

DECISION

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

FILE: B-206972

DATE: January 18, 1983

MATTER OF: Metal Service Center

DIGEST:

Contracting officer's determination of nonresponsibility based on finding that small business concern otherwise in line for award does not have acceptable quality assurance system to perform required work must be referred to Small Business Administration (SBA), albeit on an expedited basis, for consideration under certificate of competency (COC) program, since applicable law and regulations no longer allow exception to this requirement based on urgency. However, GAO recommends that Executive Branch consider developing expedited COC procedure to permit prompt consideration of COC referrals by SBA when critically urgent procurements are involved.

Metal Service Center, a small business, protests the determination that it was nonresponsible and therefore not eligible for the award of a contract under invitation for bids (IFB) No. N00612-82-B-0009 issued by the Naval Supply Center, Charleston, South Carolina. Because there was an urgent need for the items being procured, the agency made award to another bidder without referring the question of Metal Service Center's responsibility to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) program. Metal Service Center maintains that the nonresponsibility determination was based on erroneous and outdated information and that the award of the contract is illegal because, as a small business, it had the right to apply for a COC from the SBA, but was never given the opportunity. For the reasons discussed below, the protest is sustained.

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The IFB, issued January 18, 1982, solicited bids for two lengths of copper-nickel alloy tubing which was required by the Navy as piping material for the overhaul of nuclear submarines. The IFB identified the requirement as "Level I" which indicated that the material was to be used in high pressure piping systems operating under critical conditions. As a result, the IFB contained numerous stringent quality assurance requirements, including a requirement for the contractor to maintain an inspection system in accordance with Military Specification MIL-I-45208 in effect on the date of the contract (Defense Acquisition Regulation (DAR) § 7-104.33 (DAC 76-28, July 15, 1981)).

The IFB was mailed to 21 prospective bidders with bid opening scheduled for February 17, 1982. Three bids were received and Metal Service Center submitted the low bid. By letter of February 22, Metal Service Center advised the contracting officer that the Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania, had recently conducted a technical survey to establish the firm's ability to comply with Level I and MIL-I-45208A requirements. The survey report, dated November 20, 1981, was forwarded to the contracting officer by quality assurance personnel on February 25, 1982, 8 days after bid opening. The report cited numerous deficiencies in the contractor's quality control manual and system, and recommended changes to implement the quality assurance requirements of the military specifications. On that same day, Navy quality assurance personnel reported to the contracting officer that representatives of the Defense Contract Administration Services Management Area Atlanta (DCASMA) orally indicated that Metal Service Center, as of that date, had failed to correct the deficiencies noted in the survey report. The Navy's quality assurance personnel then prepared a "Vendor Performance Summary Report," dated February 25, recommending that no award be made to Metal Service Center because of the urgency of the requirements, noting that a second technical survey of the firm, then scheduled for mid-March 1982, was necessary to determine its compliance with contract quality requirements.

On February 26, the Director, Regional Contracting Department, determined Metal Service Center to be nonresponsible and concluded that award should be made without delay and without referral of Metal Service Center's nonresponsibility determination to the SBA for processing under the COC procedures. He based his decision on the following finding:

"The fifteen day delay required for the SBA to make a decision on whether to issue a Certificate of Competency will result in failure to meet the final critical overhaul milestone objective of [a nuclear submarine which would also result in] a failure to return this nuclear submarine to the operating fleet on schedule."

He further determined that a "concomitant result of the delay" would be the "nonavailability" of the drydock for overhaul of another nuclear submarine.

Award was made to Metal Mart, Inc., the second low bidder, on March 1, 1982. The contract was modified on March 29 to accelerate delivery by shipping the material air express. Delivery occurred on April 12, 1982.

Metal Service Center argues that the contracting officer's determination of nonresponsibility was improper since a formal preaward survey would have shown that the company had, in fact, corrected all the deficiencies disclosed by the November technical survey, when, on January 19, 1982, it furnished to DCASMA all the necessary revisions to its quality assurance system. Metal Service Center also questions the urgency of the procurement, noting that the contracting officer took from February 17 to February 25 to orally contact DCASMA about the status of Metal Service Center's quality assurance system and also noting that the procurement was effected by formal advertising rather than by expedited negotiations. The protester also points to the fact that 5 calendar days elapsed between the receipt by the contracting officer of the unfavorable survey report and award of the contract to the second low bidder, which the protester considers to be

an unreasonable delay in view of the stated urgency of the procurement. Finally, the protester objects to the contracting officer's failure to refer the question of its responsibility to the SBA as required by the Small Business Act.

The Navy admits that the contracting officer had no legal basis for not referring the question of Metal Service Center's responsibility to SBA and that he violated the Small Business Act in failing to do so. However, the Navy excuses this failure on the grounds that the contracting officer nevertheless acted "reasonably" under the "critical" factual circumstances of this procurement.

The Navy explains that during the overhaul of nuclear submarines a "critical path" must be maintained which requires completion in sequence of each stage of the overhaul process. After issuance of the IFB, the critical path for the submarine undergoing overhaul was accelerated, requiring delivery of the tubing at the earliest possible date and not later than April 15. (The high pressure piping system was to be used in the emergency blow-out system for the ballast tanks on the nuclear submarine.) After DCASMA reported to the contracting officer on February 25 that Metal Service Center had not corrected the deficiencies noted in the technical survey, the Navy's technical experts advised the contracting officer that Metal Service Center could not correct the deficiencies and deliver the required material by April 15. Further, the contracting officer was advised that any slippage in delivery of the material would delay the undocking of the submarine and the drydocking of another submarine, with an estimated cost to the Government because of submarine scheduling delays of \$36 million.

According to the Navy, the contracting officer did not request a formal preaward survey of Metal Service Center because completion of the survey would have required 10 to 30 days. Similarly, the contracting officer did not refer the question of the company's

responsibility to the SBA because processing of the COC application would have required approximately 15 days. Therefore, because of his concern that the required material be timely delivered, the contracting officer awarded the contract to the second low bidder.

Finally, the Navy argues that, in any event, once the requirement for an acceleration of the delivery schedule materialized after bid opening, it could have canceled the IFB since the delivery schedule of June 17, 1982 set forth in the solicitation no longer represented its needs. The Navy asserts that after such cancellation the contracting officer would have had the authority to negotiate the requirements from only those vendors whose quality assurance systems were approved at the time and thus able to comply with the new accelerated required delivery date. The Navy thus argues that the protester was not prejudiced by the Navy's failure to refer the question of its responsibility to SBA since viable alternate procurement actions existed which also would have resulted in the exclusion of that firm.

We believe that by beginning its procurement process earlier the Navy could have avoided the scheduling dilemma in which it found itself. In addition, we question the magnitude of the damages which the Navy estimated would result from the delay in receiving the piping--\$36 million--which figure was without any substantiation. Nevertheless, we would agree that the record supports the conclusion that following the opening of bids the Navy found itself in urgent need of materials, delay in the receipt of which could cost the Government far more than the \$8,000 difference between the low bid of the protester and that of the awardee. These circumstances, however, do not excuse the contracting officer's failure to refer the question of Metal Service Center's responsibility to the SBA as required by the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV 1980).

Under the Act, a small business may not be precluded from award on the basis of nonresponsibility without referral of the matter to the SBA for final disposition under the COC procedures and the SBA is empowered to

certify conclusively to Government procurement officials with respect to all elements of responsibility. See Com-Data, Inc., B-191289, June 23, 1978, 78-1 CPD 459. The language and legislative history of the Act and SBA's implementing regulations provide no exception to this referral procedure. See H. R. Rep. No. 95-1, 95th Cong., 1st Sess. 18 (1977); H. Conf. Rep. No. 95-535, 95th Cong., 1st Sess. 21 (1977), reprinted in [1977] U. S. Code Cong. & Ad. News 838, 851; 13 C.F.R. § 125.5 (1982). In a prior decision concerning a procurement by the Veterans Administration, we noted specifically that the statute "makes no exception for urgency as a ground for not referring the question of a small business's responsibility to SBA" and that the Federal Procurement Regulations had been amended to eliminate the urgency exception previously allowed. Hatcher Waste Disposal, 58 Comp. Gen. 316 (1979), 79-1 CPD 157. In this regard, the urgency exception previously provided by DAR § 1-705.4(c) (iv) also has been deleted by Defense Acquisition Circular (DAC) 76-18, March 12, 1979 at 26.

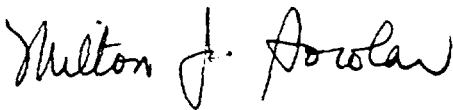
The Navy argues that the contracting officer acted reasonably under the unusual circumstances of this case. However well-meaning the contracting officer may have been, his actions were in direct contravention of a statute which requires, without exception, that the question of a small business concern's lack of responsibility must be referred to the SBA for consideration under the COC procedures. We do not think that a knowing violation of Federal law is reasonable. In addition, while DAR § 1-705.4(c) (DAC 76-24, August 28, 1980) does provide for withholding of award until SBA action concerning issuance of a COC is taken or until 15 days after the SBA is notified, in view of the urgency of this procurement, we believe the contracting officer and the SBA should have attempted to arrange for an expedited review by the SBA of Metal Service Center's responsibility.

With respect to the Navy's argument that the protester was not prejudiced because the solicitation could have been canceled and the requirements negotiated only with qualified offerors, the fact remains that the Navy

B-206972

made award under the advertised solicitation and did not comply with the law in so doing. Moreover, on this record we cannot say that the protester properly could have been viewed as unqualified for participation in a follow-on negotiated procurement.

For the foregoing reasons, we sustain the protest. However, since the contract has been performed, no corrective action is possible in this case. Nevertheless, we believe this case suggests the need for an expedited COC procedure so that contracting officials can meet the Government's most urgent procurement needs while complying with the Small Business Act. To that end, we are recommending to the Office of Federal Procurement Policy that the Executive Branch consider the development of such a procedure.

for 
Comptroller General
of the United States