

# DECISION



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

60048

FILE: B-184345

DATE: October 10, 1975

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MATTER OF: Minnesota Mining and Manufacturing Company

## DIGEST:

Where ASPR § 2-407.6(a)(2), which applies to advertised procurements, was used in negotiated procurement to determine awardee between two equally priced offerors, but was incorrectly applied thereby leading to improper award, no meaningful corrective action may be taken as contract performance has been completed. However, corrective action is being taken by agency.

Request for quotations No. F04699-75-Q-6222 was issued at McClellan Air Force Base for the procurement of magnetic tape. Although the tapes were on the Federal Supply Schedule and thus procurement by formal advertisement would have been possible under normal circumstances, it was determined that an oral solicitation of quotations was necessary so as to permit timely delivery of the items and to prevent a possible work stoppage. The contracting activity confirmed its initial oral solicitation by telegram. The firms, who had submitted prices orally, confirmed their offers by telegram.

Graham Magnetics, Inc. (Graham), and the Minnesota Mining and Manufacturing Company (3M), small and large business firms, respectively, submitted equally priced quotations. Since negotiations were not otherwise called for, the contracting activity looked to the provisions in paragraph 2-407.6(a)(2) of the Armed Services Procurement Regulation (ASPR) (1974 ed.) (although this was not a formally advertised procurement) to determine which firm should receive award and determined that award, which was subsequently made, should be made to Graham.

It is the contention of 3M that the award should have been made to it under the order of priority set forth in the applicable ASPR.

Regarding the determination as to whom award should be made when two or more equal low bids are received, the pertinent portions of ASPR § 2-407.6(a)(2) provide as follows:

\* \* \* \* \*

"(2) \* \* \* preference shall be given in the following order of priority:

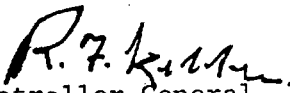
- "(i) certified-eligible concerns with a first preference (1-801) that are also small business concerns (1-701),
- "(ii) other certified-eligible concerns with a first preference,
- "(iii) certified-eligible concerns with a second preference (1-801) that are also small business concerns (1-701),
- "(iv) other certified-eligible concerns with a second preference,
- "(v) persistent or substantial labor surplus area concerns (1-801) that are also small business concerns (1-701),
- "(vi) other persistent or substantial labor surplus area concerns, and
- "(vii) other small business concerns.

"If two or more bidders still remain eligible for award, the award shall be made by a drawing by lot limited to such bidders."

The Department of the Air Force now agrees that award should have been made to 3M under subparagraph (vi), since performance by 3M was to take place at its Camarillo, California, manufacturing facility, which is in a labor surplus area. At no time prior to award, however, was the contracting officer aware that 3M intended to manufacture the materials at a plant in a labor surplus area. The 3M facilities in St. Paul, Minnesota, where it was believed performance was to take place, are not located in a labor surplus area. The award was made to Graham under subparagraph (v) since the contracting officer knew Graham was a small business and also erroneously attached importance to the fact that payment would be made to a Graham district office located in a labor surplus area.

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The Department of the Air Force advises that in all future, similar procurements each offeror or bidder will be required to state in writing the place of contract performance. Because, however, there is no indication that the contracting officer's actions were taken in other than good faith and because the contract was awarded on June 17, 1975, and was completed on June 27, no meaningful action can be taken as regards the immediate procurement.

  
Deputy Comptroller General  
of the United States