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James Peaco
Proc. I

DECISION



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

FILE: B-186471

DATE: December 15, 1976

MATTER OF: Walmartco, Ltd.; Eastern Canvas Products, Inc.

DIGEST:

1. Where protester raised same issues in protest in litigation before U.S. District Court and will pursue final adjudication on merits with court, the protest will not be considered since it is practice of GAO not to render decision on protest where issues involved are likely to be disposed of by court of competent jurisdiction and court has not expressed interest in decision from GAO.
2. Protest against small business size status of another bidder will not be considered since exclusive authority over question of size status of potential awardees rests with SBA.

On April 15, 1976, the Defense Supply Agency (DSA) solicited bids for strap frame assemblies under invitation for bids (IFB) DSA100-76-B-0598. Bids were also sought for shoulder straps under IFB DSA100-76-B-1008 issued on April 19, 1975. Both solicitations were restricted to small businesses with bid openings held respectively on May 5 and May 10, 1976. Walmartco, Ltd. (Walmartco), and Eastern Canvas Products, Inc. (Eastern), responded to both solicitations.

Protests were filed by Eastern against any contract awards to Walmartco, the low bidder, under both solicitations. Eastern's protests are based in part on a contract for similar items (No. DSA100-76-C-1379) which was awarded on May 5, 1976, by DSA to the SBA under the latter's 8(a) program, 15 U.S.C. § 637(a) (1970). SBA had selected Walmartco as the subcontractor to perform the contract.

Walmartco had been approved by SBA for participation in the 8(a) program on December 14, 1975. The record indicates that negotiations were held and completed by SBA and Walmartco prior to the dates for bid opening specified by the two IFB's. In this regard, SBA's report on the protests states that:

"* * * Agreement was reached between the 8(a) negotiators for an 8(a) award to Walmartco for

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60,000 assemblies at a contract price of \$25.00 per assembly with the provision that, if Welmetco became the successful bidder on the competitive award, then its 8(a) contract price would be reduced either to \$21.88 or to its competitively-bid price, whichever was higher. The \$21.88 price had been established by Defense Personnel Support Center as the fair market price which it determined. * * *

In view of this arrangement, Eastern asserts that by virtue of Welmetco's acceptance of the aforementioned contract under the SBA 8(a) program, Welmetco is ineligible for an award under any other formally advertised procurements. It is Eastern's position that Welmetco's participation in the 8(a) program automatically renders Welmetco's bids nonresponsive and nonresponsible for consideration under either IFB. Eastern argues that Welmetco certified to SBA that the latter was unable to compete in the marketplace when submitting an 8(a) business plan. Therefore, Welmetco's participation under these IFB's against other qualified small bidders after receiving an SBA subsidy (award) for similar items constituted an unfair bidding practice. Thus, Eastern maintains that SBA assistance precluded other bidders from competing against Welmetco.

On October 19, 1976, counsel for Eastern advised this Office that the decision had been made to pursue a final adjudication on the merits before the United States District Court for the District of Columbia (Civil Action No. 76-1284) of the same issues raised in its protests. Eastern had previously requested that the court grant a preliminary injunction enjoining the award of any contract to Welmetco pending disposition of the protests.

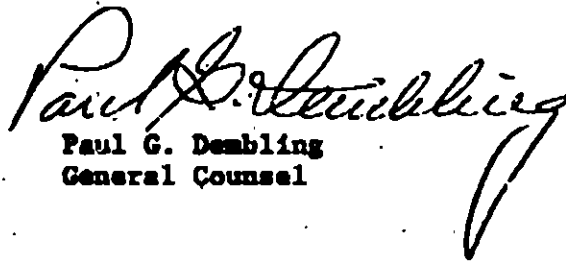
Where the issues involved in a protest are likely to be disposed of in litigation before a court of competent jurisdiction, it is the practice of our Office not to also render a decision on the merits of a protest. See General Electric Company, B-185969, August 17, 1976, 76-2 CPD 165, and 4 C.F.R. § 20.10 (1976). Nevertheless, our Office will render a decision on the merits in circumstances where the court expresses an interest in receiving our decision. Descomp, Inc., 53 Comp. Gen. 522 (1974), 74-1 CPD 44. The court has not expressed such an interest in this case.

Accordingly, we will not consider the Eastern protests on the merits.

Welmetco filed a protest with this Office against the award of a contract to Eastern under IFB DSA100-76-B-0998 on the grounds

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that Eastern was not a small business. The record shows that the Small Business Administration (SBA) found that Eastern was a small business concern and that Welmetco appealed this decision to the SBA Size Appeals Board. It has been the position of this Office that SBA has exclusive authority to adjudicate questions regarding the size status of potential awardees. See Brooks-Berry-Haynie & Associates, Inc., B-184707, September 29, 1975, 75-2 CPD 199. Accordingly, we must decline to consider Welmetco's protest. In any event, as the matter now stands, Eastern is not in line for award.


Paul G. Dembling
General Counsel