

DOCUMENT RESUME

03282 - [A2233366]

[Protests against Small Business Self-Certification by Low Bidder]. B-188305. August 9, 1977. 7 pp. + 2 enclosures (2 pp.).

Decision re: Keco Industries, Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Defense Supply Agency; Defense General Supply Center, Richmond, VA; Prigitemp Corp., New York, NY; Small Business Administration; Wedj, Inc.

Authority: A.S.P.R. 1-703(b), 55 Comp. Gen. 97, 55 Comp. Gen. 502. B-184149 (1975). B-181148 (1974). B-182686 (1976).

The protester objected to the award of a small business set-aside contract to the low bidder, alleging that the low bidder was not responsible to perform the contract for lack of expertise and capability and that the low bidder was not a small business. The protester has not affirmatively established that the small business self-certification of the low bidder was made in bad faith. The agency should consider the feasibility of contract termination, since the Small Business Administration, less than three weeks after the award, found that the contractor was other than a small business. (Author/SC)

*Answer
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DECISION



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

03282

FILE: B-188385

DATE: August 9, 1977

MATTER OF: Keco Industries, Inc.

DIGEST:

When before award, information which reasonably would impeach small business self-certification of low bidder comes to attention of contracting officer, direct size protest with the Small Business Administration should have been filed in order to assure that self-certification process is not abused. In absence of probative evidence, protester has not affirmatively established that small business self-certification was made in bad faith. Recommendation made that agency consider feasibility of contract termination where SBA, less than 3 weeks after award, found contractor was other than small business because of affiliation with another firm discussed in preaward survey.

Keco Industries, Inc. (Keco), protests the award to Wedj, Inc. (Wedj), for 40 air conditioners under total small business set-aside, invitation for bids (IFB) DSA400-76-B-4194, issued by the Defense General Supply Center (DGSC), Richmond, Virginia.

The IFB was opened as scheduled on October 20, 1976. Wedj submitted the low bid and self-certified itself small business, i.e., less than 750 employees. Keco, as next low bidder, protested on November 1, 1976, any proposed award to Wedj on the basis that it was not responsible to perform the contract for lack of expertise and capability. DGSC requested the Defense Contract Administration Services Region (DCASR), Philadelphia, Pennsylvania, to conduct a preaward survey on Wedj. The survey recommended on November 4, 1976, that no award be made to Wedj due to lack of financial resources. However, an addendum to the preaward survey prepared in January 1977 reads as follows:

"Subject proposed contract is for 40 Air Conditioners @ \$4,655.00 for a total consideration of \$186,200.00 to be delivered on or before 31 Aug. 1978. Progress payment financing for 85% of total costs are being requested by the company, and based on this type of financing and the protracted delivery

schedule, it is closely estimated that the peak cash requirement on part of company would be estimated at \$20,000. Company balance sheet, dated 31 October 1976 indicates a working capital position of \$20,256 and a tangible net worth of \$75,704. In telecon with writer [the financial analyst who participated in the preaward survey] on 6 January 1977, Dennis Gervant, Asst. Vice President of Chemical Bank, New York, N.Y. stated in effect that bank, in letter dated 6 January 1977 to WEDJ, Inc., York, Pa. certifies that \$20,000 will be advanced to company for use on this proposed contract. Mr. Gervant has stated that this loan commitment had been guaranteed by Frigitemp Corp., New York, N.Y. who as of 31 December 1975 had a net worth of \$15,320,413. Dennis Gervant, Asst. Vice President of bank stated apparently there was an agreement being consummated whereby Frigitemp would acquire WEDJ, Inc. From a financial point of view an award of IFB DSA400-76-B-4194 to WEDJ Inc. for a consideration of \$186,200.00 is recommended.

"Frigitemp Corporation stock is being traded on the American Stock Exchange and therefore in the case of guarantees to banks for loans to unrelated companies it is necessary that this information be disseminated to the U.S. Security and Exchange Commission, Washington, D.C. on Form 10K disclosing contingent liabilities. Phone call was placed by writer on 4 Jan. 1977 to Joe Heibrun, Senior Vice President and Treasurer of Frigitemp Corp. to determine the status of WEDJ, Inc. in the merger procedures. Mr. Heibrun stated in effect that Frigitemp Corporation was aware of its responsibility in the disclosure of contingent liabilities involving unrelated companies to the Securities & Exchange Commission and therefore Frigitemp Corp. was going to absorb WEDJ, Inc. as a wholly owned subsidiary, with this action to be finalized and approved at its Board of Directors meeting later in January 1977. This contemplated merger would materially improve the Government's exposure as to outstanding progress payments for 85% of total costs."

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Based upon this new information, the contracting officer determined that Wedj was responsible and awarded the contract on January 21, 1977.

On January 24, 1977, Keco requested that DGSC reconsider the determination of responsibility. Additionally, Keco protested Wedj's size status due to the affiliation with the Frigitemp Corporation (Frigitemp). Also, Keco questioned the bona fides of Wedj's self-certification as small business in light of the impending merger.

Since the size protest was received after award, it was referred to the Small Business Administration (SBA) for action pursuant to Armed Services Procurement Regulation (ASPR) § 1-703(b)(1)(c) (1976 ed.), for consideration in future actions. This was communicated to Keco by letter dated February 3, 1977. On February 8, 1977, the SBA determined that Wedj was other than small business for procurements having the same size standard, i.e., 750 employees. This action resulted from Wedj's communication to SBA on February 7, 1977, that due to a "recent affiliation" with Frigitemp, its average employee size exceeded 750. Therefore, Wedj chose not to file an application for a small business size determination. Upon receipt of the foregoing information, Keco protested to our Office.

Keco challenges both the good faith of Wedj in self-certifying itself small, as well as the reasonableness of the contracting officer in proceeding to award to Wedj when he knew, or should have known, that Wedj was other than small business under the applicable size standard. In Keco's view, the reversal of the negative preaward survey report was predicated upon Wedj's improved financial situation as a result of the affiliation with Frigitemp. Keco maintains that when this information came to the attention of the contracting officer before award he should not have proceeded with award.

Keco also points out that there was evidence of the Wedj/Frigitemp affiliation as early as April 1976 in the records of York County, Pennsylvania (Wedj's place of business), in the form of a Uniform Commercial Code required financing statement indicating that Frigitemp held a security interest in substantially all of Wedj's assets, including contract rights.

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Keco also traces a pattern of involvement among Wedj, Frigitemp and another corporation, Ferro Mechanical, dating back to June 1976. In one instance, a protest to DGSC by Keco that Ferro was not responsible was denied because Ferro and its subcontractor, Wedj, Inc., " * * * have adequate facilities, capabilities and resources * * * ." Keco believes that this determination was, in turn, influenced by Wedj's affiliation with Frigitemp.

Further, Keco notes that two major components of the air conditioner are source-controlled. Keco maintains that in connection with the above-referenced procurement the manufacturers of the source-controlled parts received a purchase order directly from Frigitemp which referenced the Ferro contract and called for deliveries directly to Wedj. Keco has been unable to obtain any documentation to support these allegations, but suggests avenues of inquiry for DLA and our Office to verify Keco's allegations. In light of this, Keco questions the good faith of Wedj's self-certification in November 1976.

The Defense Logistics Agency (DLA) maintains that the award comports with applicable regulations. DLA states that the contracting officer is not empowered to determine a bidder's size status. That determination is the responsibility of the bidder in the first instance, and then the SBA. If there is doubt as to a self-certified bidder's size status, the contracting officer's only recourse would be to submit the matter to SBA. Noting that the contracting officer is afforded discretion whether to protest a size self-certification, DLA argues that the contracting officer is not required to protest to the SBA every size certification when he finds an affiliation with another firm; nor is an investigation required to determine the effect to an affiliation upon the size status of the self-certified firm. Under this approach, DLA maintains that the contracting officer acted properly in considering the financial evidence for purposes of the responsibility inquiry. He was not required, in DLA's opinion, to inquire further into the acquisition of Wedj by Frigitemp in view of the self-certification.

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As for the bona fides of Wedj's self-certification in November, DLA states that the information in the financing statement is not sufficient, in itself, to prompt the conclusion that Wedj was other than small business in October 1976. Since the February 8 SBA size determination did not consider the effect of such a financing statement, DLA is unable to conclude that Wedj did not self-certify in good faith.

Regarding Keco's allegations of affiliation of Frigitemp, Wedj and Ferro, DLA states that it is unreasonable to expect a contracting officer to connect a contract awarded in September 1976 to Ferro and subcontracted to Wedj, in part, to a preaward survey in January 1977 which indicated only a loan agreement and possible merger. Rather, DLA maintains that the facts indicate the need for the contracting officer to be able to rely upon the bidder's self-certification.

Under ASPR § 1-703(b) (1976 ed.) the contracting officer is free to accept a small business size self-certification, unless he receives a timely size protest, or has information to the contrary. See Dyneteria, Inc., 53 Comp. Gen. 97 (1975), 75-2 CPU 36. In order to be timely and apply to a protested procurement, a size protest must be filed with, and delivered to, the contracting officer prior to the close of business on the fifth day after bid opening. ASPR § 1-703(b)(1) (1976 ed.). Otherwise, as was done here, the untimely protest may be forwarded to SBA for determination with regard to future procurements. ASPR § 1-703(b)(1) (1976 ed.). However, the contracting officer may question the size status of a bidder by filing a written protest with the SBA at any time after bid opening. That is, a contracting officer's protest is timely for the purpose of the procurement, even if filed after the 5-day period or after award. ASPR § 1-703(b)(2) (1976 ed.).

We recognize that the contracting officer is required to accept a self-certification in the absence of a timely protest by another bidder. The language of ASPR § 1-703(b)(2) (1976 ed.) is permissive regarding the filing of a protest directly with the SBA and calls

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for the exercise of discretion. See Evergreen Funeral Home, B-184149, November 6, 1975, 75-2 CPD 282. Therefore, a contracting officer's action or inaction must be measured against a standard of reasonableness in the particular case. See Service Industries, Inc., 55 Comp. Gen. 502 (1975), 75-2 CPD 345. Consistent with this standard, we believe that the clear intent of the regulation is that, if information is brought to the attention of a contracting officer, which reasonably would impeach the self-certification of a bidder, the contracting officer must file a direct protest with the SBA in order to assure that the self-certification process is not being abused. For example, we have not objected when an agent terminated for the convenience of the Government a contract awarded to a self-certified small business (under similar provisions in the Federal Procurement Regulations), when it was determined after award that sales information submitted with the bid should have caused the contracting officer to question the self-certification. Service Industries, Inc., supra.

In our opinion, the above-quoted addendum to the preaward survey clearly raised a substantial question as to the viability of Wedj's self-certification prior to award which should have prompted a direct size protest with the SBA. In light of the SBA determination communicated to the agency less than 3 weeks after award, we believe that DGSC should have terminated the Wedj contract as the agency did in Service Industries, Inc., supra.

While there appears to have been an ongoing relationship between Wedj and Frigitemp, the record is not clear as to what stage the relationship had progressed, in terms of affiliation, as of the time of the self-certification. Without further information, we could not state affirmatively that the self-certification was made in other than good faith. It is the responsibility of the protester to present evidence sufficient to affirmatively establish its position. Phelps Protection Systems, Inc., B-181148, November 7, 1974, 74-2 CPD 244. It is not the practice of our Office to conduct investigations pursuant to our bid protest function for the purpose of establishing the veracity of a protester's speculative statements. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105. In the absence of probative evidence, we must assume that the protester's allegations are speculative and conclude that the protester has not met its burden of proof. Mission Economic Development Association, supra.

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In view of the above, we recommend that DLA now consider the feasibility of terminating the Wedj contract for the convenience of the Government and communicate its results to our Office.

R. J. Killian
Deputy Comptroller General
of the United States



COMP.TROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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August 9, 1977


Lt. General W. W. Vaughan
Director, Defense Logistics Agency

Dear General Vaughan:

Enclosed is a copy of our decision of today, Keco Industries, Inc., wherein we sustain, in theory, the protest that the Defense General Supply Center should not have awarded a contract to Wedj, Inc., as a small business concern under total small business set-aside invitation for bids DSA400-76-B-4194 for air conditioners.

Your attention is invited to our recommendation that you consider the feasibility of terminating the contract for the convenience of the Government. Your expeditious response is requested in light of the ongoing performance. Please communicate the results of your inquiry to our Office. The matter was the subject of reports dated April 25, May 17, and July 18, 1977, from your Assistant Counsel.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure



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

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August 9, 1977


The Honorable Bill Gradison
House of Representatives

Dear Mr. Gradison:

Your letter of March 21, 1977, expressed your interest in the protest of Keco Industries, Inc., against an award to Wedj, Inc., for air conditioners by the Defense General Supply Center, Richmond, Virginia.

As requested, enclosed is a copy of our decision wherein we recommend that the Defense General Supply Center consider the feasibility of terminating the contract for the convenience of the Government and communicate its decision to our Office.

Sincerely yours,


Deputy Comptroller General
of the United States

Enclosure