

DECISION

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

FILE: B-187200

DATE: September 23, 1976

MATTER OF: DoAll Iowa Company

61347
97976

DIGEST:

1. Pursuant to 15 U.S.C. § 637(b)(6) (1970), SBA, rather than GAO, conclusively determines whether a concern is a small business for purposes of particular procurement. Accordingly, GAO does not consider small business size protests even if SBA declines to issue ruling applicable to the procurement in question because protest is untimely under SBA regulation.
2. Protest by large business concern that low small business bidder lacks capacity to perform contract is dismissed because protester is not interested party under 4 C.F.R. § 20.1(a) (1976). In any event, affirmative determinations of responsibility are not reviewed by GAO except for reasons not applicable in this case.

This is a protest by DoAll Iowa Company (DoAll) concerning the award of a contract to the Don Jenness Company, under procurement DAAA09-76-C-6822, issued by Rock Island Arsenal, Illinois.

The procurement is a total small business set-aside, and DoAll alleges that the awardee does not qualify as a small business concern for the subject procurement. The protester argues that the contractor is not the "true manufacturer" of the goods offered since it proposes to purchase parts, allegedly constituting over 70 percent of the cost, from a manufacturer which is not a small business.

The protester's contention that the awardee is not a small business manufacturer for purposes of the subject procurement is a matter for consideration by the Small Business Administration (SBA). SBA regulations, at 13 C.F.R. § 121.3-8(c) (1976), state that:

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"Whether a bidder on a particular procurement is the manufacturer or a non-manufacturer for the purpose of a size determination is not for determination by the contracting officer. The decision shall be made by the appropriate SBA regional director or his delegatee, and need not be consistent with the contracting officer's decision as to whether such concern is or is not a manufacturer for the purpose of the Walsh-Healey Act, etc."

Under 15 U.S.C. § 637(b)(6) (1970), SBA, rather than GAO, is empowered to determine whether a concern qualifies as a small business for purposes of a particular procurement. See Atkinson Dredging Company, 53 Comp. Gen. 904 (1974), 74-1 CPD 299; Nanakuli Paving & Rock Co., B-181873, January 28, 1975, 75-1 CPD 58. Since, by law, SBA's determination as to a prospective contractor's size is made conclusive upon the procurement agency involved, our Office does not have jurisdiction to resolve such matters. See Old Atlantic Services, Inc., B-182559, December 12, 1974, 74-2 CPD 332. Moreover, DoAll's initial protest to the contracting officer was filed after contract award and therefore is not for application to the procurement in question. 13 C.F.R. § 121.3-5(a) (1976) and Armed Services Procurement Regulation 1-703(b)(1)(c) (1975 ed.). Even though SBA will not act to determine the contractor's small business status for the instant procurement, there is no authority in this Office to resolve such matters.

The protester has also requested our Office to review the procuring agency's determination that the awardee has the capacity to perform the contract. The Bid Protest Procedures of this Office provide that only an "interested" party may file a protest. 4 C.F.R. § 20.1(a) (1976).

Because DoAll, as a large business, is not eligible for contract award in this case, we believe it should not be considered an interested party. Coleman Transfer and Storage, Inc., B-182420, October 17, 1975, 75-2 CPD 238. In any event, this Office no longer reviews protests concerning affirmative determinations of responsibility, absent a showing of fraud on the part of contracting officials or other circumstances not alleged in this case. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2

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CPD 64. Affirmative determinations 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. In contrast, we continue to review protests by bidders who have been rejected as nonresponsible to provide assurance against the arbitrary rejection of bids.

Accordingly, the protest is dismissed.

Robert K. Meyer
Deputy Comptroller General
of the United States