

DECISION



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

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FILE: B-184543

DATE: May 28, 1976

MATTER OF: Welmetco, Ltd.

DIGEST:

1. Since SBA has conclusive authority over small business size matters, such questions will not be reviewed absent prima facie showing that SBA action was taken fraudulently or with such willful disregard of facts as to necessarily imply bad faith.
2. Alleged "buy-in" through below cost bid is not basis upon which to challenge award validity.
3. Determination that bidder could perform at bid price involves affirmative bidder responsibility determination, which is not reviewable by GAO where protester does not allege that procurement officials acted fraudulently or that definitive responsibility criteria were not applied.
4. Allegation that mistake in bid accounted for low bidder's low price has no merit because agency believes low bidder has ability to perform contract at bid price based upon preaward survey and sufficient verification of bid price by low bidder was obtained.

Welmetco, Ltd. (Welmetco), has protested the proposed awards to Penn Metal Fabricators Inc. (Penn) under invitations for bids (IFB's) DAAK01-75-B-2112 (-2112), a total small business set-aside, and DAAK01-76-B-5078, a 50-percent labor surplus set-aside, issued by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri.

Welmetco first protested that Penn may not be a small business concern and is ineligible for award under IFB -2112. However, the Small Business Administration (SBA) has found that Penn qualifies as a small business concern under the IFB. The SBA has been granted conclusive authority under 15 U.S.C. § 637(b)(6) (1970) to resolve for procurement purposes questions of bidders' small business size status. Consequently, our Office will not review questions involving small business size, absent a prima facie showing that the SBA action was taken fraudulently or with such willful disregard of the facts as to necessarily imply

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bad faith. Zac Smith & Company, Inc., B-183843, November 4, 1975, 75-2 CPD 276; Enterprise Roofing Service, 55 Comp. Gen. 617 (1976), 76-1 CPD 5. Welmetco has not alleged that the SBA determination involved fraud or bad faith.

Subsequently, Welmetco protested that Penn's bids on the IFB's were so low that Penn has either made "buy-ins" or mistakes in its bids.

With regard to Welmetco's "buy-in" contention, our Office has consistently held that the submission of a low price or below cost bid is not a basis upon which to challenge the validity of an award. See Futronics Industries, Inc., B-185896, March 10, 1976, 76-1 CPD 169; UTL Corporation, B-185832, March 30, 1976, 76-1 CPD 209. Moreover, the question of whether a bidder can perform at its offered price is one of bidder responsibility. See Columbia Loose-Leaf Corporation, B-184645, September 12, 1975, 75-2 CPD 147; UTL Corporation, *supra*. TROSCOM has made a specific determination that Penn is responsible based on a favorable preaward survey.

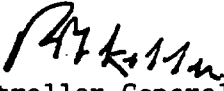
Our Office does not review protests against affirmative determinations of responsibility, except for actions by procurement officials which are tantamount to fraud or where the solicitation contains definitive responsibility criteria which allegedly have not been applied. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Affirmative determinations of responsibility are based in large measure on subjective judgments which are largely within the discretion of procuring officials who must suffer any difficulties experienced by reason of a contractor's inability to perform. Welmetco's protest does not allege that TROSCOM officials acted fraudulently or that definitive responsibility criteria were not applied in this case. However, we do consider protests involving determinations of nonresponsibility to provide assurance to a rejected bidder against the arbitrary rejection of its bid.

With regard to Welmetco's contention that Penn may have made mistakes in its bids, TROSCOM specifically asked Penn, which had a representative at the bid openings, where the bid prices were read aloud, to verify its bids in view of the disparity between Penn's bid prices and the others received. Penn unqualifiedly confirmed the

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accuracy of its bid prices. Also, based upon the verification, which appears sufficient under Armed Services Procurement Regulation s 2-406.3(e)(1) (1975 ed.) and the above-mentioned positive preaward survey, TROSCOM believes that Penn has the ability to perform the contract at the bid price. See UTL Corporation, supra. Therefore, any award at the prices bid will result in a valid and binding contract.

In view of the foregoing, Welmetco's protest is denied.


Deputy Comptroller General
of the United States