

DECISION

25457
**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-210200**DATE:** June 14, 1983**MATTER OF:** Sayco Ltd.**DIGEST:**

1. Under limited circumstances, a recent denial by the Small Business Administration (SBA) for a certificate of competency may be used by a contracting officer as SBA confirmation of another finding of nonresponsibility.
2. Where a defaulted contractor has been paid the full contract price under the defaulted contract, it is not entitled to award of the repurchase contract because it is not permitted to be paid more than the original contract price. Award of the repurchase contract would be tantamount to modification of the original contract without consideration flowing to the Government.

Sayco Ltd., a defaulted contractor under contract No. N00102-81-C-4921, protests the award of a procurement contract under request for proposals (RFP) No. N00102-82-R-0247, issued by the Department of the Navy for a quantity of tube fittings. Sayco, having been found nonresponsible under the RFP, protests that it has the right as a small business to have the matter of its responsibility reviewed by the Small Business Administration (SBA) under the certificate of competency (COC) procedures, but that the Navy has refused to refer the matter to SBA. We deny the protest.

The solicitation was a 100 percent small business set-aside with a closing date of September 27, 1982. Sayco submitted the low proposal of \$44,676.00 in response to the RFP but was found nonresponsible because of numerous production deficiencies and delinquencies. As a result of the nonresponsibility determination, an award was made to another contractor for \$52,990.70.

Sayco maintains that upon being found nonresponsible under the subject solicitation it had a right to apply to SBA for a COC, but that in violation of the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980), the Navy will not refer the matter to SBA. Sayco requests that our Office direct the Navy to do so.

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The Navy, on the other hand, takes the position that the contracting officer's nonresponsibility determination was proper because it was based on the following factors:

- (1) Sayco's termination for default on its contract for the item;
- (2) a pre-award survey for similar items conducted within 75 days of the closing of this solicitation which concluded that Sayco's production capability, purchasing and subcontracting practices, performance record, and ability to meet required schedules were all "unsatisfactory";
- (3) the fact that SBA refused to issue Sayco a COC for similar items only 27 days before the closing date of this solicitation; and
- (4) current information obtained from the Defense Contract Administration Services Management Area-Reading, Pennsylvania (DCASMA), which detailed Sayco's continuing delinquency.

The Navy emphasizes that the contracting officer based his nonresponsibility determination on his personal knowledge of Sayco's recent default and continuing inability to perform the contract requirements. In this regard, the Navy points to the following statement from DCASMA concerning Sayco:

"The subject contractor's current performance record shows there are 53 delinquent contracts of a total of 63 Government contracts on hand.

"This situation has been caused by contractor's bidding on solicitations knowing that deliveries can't be met. Bidding on items that require close tolerances and will require waivers, in most cases, prior to acceptance. Lack of adequate production planning, scheduling and control through the plant.

"It is considered extremely likely that subsequent awards will result in late deliveries and additional costs until corrective action is taken."

The Navy argues that, under the circumstances, the record clearly supports the Navy's determination that Sayco was not responsible. The Navy further states, citing Sigma Industries, Inc., B-195377, October 5, 1979, 79-2 CPD 242, that this case was an appropriate one for not referring the matter to SBA.

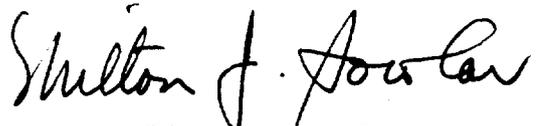
We think the Navy acted reasonably in not referring the question of Sayco's responsibility to SBA. In Sigma, we recognized, in effect, that in very limited circumstances a recent SBA denial of a COC could apply prospectively. In that case, SBA, 4 days before bid opening, had denied a COC in another procurement for a similar item, and contracting officials had ascertained that the firm's capabilities had not improved. Under those circumstances, we did not require referral to SBA. We viewed the very recent denial of the COC as SBA confirmation of the contracting officer's subsequent determination of nonresponsibility. Similarly, in this case, SBA denied the protester a COC for the production of a similar item only 27 days before the closing date for the receipt of proposals. In addition, Sayco already had defaulted on the original contract, and current information available to the contracting officer at the time the finding of nonresponsibility was made indicated no change in the protester's capability to perform.

In any event, we do not believe Sayco properly could have been awarded the reprocurement contract. Sayco's original contract price was \$139,612, which was fully paid by the Government. It is well established that a reprocurement contract may not be awarded to the defaulted contractor at a price that would give the contractor more than the terminated contract price because this would be tantamount to modification of the terminated contract without consideration. PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977), 77-2 CPD 213. Sayco was unwilling to correct what the Navy views as a defect in what Sayco originally furnished without charge, and here argues that its proposal price of \$44,676 should have been accepted. Since Sayco already has received the full price called for in the original contract, it is not entitled to this additional amount. Although Sayco is challenging the termination for default before the Armed Services Board of

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Contract Appeals and could, of course, prevail in that litigation, as of the time of award of the repurchase contract Sayco had been defaulted and simply was not entitled to additional compensation for doing what its original contract called for.

The protest is denied.

for 
Comptroller General
of the United States