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DECISION

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

FILE: B-217508 **DATE:** April 2, 1985

MATTER OF: Neal R. Gross and Company, Inc.

DIGEST:

1. Protester, rejected as nonresponsible, contending that it has a right as a small business concern to have the determination of its responsibility referred to the Small Business Administration (SBA) under the certificate of competency (COC) procedures is protesting the agency's action and not a solicitation defect (the omission of a size status certification clause).

2. Where firm does not certify itself as a small business concern in its bid due to an omission of size status certification clause from solicitation, a bidder claiming to be a small business does not waive its right to SBA review. In such a case, contracting officer should give the bidder an opportunity to indicate whether it is small.

3. Contracting officer's determination that small business concern is nonresponsible on basis of unsatisfactory record of performance and unreasonably low cost must be referred to SBA for consideration under the COC procedures, since applicable law and regulations do not allow any exceptions to this requirement. GAO and the courts have found very limited exceptions to the referral requirement and such circumstances are not present here.

Neal R. Gross and Company, Inc. (Gross), protests award of a contract to Executive Court Reporters under invitation for bids (IFB) No. BI-FMC-85-1 issued by the Federal Maritime Commission (FMC) for court reporting services. Gross, having been found nonresponsible under the IFB, contends that it has a right as a small business concern to have the determination of its responsibility referred to the Small Business Administration (SBA) for final disposition under the certificate of competency (COC) procedures. We agree.

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Due to an oversight which occurred while standard form 33 was being revised, FMC failed to include certain checklist items, including a size status certification clause, in the solicitation. This inadvertent omission went unnoticed until after bid opening. FMC asserts that Gross is alleging that the solicitation was defective because this clause was omitted and, since the protest was filed after bid opening, it is untimely. 4 C.F.R. § 21.2(b)(1) (1984). Gross, however, is not contending that the solicitation improperly failed to include a size status certification clause. Rather, Gross is contending that the agency acted improperly after bid opening by rejecting the firm's bid without referring it to the SBA for review. Thus, Gross' protest only had to be filed within 10 working days after it knew or should have known that its bid was rejected. 4 C.F.R. § 21.2(b)(2). The protest was filed within the prescribed period of time and, therefore, is timely.

FMC also asserts that, since Gross failed to protest the omission of the size status certification clause prior to bid opening, the firm waived its right to the procedural safeguards of which it is now trying to avail itself. To the contrary, the fact that Gross did not certify itself as a small business concern in its bid is not a waiver of its right to SBA review. We have held that a firm's failure to check a box in a solicitation indicating that it is a small business concern is a minor informality which the contracting officer is required either to waive or to give the bidder an opportunity to cure. Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.405 (1984); Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 C.P.D. ¶ 629. Due to the omission of the size status certification clause here, the firm did not have the opportunity to check the box. Since it could not be determined from Gross' bid whether or not the firm was small, as in those cases where a firm fails to check a box, the contracting officer should have given Gross the opportunity to cure this deficiency. See Washington Patrol Service, Inc., B-195900, Aug. 19, 1980, 80-2 C.P.D. ¶ 132.

Had the contracting officer given Gross this opportunity, he would have learned that Gross claimed to be a small business. In fact, the contracting officer knew, or should have known, that Gross was small since Gross was the incumbent contractor and it had certified itself as a small business concern in the previous contract. If the contracting officer had any doubt as to Gross' size, he should have asked the firm. See Anderson-Cottonwood Disposal, B-194885,

Aug. 8, 1979, 79-2 C.P.D. ¶ 98. Thus, FMC cannot properly deny Gross its right to an SBA review of the nonresponsibility determination on the basis of the firm's failure to certify itself as small in its bid.

FMC explains that Gross' low bid was rejected for two reasons. First, the contracting officer determined that, based on Gross' performance as the incumbent contractor, Gross had an unsatisfactory record of performance. Second, the contracting officer believed that Gross' bid price of 10 cents per page for transcripts of hearings conducted outside of Washington D.C., was far below cost and was based on speculation that future proceedings would be held only in Washington, D.C. The contracting officer determined that, if extensive hearings occurred outside of Washington, D.C., Gross' unreasonably low bid would cause the firm to default on the contract.

Contrary to suggestions by the agency, these bases are both matters of responsibility. First, FAR, 48 C.F.R. § 9.104-1(c), lists a satisfactory record of performance as one of the elements required of a prospective contractor to be determined responsible. Second, we have held that the question of whether a bidder will be able to perform the contract in light of a low bid price is a matter of responsibility. Freund Precision, Inc., B-216352, Sept. 26, 1984, 84-2 C.P.D. ¶ 360. The provision relied on by the agency, FAR, 48 C.F.R. § 14.404-2(f), allows rejection of a bid determined to be unreasonable as to price, but it applies only to the rejection of excessively high bids and is not authority to reject an unreasonably low bid. North American Laboratories of Ohio, Inc., B-194630, Aug. 9, 1979, 79-2 C.P.D. ¶ 106.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), whenever a contracting officer makes a determination that a small business is nonresponsible, he must refer the matter to SBA for final disposition under the COC procedures, and the SBA has conclusive authority to determine whether a small business bidder is nonresponsible. See D. J. Findley, Inc., B-215083, July 24, 1984, 84-2 C.P.D. ¶ 106. 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), reprinted in [1977] U.S. Code Cong. & Ad. News 821, 838; H. Conf. Rep. No. 95-535, 95th Cong. 1st Sess. 21 (1977), reprinted in [1977] U.S. Code Cong. & Ad.

News 843, 851; 13 C.F.R. § 125.5 (1984); Metal Service Center, B-206972, Jan. 18, 1983, 83-1 C.P.D. ¶ 58. Thus, an agency is required to refer a nonresponsibility determination to SBA regardless of the basis of the nonresponsibility finding. Angelo Warehouses Co., B-196780, Mar. 28, 1980, 80-1 C.P.D. ¶ 228.

Our Office has recognized very few exceptions to the agency's requirement to refer the question of a small business' responsibility to SBA and FMC does not assert that any of these exceptions are applicable here. Instead, FMC relies on court cases to support its decision not to refer its determination of Gross' nonresponsibility to the SBA for review. Citing Siller Brothers, Inc. v. United States, 655 F.2d 1039 (Ct. Cl. 1981), cert. denied 456 U.S. 925 (1982). FMC asserts that a procuring activity may make a nonresponsibility determination on the basis of the bidder's performance under a previous contract without referral to SBA. It also argues that referral is not required where the determination of nonresponsibility was made on bases unrelated to the size status of Gross. Electro-Methods, Inc. v. United States, 728 F.2d 1471 (Fed. Cir. 1984).

These cases, however, are inapposite. Both involved agency action pursuant to published regulations prohibiting a firm from competing for a contract. Siller Brothers merely upheld Forest Service regulations which prohibit a firm from bidding on a contract when it defaulted while performing the previous contract, see Seaboard Lumber Co., B-213926, Mar. 15, 1984, 84-1 C.P.D. ¶ 311, while Electro-Methods allowed an agency pursuant to its regulations to suspend a firm from bidding on contracts due to possible criminal involvement. Here, Gross was permitted to submit a bid and it was only after its bid was found to be the apparent low bid that a determination was made on the firm's responsibility under this IFB. Moreover, this determination was not based on any agency regulations, and the reasons for the finding of nonresponsibility also differed from those offered in the cases cited: the record indicates that FMC expressly decided against defaulting Gross, and there is no indication that the firm was suspended from bidding. We therefore are unable to conclude that referral to SBA for review of the determination of Gross' nonresponsibility was not required.

We find that the contracting officer's actions were in direct contravention of the statute which requires that the question of a small business concern's lack of responsibility be referred to SBA under the COC procedures. We therefore recommend that FMC refer this matter to the SBA. We further recommend that, if the SBA issues a certficate of competency, FMC should terminate for the convenience of the government the contract awarded to Executive Court Reporters and make award to Gross.

Since this decision contains a recommendation that corrective action be taken, we are furnishing copies to the Senate Committees on Governmental Affairs and Appropriations and the House Committees on Government Operations and Appropriations in accordance with section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (1982), which requires the submission of written statements by the agency to the committees concerning the action taken with respect to our recommendation.

The protest is sustained.

Harry R. Van Cleve
for Comptroller General
of the United States