

DECISION



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

Melody
16072

FILE: B-201739

DATE: February 9, 1981

MATTER OF: Environmental Container Systems, Inc. *DLG06042*

DIGEST:

1. *Alleging* [Protest that patent infringement would result from performance under contract award] to another firm is not for consideration by GAO since exclusive remedy is action in Court of Claims against Government for money damages under 28 U.S.C. § 1498 (1976).
2. Where neither Small Business Act nor applicable regulations mandate set aside of particular procurement for small business, decision whether to set aside procurement is within discretion of contracting agency.
3. Whether or not bidder has manufacturing capability to produce item under contract is question of bidder's responsibility as prospective contractor and is for determination by contracting officer.

Environmental Container Systems, Inc. (ECS) protests the award of a contract under invitation for bids *DLG01342* No. F33659-81-B-0001, issued by Newark Air Force Station, Ohio, to any firm which is not a royalty-paying licensee of ESC under U.S. Patent 3,482,895. The primary basis for the protest is that ECS currently owns this patent which covers the product to be delivered under the contract, and that the production and/or furnishing of the item by a nonlicensee may result in an infringement of the patent. ECS also argues that this contract should have been set aside for small business enterprises and that the other offeror, H. Koch and Sons, Inc. (Koch), lacks the manufacturing capability to produce the item. For the reasons stated below, the protest is dismissed. *DLG06044*

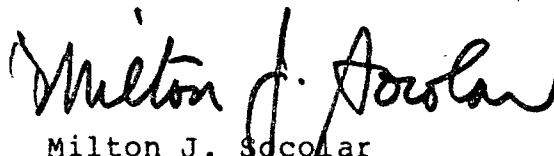
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The law provides that a patent holder's exclusive remedy for any potential infringement of its patent rights is by suit in the United States Court of Claims against the Government for money damages. ✓ 28 U.S.C. § 1498 (1976). Accordingly a protest that patent or license infringement may result from performance under a contract awarded to another firm is not for consideration by our Office. See Beckman Instruments, Inc., B-195193, August 14, 1979, 79-2 CPD 122; Miltope Corporation, B-191322, July 7, 1978, 78-2 CPD 20.

Further, while it is the policy of the Government to award a fair proportion of purchases of supplies and services to small business concerns, there is nothing in the Small Business Act or applicable regulations which mandates that this particular procurement be set aside for small business. Rather, the decision whether a procurement is to be set aside generally is within the discretion of the contracting agency. Horne Health Care, Inc., B-198244, April 23, 1980, 80-1 CPD 291; Instrument Control Service, B-194503, April 30, 1979, 79-1 CPD 299.

Finally, whether or not Koch is capable of manufacturing the product in question at its offered price is a question of that bidder's responsibility as a prospective contractor. A responsibility determination must be made by the contracting officer prior to award. Defense Acquisition Regulation (DAR) § 2-407.3 (1976 ed.). Although it is not clear whether such a determination has yet been made here, our Office generally will not review a protest of an affirmative determination of responsibility, which is largely a business judgment, unless either fraud is alleged on the part of the procuring officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. X-Tyal International Corp., B-198802, May 22, 1980, 80-1 CPD 355. Neither of these has been alleged in the instant case.

The protest is dismissed.


Milton J. Socolar
General Counsel