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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: E. Huttenbauer & Son, Inc.

File: B-258018.3

Date: March 20, 1995

Alan M. Grayson, Esq., for the protester.

DIGEST

A decision not to exercise an option based on responsibility-type concerns does not require referral to the Small Business Administration where the contractor is a small business since such decision does not involve a responsibility determination; the concept of responsibility is applicable only in the contract formation process and not in the administration of contracts already awarded.

DECISION

E. Huttenbauer & Son, Inc., a small business, requests reconsideration of our decision, E.Huttenbauer & Son, Inc., B-258018.2, Feb. 21, 1995, in which we dismissed E. Huttenbauer's protest that the Defense Logistics Agency was required to refer the question of Huttenbauer's responsibility in connection with the agency's decision not to exercise an option in Huttenbauer's contract to the Small Business Administration (SBA). We held that contract options are exercised solely at the discretion of the contracting officer and that there is no requirement for a referral to the SBA prior to a decision not to exercise a contract option.

In its reconsideration request, Huttenbauer argues that we ignored the Small Business Act in rendering this decision. Huttenbauer states that under the act only the SBA, not the contracting agency, can determine that a small business is not responsible, asserts that the decision not to exercise the option was based on a nonresponsibility determination, and concludes that therefore a referral to the SBA was required before the agency could properly decide not to exercise the option.

We did not ignore the requirements of the Small Business Act in rendering our decision. We explicitly noted that the SBA has the conclusive authority to determine the responsibility of a small business for the purpose of receiving and performing a government contract. We further stated, however, that the SBA referral requirement is not applicable to post-award situations.

We reached this conclusion because the concept of "responsibility" has no applicability with respect to a contract once that contract has been awarded. Responsibility is a contract formation term that refers to the ability and willingness of a prospective contractor to perform the contract for which it has submitted an offer; by law, a contracting officer must determine that an offeror is responsible before awarding it a contract. See 10 U.S.C. § 2305(b)(3), (4) (Supp. V 1993); Federal Acquisition Regulation (FAR) § 9.000 et. seq. Once that offeror is determined to be responsible and is awarded a contract, the role of "responsibility" with respect to that contract is over.

The new relationship between the government and the awardee/contractor is not governed by contract formation rules; instead, it is governed by principles of contract administration, any applicable FAR provisions, and the provisions of the contract itself. That means that if the contractor should perform poorly or not comply with specification requirements, the contracting officer does not then make a new responsibility determination and find the contractor to be nonresponsible; instead, the contracting officer proceeds under contract provisions permitting him to take certain actions up to and including termination of the contract for default or for the convenience of the government.

Similarly, if a contract contains option provisions, the contracting officer is not required to make a new responsibility determination before deciding whether to exercise an option; he simply proceeds pursuant to those option provisions and to the applicable provisions in FAR § 17.207. Those provisions establish no prerequisites for a decision not to exercise an option; thus, that decision is solely within the discretion of the contracting agency. In other words, in administrating the contract the contracting agency is free to decide, whether on the basis of concerns about performance or for any other reason, that it does not wish to extend or expand the contract through the exercise of an option.

In short, a decision not to exercise an option, even if based on responsibility-type concerns[1] about acceptable contract performance, does not involve a determination that the contractor is not responsible--it is simply one of several decisions--such as whether to issue a cure notice, see FAR § 49.402-3 , whether to impose liquidated damages, see FAR § 49.402-7, and whether to terminate the contract, see FAR part 49, that a contracting agency having such concerns might make in administering its contracts. Since a responsibility determination is not being made,

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[1]It is not uncommon for responsibility-type concerns to be taken into account in situations that do not involve responsibility determinations and therefore do not require SBA referral. See, e.g., Tri-Services, Inc., B-256196.4, Sept. 30, 1994, 94-2 CPD ¶ 121.

there is no requirement that such a matter be referred to the SBA pursuant to its authority under 15 U.S.C. § 637(b)(7)(A) (1988) to certify the responsibility of a small business to receive and perform a contract.

The decision is affirmed.

Robert H. Hunter

Robert H. Hunter
Senior Associate General Counsel