

DECISION



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

10,099

FILE: B-193634

DATE: May 8, 1979

MATTER OF: Opalack & Company

DIGEST:

DK 015-35
[Protest of DOL Refusal to Refer Responsibility Determination to SBA]

Department of Labor (DOL) determination that small business concern otherwise in line for award was nonresponsible because prior contract with DOL had been terminated for default causing that business concern to be subject of suspension order and debarment proceeding must be referred to SBA under applicable law and regulations for consideration under certificate of competency program.

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 [Opalack & Company (Opalack), having been found nonresponsible under request for proposals (RFP) No. DL-ETA/V-8-004, issued by the Department of Labor, (DOL), Region V, Chicago, Illinois, protests that it has the right as a small business to apply for a certificate of competency (COC) from the Small Business Administration (SBA), but that DOL has refused to refer the matter to SBA.]

The solicitation was a 100 percent small business set-aside [requesting proposals for the services of a project director and three assistants to give on-site technical assistance to employment and training administration contractors to facilitate the closeout of their contracts.] According to the record available, Opalack submitted the low proposal in response to the RFP, but was found nonresponsible because a contract that Opalack had entered into previously with DOL's Office of Special Investigations had been terminated for default. Opalack has indicated that as a result of the nonresponsibility determination, an award was made to another contractor who has been performing since November 1978.

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On December 6, 1978, after having initiated the matter with DOL in November, Opalock filed a protest with our Office requesting that we direct DOL to refer this matter to SBA for its determination on the question of Opalack's responsibility. In the meantime, DOL was taking steps to suspend and eventually to debar Opalack from further contracts with DOL because of its performance under the contract that DOL found necessary to terminate for default.

By letter of January 4, 1979, therefore, DOL notified Opalock of its immediate suspension and proposed debarment. Opalack then requested a hearing on the matter which was held before a DOL Administrative Law Judge on March 5, 1979. After weighing the testimony and exhibits presented, the judge issued an order on March 16, 1979, which immediately terminated Opalack's suspension.

The judge found that DOL had failed to comply with its own rules and regulations with respect to the suspension of bidders, Federal Procurement Regulations (FPR) § 1-1.605 (1964 ed. amend. 127), and also that the evidence presented of Opalack's alleged misconduct was not of such a serious nature as to warrant suspension within the meaning of FPR § 1-1.605-1(a)(2). The debarment proceeding, however, was deferred until the judge could receive and consider both the hearing transcript and the briefs of counsel. We have been advised that this proceeding is still pending.

Opalack maintains that upon being found non-responsible under the subject solicitation it had a right to apply to SBA for a COC, but that in violation of the Small Business Act, as amended by Pub. L., No. 95-89, DOL has refused to refer this matter to SBA. Based on this, therefore, Opalack requests that our Office direct DOL to refer this matter to SBA for the possible issuance of a COC. *request*

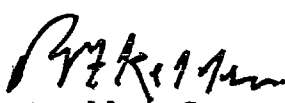
DOL, on the other hand, takes the position that it is not required to submit a request to SBA for a COC due to Opalack initially being subject to a suspension order and now being subject to a debarment proceeding. *because*

Under 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, the SBA is empowered to certify conclusively to Government procurement officials with respect to all elements of responsibility. Com-Data, Inc., B-191289, June 23, 1978, 78-1 CPD 459; see also FPR § 1-1.708 (1964 ed. amend. 192). Moreover, there are no exceptions to SBA's authority to determine the responsibility of a small business. See, e.g., Hatcher Waste Disposal, B-193065, March 7, 1979, 79-1 CPD 157. Thus, whenever a contracting officer believes that a small business is nonresponsible, the matter must be referred to SBA for a final disposition. Pub. L. No. 95-89, § 501, 91 Stat. 561.

Although it may be that Opalack was being considered for suspension and debarment at the time of award, that did not excuse DOL from referring the matter to SBA. Clearly, then, DOL had no legal basis for not referring the question of Opalack's responsibility to SBA.)

By letter of today to the Secretary of Labor, we are recommending that the contracting officer immediately refer the matter to the appropriate SBA officials for possible issuance of a COC. If a COC is issued, and Opalack accepts award for the balance of the contract term, the current contract should be terminated for the convenience of the Government. If a COC is not issued or Opalack refuses such an award, no further action is required.

Accordingly, the protest is sustained.


Deputy Comptroller General
of the United States