

Jones



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Skyline Products--Request for Reconsideration  
File: B-231775.2  
Date: August 11, 1988

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### DIGEST

1. The General Accounting Office does not review a protest of an agency's affirmative determination of responsibility absent a showing of possible fraud, bad faith or failure to apply definitive criteria contained in the solicitation.
2. The General Accounting Office does not consider whether a bidder qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to review by the Small Business Administration (SBA), if a small business is involved, and the Secretary of Labor. Where the agency is apprised of the protester's continued disagreement with its determination, it should now refer matter to SBA as required by the Federal Acquisition Regulations.
3. Whether or not a firm actually performs in compliance with contract requirements is a matter of contract administration, which the General Accounting Office does not review as part of its bid protest function.

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### DECISION

Skyline Products requests that we reconsider our decision in Skyline Products, B-231775, July 7, 1988, 88-1 CPD ¶ \_\_\_\_\_. In that decision, we dismissed Skyline's protest of an award to Allied Insulation Supply Co. under invitation for bids (IFB) No. DTCG80-88-B-00040, issued by the United States Coast Guard for the manufacture of honeycomb core panels.

We affirm our prior decision. We also dismiss two additional protest issues that Skyline now raises, concerning the awardee's ability and intention to meet its contractual obligations.

In its initial protest, Skyline argued that Allied Insulation is not a responsible contractor because it does not have the manufacturing capability to fabricate the specified

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panels. Skyline also argued that the awardee intended to supply a product that is manufactured by a large business even though the procurement was set aside for small business; this argument also involved Allied Insulation's responsibility since the bid, on its face, represented the necessary commitment. We dismissed these aspects of Skyline's protest because our Office does not review a protest of a contracting agency's affirmative determination of a bidder's responsibility unless there is a showing of possible fraud, bad faith or failure to apply definitive criteria contained in the solicitation. Skyline did not make such a showing.

Skyline also argued that Allied Insulation did not qualify as either a manufacturer or regular dealer under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 (1982), and, therefore, was not eligible for award. We dismissed this aspect of the protest because our Office does not consider whether an offeror so qualifies since such matters are for determination by the contracting officer in the first instance, subject to final review by the Small Business Administration (SBA), if a small business is involved, and by the Secretary of Labor. 4 C.F.R. § 21.3(m)(9) (1988).

On reconsideration, Skyline asserts that the Coast Guard simply accepted the awardee's self-certification that it was a manufacturer or regular dealer and that the agency thus did not make an independent, affirmative determination of responsibility in that regard. In this respect, Federal Acquisition Regulation (FAR) § 22.608-2 (FAC 84-29) requires that a contracting officer investigate an offeror's eligibility as a manufacturer or regular dealer, and that he not rely on the firm's own representation where a protest of the offeror's eligibility has been lodged. According to Skyline, our dismissal was, therefore, premature.

The Coast Guard has advised us that it did in fact look beyond the self-certification of Allied Insulation in determining both the firm's responsibility and its eligibility as a manufacturer or regular dealer. In making these judgments, the contracting officer primarily relied upon a preaward survey which included evidence obtained from an on-site survey conducted specifically for the purpose of making the determination. The contracting officer thus satisfied his duty under the FAR in that respect.

The record, however, shows that the Coast Guard has not referred Skyline's protest to the SBA. Since Skyline disagrees with the contracting agency's determination that Allied Insulation is a manufacturer or regular dealer of the specified products, the Coast Guard should now refer the

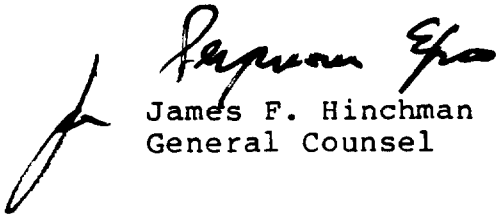
matter to the SBA for its determination, pursuant to FAR § 22.608-3(b)(2). See Stephan Woods Products, Inc., B-225631, Apr. 1, 1987, 87-1 CPD ¶ 369. We are so advising the agency. If the SBA agrees with the contracting officer's determination, the case will be forwarded to the Department of Labor for final determination. FAR § 22.608-2(f)(2)(i). If the contracting officer discovers that the award was improper, he may terminate the contract or take other action appropriate as provided in FAR § 22.608-6 (FAC 84-7).

Skyline also raises in its request for reconsideration two additional protest issues the firm had raised with the Coast Guard and which the agency recently dismissed as matters of contract performance. First, Skyline contends that, pursuant to paragraph 14 of the specification for honeycomb core panels, it would appear that only a firm that has a certified test report for the product is eligible for award; Skyline argues that Allied Insulation does not manufacture a honeycomb core panel which meets the specification and that has been certified as required by paragraph 14. Second, Skyline contends that it has been informed that the awardee intends to provide a product which the protester knows by experience does not meet the requirements of the solicitation.

We dismiss this aspect of Skyline's protest. As indicated in our prior decision, in its bid Allied Insulation took no exception to the IFB's requirement--the bid, therefore, was responsive to the solicitation. See Ibex Ltd., B-230218, Mar. 11, 1988, 88-1 CPD ¶ 257. A prospective contractor's ability to provide the required product in accordance with the solicitation is a matter of the firm's responsibility, which the procuring agency must determine prior to contract award. Id. Again, our Office does not review such a determination except in limited circumstances not applicable here.

Moreover, the Coast Guard evidently has decided that the awardee is capable of furnishing items that conform to the solicitation's specifications, and its acceptance of Allied Insulation's bid and offer has obligated Allied Insulation to supply compliant honeycomb core panels. Mincco, Inc., B-225419.3, et al., Aug. 25, 1987, 87-2 CPD ¶ 202. Whether Allied Insulation actually does so is a matter of contract administration, which our Office does not review. Id.

We affirm our prior decision, and we dismiss the additional protest.



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