



Comptroller General
of the United States

Washington, D.C. 20548

K44441

Decision

Matter of: J. Morris & Associates, Inc.

File: B-244647

Date: July 22, 1991

Lynn G. Morris for the protester.
Tania L. Calhoun, Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Agency is not required to withhold award to second low offeror pending appeal of Small Business Administration determination that low bidder is not a small disadvantaged business (SDB) that rendered the firm ineligible for award under an SDB set-aside.

DECISION

J. Morris & Associates, Inc. protests the proposed award of a construction contract to Selmon Enterprises, Inc., under request for proposals (RFP) No. F34650-91-R-0023, issued by the Department of the Air Force, Tinker Air Force Base, Oklahoma. The RFP was set aside for small disadvantaged businesses (SDB).

We dismiss the protest.

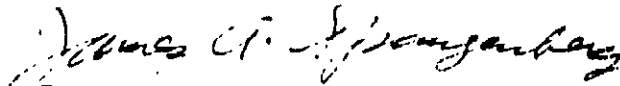
Morris submitted the low-priced offer but its SDB eligibility was protested. The protest was forwarded to the Small Business Administration (SBA), which found Morris was not an SDB for purposes of this procurement. Morris has filed an appeal with the SBA Office of Hearings and Appeals and is awaiting a decision. Meanwhile, the Air Force is contemplating award to Selmon, the next low offeror. Morris protests that the award should be stayed pending a decision on the appeal.

SBA has the authority to conclusively determine a firm's eligibility for Department of Defense SDB set-asides. Consequently, our Office will not consider a protest that a firm was not awarded a contract under an SDB set-aside when SBA has found the firm ineligible, absent a showing of possible fraud or bad faith on the part of government.

officials or that regulations may have been violated. See C&J Serv., B-230579.3, Sept. 23, 1988, 88-2 CPD ¶ 280.

A contracting agency is generally not required to withhold award during the pendency of an appeal before SBA. See Suddath Moving Sys., Inc., B-229992, Apr. 1, 1988, 88-1 ¶ 332. With respect to an appeal of a finding of ineligibility for SDB status, SBA regulations do not require agencies to withhold award pending an SDB appeal, and specifically provide that if an award is made while an appeal is pending, any subsequent reversal by SBA of its finding of SDB ineligibility shall not affect that award; the successful appeal shall have only prospective effect with respect to future procurements. 13 C.F.R. § 124.610(f) (1991). Since there is no requirement that an agency withhold award pending an appeal, Morris's complaint provides no basis for our objecting to the Air Force's actions.

Accordingly, the protest is dismissed.


James A. Spangenberg
Assistant General Counsel