



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

B-178701

December 28, 1973

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The Honorable
The Secretary of the Air Force

Dear Mr. Secretary:

This is in reply to letter LGFM, dated September 18, 1973, from the Chief, Contract Management Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, reporting on the protests of Chemical Technology, Inc. (CTI), Quality Maintenance Company, Inc. (Quality), Jets Services, Inc. (Jets), and the Small Business Administration (SBA) against the award of a contract to Dyneteria, Inc. (Dyneteria), under invitation for bids (IFB) F05600-73-B-0387, issued by Lowry Air Force Base.

The IFB, issued on May 7, 1973, requested bids for full food services for one year commencing September 1 with two 1-year options. The bid opening date was extended several times because of efforts to have the procurement restricted, as a small business set-aside. The opening date was finally established by amendment as July 10, 1973. The amendment also advised bidders that the solicitation would be restricted to small business concerns.

At bid opening, the following bids, including option periods, were received:

CTI	\$4,173,430.72
Jets	4,699,053.45
Holloway Enterprises	4,721,783.69
Quality	5,242,554.11
Dyneteria	5,310,309.58
Ancor, Inc.	5,633,058.83
MC&E Service & Support Co. (MC&E)	6,485,386.83
ABC Food Service	6,831,076.39

Preaward surveys were conducted on CTI, Jets, and Quality. The surveys recommended against award to these low bidders. Holloway alleged a mistake in bid and indicated that it would not participate in any pre-award survey or take steps to demonstrate technical competence to perform the contract or to obtain a certificate of competency. In view of this, Holloway was determined to be nonresponsible.

[Protests Against Air Force Award]

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Since the four low bidders were not recommended for consideration, a preaward survey was performed on Dynsteria which resulted in a recommendation for award. On July 31, 1973, a determination of urgency was made pursuant to paragraph 1-705.4(c)(iv) of the Armed Services Procurement Regulation (ASPR) and on August 1, 1973, the contract was awarded to Dynsteria without referring the nonresponsibility of the four low bidders to SBA under the certificate of competency (COC) procedures. The determination of urgency was based on the necessity to award the contract 30 days before the start of performance, September 1, 1973, to allow the contractor sufficient start-up time.

CTI, Jets, SBA, and Quality protested to our Office on August 6, 8, 10, and 14, respectively, the award of the contract to Dynsteria on the grounds that: first, CTI, Jets, and Quality were entitled to have the determinations of nonresponsibility referred to SBA; second, Dynsteria was other than small business and, therefore, ineligible for award. In accordance with section 20.9 of our Interim Bid Protest Procedures and Standards, our Office extended the opportunity to all interested parties (CTI, Jets, Quality, Dynsteria, SBA, and the Air Force) to attend an informal conference on the protest.

The purpose of the conference is to crystallize the issues before our Office and to afford all interested parties an opportunity to present their views on the merits of the protest. Also, our Office gains further insight, not readily discernible from the record, into significant factors inherent in the particular procurement being protested. Air Force representatives declined our invitation to attend the conference apparently because it is contrary to Air Force policy to attend protest conferences. Though we are unaware of the policy considerations involved, it is difficult for us to understand how attendance could be adverse to the interest of the Air Force or deleterious to its procurement process. We earnestly urge that this policy be reconsidered since the advantages to be gained are significant. We would like to point out that other procurement agencies participate in these conferences and have acknowledged their usefulness. We would be pleased to discuss the matter further with the hope that your Department will, in the future, avail itself of this salutary procedure.

The protestors contend that they were denied recourse to the COC procedure outlined in ASPR 1-705.4. This provision requires a contracting officer to refer the nonresponsibility of a small business concern to SBA for COC consideration. Issuance of a COC is conclusive on the agency as to the bidder's capacity and credit. However, in this procurement, the contracting officer made a determination of urgency

under ASPR 1-703.4(c)(iv) and did not refer the nonresponsibility matters to SBA. It appears from the record before our Office that the determinations of nonresponsibility and the nonapplicability of the COC procedures were in compliance with ASPR and we find no basis to question these determinations.

Also, the protestors have challenged the findings of nonresponsibility by the contracting officer. We have often held that we will not substitute our judgment for that of the contracting officer in this area, unless it is shown by convincing evidence of record that the finding of nonresponsibility was arbitrary, capricious, or not based on substantial evidence. 45 Comp. Gen. 4 (1965). We do not believe this test has been met by the protestors and we will interpose no objection to the determinations of nonresponsibility.

A review of the record before our Office shows that on June 27, 1973, the Charlotte, North Carolina, District Office of SBA determined Dyneteria to be other than a small business firm for food service procurements at Fort Ord, California; Fort Belvoir, Virginia; Fort Richardson, Alaska; and Hickam Air Force Base, Hawaii. This determination was timely appealed by Dyneteria. On August 17, 1973, the SBA Size Appeals Board affirmed the District Office decision. Notwithstanding the fact that the instant procurement was under the same size standards as the four involved in the SBA District Office determination, Dyneteria self-certified in its bid that it was an eligible small business concern. By letter dated July 11, 1973, the day after bid opening, M&E protested to the contracting officer the size status of Dyneteria. This protest was received on July 16, 1973, and was forwarded to SBA for determination on July 17, 1973. On July 29, 1973, the contracting officer received a letter from the SBA Charlotte Office informing him of the June 27 determination and the appeal to the SBA Size Appeals Board filed by Dyneteria.

On these facts, the protestors maintain that the contracting officer knew, prior to award, that Dyneteria was a large business concern and was, therefore, ineligible for award. The Air Force's position is that under the pertinent provisions of ASPR, the SBA District Office's determination was not "final" since Dyneteria had appealed. Therefore, Dyneteria was eligible for award.

ASPR 1-703(b) states, in part, as follows:

"(b) Representation by a Bidder or Offeror.
Representation by a bidder or offeror that it is a small

business concern shall be effective, even though questioned in accordance with the terms of this subparagraph (b), unless the SBA, in response to such question and pursuant to the procedures in (3) below, determines that the bidder or offeror in question is not a small business concern. * * * The controlling point in time for a determination concerning the size status of a questioned bidder or offeror shall be the date of award, except that no bidder or offeror shall be eligible for award as a small business concern unless he has, or unless he could have (in those cases where a representation as to size of business has not been made), in good faith represented himself as small business prior to the opening of bids or closing date for submission of offers * * *. A representation by a bidder or offeror that it is a small business concern will not be accepted by the contracting officer if it is known that (i) such concern has previously been finally determined by SBA to be ineligible as a small business for the item or service being procured, and (ii) such concern has not subsequently been certified by SBA as being a small business. * * * (Emphasis supplied.)

Subparagraphs (2) and (3) provide as follows:

"(2) Questioning of Status by Contracting Officer. A contracting officer may, any time after bid opening, protest the small business status of any bidder or offeror on the instant procurement by sending a written notice to the SBA district office of the district in which the bidder or offeror has his principal place of business. Such notice shall contain a statement of the basis for the protest, together with available supporting facts. SBA will advise the bidder or offeror in question that his small business status is under review.

"(3) Determination by SBA District Director. The SBA District Director will determine the small business status of the questioned bidder or offeror and notify the contracting officer and the bidder or offeror of his determination, and award may be made on the basis of that determination. This determination is final unless it is appealed in accordance with (4) below, and the contracting officer is notified of the appeal prior to award. If an award was made prior to the time the contracting officer received notice of the appeal, the contract shall be presumed to be valid. * * *

Subparagraph (4) provides for an appeal to the SBA Size Appeals Board from a size determination of the SBA District Director.

Pursuant to 15 U.S.C. 637(b)(6), SBA is empowered to determine a business concern's size status for procurement purposes. Offices of the Government having procurement powers must accept as conclusive SBA's determination as to which concerns are to be designated small business. In discharge of this responsibility, SBA has promulgated regulations, which have the force and effect of law (Otis Steel Products Corp. v. United States, 161 Ct. Cl. 594 (1963)), found at part 121 of chapter I of title 13 of the Code of Federal Regulations. Section 121.3-4, entitled "Size Determinations," provides that original size determinations shall be made by the director serving the region in which the principal office of the concern whose size is being protested is located. Such determinations are final unless appealed in accordance with section 121.3-6. Section 121.3-6(a) provides that the Size Appeals Board shall review appeals from size determinations made pursuant to section 121.3-4 and shall make final decisions as to whether determinations should be affirmed, reversed, or modified. Section 121.3-6(g) provides that following any decision in a size appeals case, an interested party may petition the Size Appeals Board for reconsideration of its decision. The reconsideration of the Size Appeals Board constitutes the final administrative remedy of SBA. When viewed in conjunction with the statutes and ASPR, these size regulations clearly establish SBA as the sole adjudicator of size status matters.

It is not disputed that, as of the date of award, the contracting officer knew that Dynsteria had self-certified itself small business; that the cognizant SBA district office had determined Dynsteria large business under the same size standard for the instant procurement; that Dynsteria had appealed the district office's determination to the Size Appeals Board; and that the Size Appeals Board's decision would not be forthcoming before the required award date. Under these circumstances, the contracting officer concluded, erroneously, we believe, that unless a decision he considered to be "final" had been rendered by SBA, he was free to ignore the only outstanding SBA size determination.

ASPR 1-703(b)(3) provides that the SBA District Director will determine the small business status of a questioned bidder and award may be made on the basis of that determination. This determination is accorded finality unless appealed. In our view, this provision, as well as the regulatory scheme as a whole, is designed to facilitate orderly conduct of Government procurement where size questions are involved. Considering that SBA alone can determine small business status, there is a need for Government agencies to be able to rely upon SBA action at each stage of the procurement process.

Clearly, the right of appeal from a District Director's determination exists as to all interested concerns. However, the existence of that right, or even the exercise of an appeal, does not negate the validity of a size determination by an SBA District Director. The appeal is simply notice that the interested concern does not agree with the size determination. Until the District Director's determination is reversed or modified as provided for in the regulations, it remains in full force and effect insofar as the size of a bidder is concerned. We do not subscribe to the Air Force's interpretation that the appeal and self-certification of Dynstoria overrode the District Director's adverse size determination. Under the SBA regulations, only the Size Appeals Board can change the District Director's determination. A contracting officer is not free to independently evaluate the District Director's decision and reject it in favor of a bidder's self-serving statement. The applicable regulations give the contracting officer no decision-making authority in size determination. Mid-West Construction, Ltd. v. United States, 387 F. 2d 957, 961 (1968).

Pursuant to ASPR 1-703(b), a contracting officer cannot accept a bidder's self-certification if it is known that the bidder has been previously finally determined ineligible as a small business concern. In our view, the use of the word "finally" in this context clearly envisions a timeframe sufficient to permit full exhaustion of the size determination process. Thus, this ASPR provision gives direction in a situation where a bidder has exhausted SBA's administrative remedies. However, this does not imply, as the Air Force asserts, that in the absence of a "final" SBA determination a bidder's representation is to control over an SBA District Director's size determination.

While ASPR 1-703(b)(3)(iv) permits suspension of the full size determination cycle when the urgency of the procurement so requires, this authority does not negate a regional size determination made prior to award. To hold otherwise would be an emasculation of the authority vested in SBA to make size determinations under its statute which are "conclusive" on procurement officers of the Government. In effect, the contracting officer, in this case, has used the urgency situation to circumvent SBA's statutory authority. In an urgent procurement which cannot tolerate the delay incident to complete prosecution of all appeal rights, the only reasonable course of action open would be reliance on the district office's size determination.

Though we conclude that Dynstoria was ineligible for award as a small business concern, we recognize that the contracting officer was not misled by Dynstoria's self-certification but acted with full

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knowledge of the facts in reliance on his reading of the applicable ASPR provisions, quoted above. In view of this and the need for continuous food service, we recommend that the contract awarded Dyneteria be terminated for the convenience of the Government and the requirements, including the option periods, be resolicited.

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 U.S.C. 1172. In view thereof, your attention is directed to section 236 of the Act, 31 U.S.C. 1172, which requires you to submit written statements of the action to be taken with respect to the recommendation. The statements are to be sent to the House and Senate Committees on Government Operations not later than 60 days after the date of this letter and to the Committees on Appropriations in connection with the first request for appropriations made by your agency more than 60 days after the date of this letter.

We would appreciate advice of the action taken on our recommendation.

Sincerely yours,

R.F.KELLER

[Deputy Comptroller General
of the United States