BMR), protests the rejection of its offer and the award of contracts instead to Union Manufacturing Company (Union), Radnor Manufacturing Company (Radnor), and Auto State Company, Inc. (Auto State), under General Services Administration (GSA), Federal Supply Service, request for proposals (RFP) FTAP-C2-61069-N for four types of tool boxes.

The contract, a total small business set-aside, was negotiated by telephone on September 10, 1976, under the exigency authority of 41 U.S.C. § 252(c)(2) (1970), as implemented by Federal Procurement Regulations (FPR) § 1-3.202 (1964 ed. amend. 32). Eleven offers were received including these from BMR, Union, Radnor and Auto State. Because the procurement office had no background information on BMR, the quality control office was requested to make a plant survey. Based on a negative pre-award survey by the quality control office, the contracting officer concluded that BMR was not responsible. A findings and determination of nonresponsibility and a certification that the procurement was urgent and would not permit the delay associated with Small Business Administration (SBA) certificate of competency (CO) procedures were prepared by the contracting officer and approved by higher authority. Contracts were awarded to Union, Radnor and Auto State.

BMR protests these awards on the grounds that GSA rejected BMR's offer arbitrarily, capriciously and without cause, did not follow procedures set forth in FPR § 1-1.708 (1964 ed. amend 71) for evaluation of low responsive offers from small business firms and improperly invoked the public exigency authority to negotiate.

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BMR's offer was rejected because the contracting officer, after considering the negative pre-award survey report indicating inadequate production facilities, lack of personnel, lack of raw material commitments and limited experience in manufacturing the type of tool boxes being procured, determined that BMR was not responsible. The contracting officer's determination based on the negative pre-award survey was not unreasonable. United Office Machines, B-187193, March 16, 1977.

FPR § 1-1.708-2(a) (1964 ed. amend. 71) provides that, when a contracting officer plans to reject an offer of a small business concern on the grounds that the firm is not responsible as to capacity or credit, SBA must be notified in order to give it an opportunity to issue a COC. This procedure is not mandatory if the procurement is certified as urgent and SBA is promptly furnished a copy of the urgency certificate. FPR § 1-1.708-2(a)(1) (1964 ed. amend. 71). BMR contends that GSA did not comply with the procedure because it failed to notify the resident SBA representative at the Federal Supply Service of the action of the contracting officer. However, the procedure does not require that the resident SBA representative be notified. As indicated, only SBA must be notified and GSA has stated that a copy of the urgency certificate was sent to SBA. Therefore, GSA has met the requirement of the regulation.

The findings and determination for negotiation under the public exigency exception were based on the following factors:

- "c. GSA stocks have been depleted by unusually heavy demands to the extent that a substantial volume of backorders now exists or will result to the serious injury of the Government unless stock replenishment is made within less time than the minimum time required for formal advertising.
- "d. This requirement cannot be obtained from current requirements or definite quantity contracts, or other established sources:

\* \* \* \* \*

"The current contractor for the item(s) was contacted but cannot supply this requirement within the time required."

BMR contends that the public exigency authority to negotiate was improperly invoked because the backorders did not result from a fire, flood, explosion or other similar disaster. Although FPR § 1-3.202 provides that contracts may be negotiated when property or services are needed as a result of such disasters, public exigency purchases are not limited to those situations. Section 5A-72.106(c) of the GSA Procurement Regulations governing the Federal Supply Service specifically provides for public exigency purchases in backorder situations as follows:

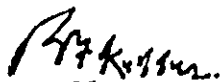
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"Stock items may be procured under public exigency procedures \* \* \* when the inventory manager has determined that stocks have been depleted by unusually heavy demands so that a substantial volume of backorders will result unless stock replenishment is made within less time than the minimum time required for formal advertising."

This regulation is in accordance with 38 Comp. Gen. 171, 174 (1958), where it was stated:

"\* \* \* we would not object to negotiated purchases for stock replenishment in instances in which exceptionally heavy and sudden demands make it obvious that a stock item for which there is a normally steady requirement will be depleted to such an extent that, unless replacements are obtained within less time than even the minimum required for procurement by advertising, a substantial volume of normally anticipated orders might not be capable of being filled. \* \* \*"

Accordingly, the BMR protest is denied.

  
Deputy Comptroller General  
of the United States