

DECISION



13285 PL-1
**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

[Protest of Nonresponsibility Determination]

FILE: B-196780

DATE: March 28, 1980

MATTER OF: Angelo Warehouses Co.

DIGEST:

1. Where pertinent regulations require contracting officer to refer issue of small business bidder's responsibility to Small Business Administration for consideration under certificate of competency (COC) program, failure to make referral was improper. Consequently, referral now should be made and, if COC is issued, awarded contract should be terminated for convenience of Government and award made to protester for remaining portion of terminated contract.
2. Agency is advised of possible deficiency in negotiated procurement where competitive range of one was established even though record indicates there were two marginally acceptable proposals.

The National Highway Traffic Safety Administration (NHTSA), Department of Transportation, issued solicitation No. NHTSA-9-C509 for warehouse storage space. Of the four firms submitting proposals, two were initially dropped from consideration (one or both--the report is not clear on this matter--were determined to have submitted only marginally acceptable technical proposals). The third firm's proposal was found unacceptable due to a failure to comply with the minimum warehouse space requirements. Only the proposal of the Angelo Warehouses Co. (Angelo), a small business firm, was found technically acceptable and in the competitive range, and negotiations with that firm were begun. However, because the agency believed the integrity of Angelo's manager

BON

009447 111942

to be questionable and Angelo would not replace him, the contracting officer determined Angelo to be nonresponsible.

Prior to any final decision as regarded an award to Angelo, attempts were made to upgrade the proposals of the two firms initially found to have submitted unacceptable or marginally acceptable technical proposals. Award (contract No. DTNH22-80-C-07148) was made to one of those firms on November 11, 1979, at the time it was also decided to reject Angelo. The contract was for a 1-year period, with two 1-year options.

Angelo protested the finding of nonresponsibility to our Office. It also submitted a claim of \$1,216 for services rendered after representations allegedly made by an NHTSA official in Washington, D.C., that Angelo should begin preparations for the contract award, which Angelo was allegedly led to believe it would receive. Angelo states these representations were made in a telephone conversation between itself and that official. While it also stated it could present affidavits of disinterested parties to prove its allegation on this matter, it has not and has stated that it will drop the claim if the issue of its responsibility is submitted--as should have been done originally--to the Small Business Administration (SBA) for the possible issuance of a certificate of competency (COC).

The issue of Angelo's responsibility was not referred to the SBA for the possible issuance of a COC because it was not believed that determinations regarding a firm's integrity had to be so referred. However, under the provisions of the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. I, 1977), and the applicable section of the Federal Procurement Regulations (§ 1-1.708-2 (1964 ed. amend. 192)), no small business concern may be precluded from award because of nonresponsibility without referral of the matter to the SBA for a final disposition under the COC procedure regardless of the basis of the nonresponsibility finding. 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; The Forestry Account, B-193089, January 30, 1979, 79-1 CPD 68.

Accordingly, the protest is sustained.

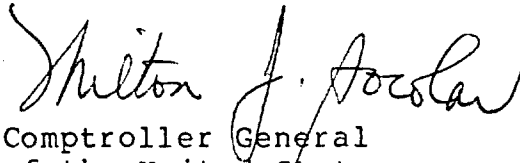
By letter of today to the Secretary of Transportation, we are recommending that the contracting officer immediately refer the matter to the appropriate SBA officials for the possible issuance of a COC. If a COC is issued and the protester is willing to accept an award under the subject solicitation for the remaining portion of the contract period, the current contract should be terminated for the convenience of the Government. If a COC is not issued or the protester refuses such an award, no further action is required.

Also, we are advising the Secretary of a further deficiency which may have occurred during this procurement. Where the proposal of only one offeror has been determined to be acceptable and within the competitive range, our Office will give close scrutiny to that determination in reviewing its propriety. As we have stated (see, Comten-Comress, B-183379, June 30, 1975, 75-1 CPD 400, and Audio Technical Services, Ltd., B-192155, April 2, 1979, 79-1 CPD 223), factors for consideration are:

"* * * If there is a close question of acceptability; if there is an opportunity for significant cost savings; if the inadequacies of the solicitation contributed to the technical deficiency of the proposal; if the informational deficiency could be reasonably corrected by relatively limited discussions, then inclusion of the proposal in the competitive range and discussions are in order. * * *"

In this case, one or two of the firms submitting proposals apparently were determined to have submitted marginally acceptable technical proposals, and it may

have been advisable to have included them in the competitive range for negotiation purposes. It is not clear why the third offeror also was not included in the competitive range. Therefore, we are recommending that this possible deficiency be brought to the attention of the cognizant contracting officials.

A handwritten signature in cursive script, reading "Milton J. Fowler". The signature is written in dark ink and is positioned above the typed name and title.

For the Comptroller General
of the United States