



Comptroller General  
of the United States

Washington, D.C. 20542

## Decision

**Matter of:** Jarrett S. Blankenship

**File:** B-237584

**Date:** March 8, 1990

**Jarrett S. Blankenship, for the protester.**

Douglas P. Larsen, Jr., Esq., and Charles J. McManus, Esq., Office of the General Counsel, Department of the Navy, for the agency.

John Formica, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### **DIGEST**

Agency's determination that a small disadvantaged business (SDB) was not a regular dealer in air cooled chiller systems, and thus was not eligible for an SDB evaluation preference, did not have a reasonable basis where the contracting officer rejected the SDB's certification as a regular dealer without any inquiry or investigation, and without explanation applied eligibility criteria in determining the SDB's regular dealer status which depart significantly from regulations implementing the Walsh-Healey Act which agency reports it has adopted.

### **DECISION**

Jarrett S. Blankenship protests the award of a contract to the Trane Company under request for proposals (RFP) No. N62604-89-R-7538, issued by the Department of the Navy for a 120-ton air cooled chiller system. Blankenship contends that the Navy improperly determined that it was not eligible for a small disadvantaged business (SDB) evaluation preference because it was not a regular dealer of the chiller system to be provided. Blankenship would have been the low-priced offeror had an SDB evaluation preference been applied.

We sustain the protest.

The terms and conditions of the evaluation preference are set forth in the standard clause, "NOTICE OF EVALUATION

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PREFERENCE FOR SMALL DISADVANTAGED BUSINESS (SDB) CONCERNS,  
set forth at Department of Defense (DOD) Federal Acquisition  
Regulation Supplement (DFARS) § 252.219-7007 (DAC 88-2).  
This clause provides in pertinent part as follows:

"(b) Evaluation. After all other evaluation factors described in this solicitation are applied, offers will be evaluated by adding a factor of ten percent (10%) to offers from concerns that are not SDB concerns . . . .

"(c) Agreement. By submission of an offer and execution of a contract, the SDB Offeror/Contractor (except a regular dealer) . . . agrees that in performance of the contract in the case of a contract for--

[Text Omitted.]

"(2) Supplies. The concern shall perform work for at least fifty percent (50%) of the cost of manufacturing the supplies, not including the cost of materials."

This last section of the standard clause effectively establishes eligibility requirements for receipt of the SDB evaluation preference. That is, an SDB, to qualify for the preference, must either be a regular dealer in the item offered or agree to perform work representing 50 percent of the cost of manufacture. In evaluating a firm's status as a regular dealer, the agency reports that it has adopted the definition of regular dealer as set forth in regulations implementing the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 (1982), which provide generally that an offeror may qualify as a regular dealer if it "regularly deal[s] in the particular goods or goods of the same general character offered to the Government." 41 C.F.R. § 50-206.53(a) (1989). Additionally, an offeror must be able to show that it has space on a continuing basis (not a demand basis) in which it maintains a true inventory from which sales are made, and that the goods stocked are of the same general character as the goods to be supplied to the government. 41 C.F.R. § 50-206.53(b)

In responding to the solicitation, Blankenship certified that it was an SDB and a regular dealer of the chiller system it offered. Blankenship also identified Carrier Corporation as the actual manufacturer.

In responding to the protest, the agency explains that the contracting officer had determined on the basis of an

earlier solicitation that only five manufacturers, including Carrier and Trane, were capable of producing the chiller system, and concluded that a chiller system compliant with the solicitation specifications was not a commercially stocked item, but would have to be produced by the manufacturer on demand. As a result of this, and because Blankenship indicated it would be providing a chiller system manufactured by Carrier, the contracting officer concluded that Blankenship could not maintain a regular inventory of 120-ton chiller systems. The contracting officer also speculates, based on the large size of the system, that it would be shipped directly to the Navy from the manufacturer and thus would never enter Blankenship's warehouse or be part of Blankenship's inventory. Based on this, the contracting officer concluded that despite its certification, Blankenship did not qualify as a regular dealer for the purpose of the SDB evaluation preference.

While we have approved DOD's imposition of the Walsh-Healey Act regular dealer eligibility requirement for participation in the SDB preference program, see for example G&D Foods, Inc., B-233511 et al.; G&D Foods, Inc., B-235013; B-235014, Aug. 7, 1989, 89-2 CPD ¶ 110, in this case we find that the Navy's conclusion that Blankenship does not meet that requirement does not have a reasonable basis. Despite Blankenship's certification that it is a regular dealer of the chiller system it offered, the Navy determined that this was not so without any investigation or inquiry as to Blankenship's dealership status. The Navy's determination was based solely on a number of assumptions, noted above, made by the contracting officer concerning the manufacturer's method of supplying the chiller and Blankenship's facilities.

Furthermore, the contracting officer's definition of the term "regular dealer" as applied to Blankenship departs significantly from the definition in the regulations implementing the Walsh-Healey Act, which the Navy reports it has adopted. As noted previously, those regulations provide that an offeror may qualify as a dealer if it regularly deals in goods of the same general character as those offered to the government and maintains space in which it stocks goods of the same general character as those offered to the government and from which sales are made. 41 C.F.R. § 50-206.53. Despite the regulation's repeated reference to "goods of the same general character" as those offered to the government, the contracting officer concluded that Blankenship could not qualify as a regular dealer of the chiller system on the assumption that Blankenship could not maintain an inventory of goods identical to the 120-ton system Blankenship offered to the government. There is no

indication in the record that the agency even considered whether Blankenship regularly deals in goods of the same general character as the chiller system it offered. The Navy has supplied no rationale for the contracting officer's departure from the definition of regular dealer provided in the regulations which the Navy reports it has adopted. While the agency has some discretion in making determinations such as the one made here, the record does not support in any meaningful way the agency's conclusion. We therefore sustain the protest.

We do not recommend corrective action since performance under the contract is complete. In view, however, of our conclusion that the agency failed to make a proper determination as to Blankenship's eligibility for the SDB evaluation preference, we think Blankenship is entitled to the costs of preparing its proposal and to its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1),(2) (1989). Blankenship should submit its claim for such costs directly to the agency. 4 C.F.R. § 21.6(e).

*Milton J. Horstar*  
for Comptroller General  
of the United States