DECISION

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

FILE: B-222308, B-222309, B-222310, B-222796 **DATE:** April 28, 1986

MATTER OF: S.A.F.E. Export Corporation

DIGEST:

1. A firm proposed for debarment from government contracting generally is precluded from receiving government contracts pending a final debarment decision.

2. Where actions of a debarred firm following an initial debarment so warrant, the debarment may be extended in order to protect the government's interests.

3. The Federal Acquisition Regulation, 48 C.F.R. § 9.406-1(b), provides that a debarring official may extend the decision to debar a contractor to all of its affiliates only if each affiliate is specifically named on the notification of proposed debarment. The failure of the debarring official to comply with this requirement is a mere procedural defect, not affecting the validity of the proposed debarment of the affiliate, where the affiliate is otherwise on notice of proposed action and is afforded the opportunity to respond.

S.A.F.E. Export Corporation protests the decision of the U.S. Army Contracting Agency, Europe, not to consider it for award under four solicitations: DAJA37-86-R-0321, -0322, -0333, and -0425. S.A.F.E. Export contends that although it previously had been debarred, it was eligible for award under these solicitations because it had been removed from the debarred bidders list before the awards were to be made. The Army rejected the firm's offer or refused to solicit it, advising the firm that it was once again being considered for debarment. While conceding that the Army is currently proposing debarment of S.A.F.E. oHG, an affiliate, S.A.F.E.Export maintains that it is not a party to this action.

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We dismiss the protests.

The record indicates that S.A.F.E. oHG, its affiliated companies, and Mr. E.J.P. Tierney, the president of S.A.F.E. Export and a partner in S.A.F.E. oHG, were debarred and thus ineligible for contract award from June 5, 1984 through February 10, 1986. By letter dated February 7, 1986, a copy of which the Army has furnished us, the agency advised Mr. Tierney that pursuant to the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.406-4(b)[1/] (1984), he, S.A.F.E. oHG, and affiliated companies were being proposed for debarment for an additional 3-year period for new and independent reasons. Among these, the Army stated, was the fact that although S.A.F.E. oHG was debarred in June 1984, it had continued to solicit and enter into government contracts. In so doing, the Army continued, S.A.F.E. oHG willfully deceived contracting and ordering officers about its eligibility to receive contracts and blatently disregarded the June 5, 1984 debarment order and the procedures set forth in the FAR, 48 C.F.R. § 9.406-4(c), for seeking relief from debarment.

As further justification for this proposed action, the Army referred to several of S.A.F.E. oHG's subsequent business dealings with the military that it believed demonstrated the continued lack of business integrity and business responsibility necessary for award of government contracts. For example, the Army stated, the firm accepted a $750 order for electronic locks, issued by a contracting officer who was not aware of the debarment. Although the Army paid for the supplies, the firm attempted to recover interest in a proceeding before the Armed Services Board of Contract Appeals (ASBCA), alleging that payment had not been timely. According to the Army, it subsequently

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[1/] This regulation provides in pertinent part that where the actions of a debarred firm since the imposition of its inital debarment so warrant, a debarring official may extend the debarment for an additional period, if that official determines that an extension is necessary to further protect the government's interests.

rescinded the contract, and the ASBCA dismissed the claim for lack of jurisdiction. The Army notes that during these proceedings, S.A.F.E. oHG asserted that it did not recognize the debarment as legal and that it intended to continue to accept Army contracts.

The FAR provides that agencies will not solicit offers from, award contracts to, renew or otherwise extend contracts with, or consent to subcontracts with, contractors proposed for debarment. 48 C.F.R. § 9.406-3(c)(7). The Army maintains that it was thus precluded from awarding contracts under the protested solicitations to S.A.F.E. oHG and affiliated companies, including S.A.F.E. Export, and that its rejection of S.A.F.E. Export's offers submitted in response to these solicitations was therefore proper.

S.A.F.E. Export responds that under the FAR, 48 C.F.R. § 9.406-1(b), affiliates of contractors proposed for debarment are not automatically precluded from receiving government contracts. To be so precluded, the affiliate must be specifically named and given written notice of the proposed debarment, as well as an opportunity to respond. S.A.F.E. Export contends that the Army did not comply with this procedural requirement when it proposed to debar affiliates of S.A.F.E. oHG, since its February 7 letter to S.A.F.E. oHG did not specifically name S.A.F.E. Export. S.A.F.E. Export concludes that this proposed debarment consequently does not affect its eligibility for contracts to be awarded under the protested solicitations.

Our review of this matter is restricted to an examination of whether the contracting officer's determination that S.A.F.E. Export was ineligible for contract award was reasonable. See Solid Waste Services, Inc., B-218445 et al., June 20, 1985, 85-1 CPD ¶ 703. In examining the reasonableness of the agency's actions here, we recognize that the Army, by not specifically naming S.A.F.E. Export in the February 7 notice of debarment, indeed failed to conform to the precise requirements of the regulation. We view this failure as a mere procedural defect, however, not one that affects the validity of the Army's decision to exclude S.A.F.E. Export from the subject competitions.

The thrust of the regulation that debarments may be extended to affiliated firms only where the affiliate is specifically named is to ensure that the affected affiliate has notice of the proposed action so that it may respond to it. Here, we think the Army's February 7 letter, by referring to affiliated companies of S.A.F.E. oHG, was sufficient to place S.A.F.E. Export on notice of the proposed debarment. In this regard, we particularly note that S.A.F.E. Export is nothing more than a mail drop in Baltimore, Maryland, for correspondence that is to be forwarded to S.A.F.E. oHG in Frankfurt, Germany, and that Mr. Tierney is the principal officer and employee of both companies. See S.A.F.E. Export Corp., B-203346, Jan. 15, 1982, 82-1 CPD ¶ 35. Thus, we believe that Mr. Tierney's receipt of the letter was sufficient to ensure that S.A.F.E. Export was on notice of the proposed debarment.

Accordingly, we conclude that the Army properly viewed the February 7 notification of proposed debarment as applying to S.A.F.E. Export as well as S.A.F.E. oHG. Under applicable regulations, FAR, 48 C.F.R. § 9.406-3(c)(7), S.A.F.E. Export, therefore, was generally precluded from being solicited for or receiving government contracts pending the debarment decision. Titan Construction, Co., B-220691 et al., Oct. 15, 1985, 85-2 CPD ¶ 412.

The Army now informs us that the debarment proposed in February 1986 has become final. As S.A.F.E. Export thus has been continually ineligible for contract award since the inception of its initial debarment in June 1984, we have no legal basis to object to the Army's actions under the protested solicitations. Moreover, given its status, S.A.F.E. Export is not an interested party under our Bid Protest Regulations, and we will not consider future protests from the firm while it remains debarred. See 4 C.F.R. § 21.0(a) (1985); Solid Waste Services, Inc., supra.

The protests are dismissed.

Ronald Berger

Ronald Berger
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