

DECISION



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

51017

FILE: B-184669

DATE: August 27, 1975

MATTER OF: Octagon Process Inc.

97449

DIGEST:

Protest against small business set-aside on ground that required product is not manufactured by any small businesses is untimely and not for consideration on merits since protest was filed after award and 4 C.F.R. 20.2 (b) (1) (1975) requires that alleged improprieties apparent prior to bid opening be filed prior to bid opening. Moreover, under 15 U.S.C. 637 (b) (5) (1970) GAO is without authority to determine size status of awardees.

Octagon Process Inc. (Octagon) protests the award of two contracts, one to Continental Chemical Corporation (Continental) and another to B.W.I. Plastics and Chemicals Corporation (BWI) under small business set-aside Invitation for Bids No. DSA-400-75-B-5398 for Sodium Hexametaphosphate issued by the Defense Supply Agency, Defense General Supply Center, Richmond, Virginia.

Octagon states that its bid was rejected because it cited a large business firm as the manufacturer of its end product. Octagon contends, however, that there are no small business manufacturers of sodium hexametaphosphate and therefore, the awards to Continental and BWI are erroneous. In support of its protest Octagon has submitted a statement from its supplier of sodium hexametaphosphate that no small businesses manufacture the substance in question.

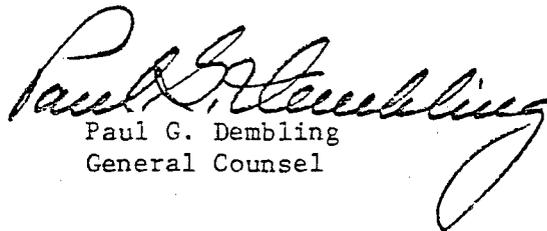
The solicitation incorporated by reference Armed Services Procurement Regulation (ASPR) 7-2003.2 (1974) "Notice of Total Small Business Set-Aside" which provides in pertinent part that "a manufacturer or regular dealer submitting offers in his own name must agree to furnish in the performance of the contract end items manufactured or produced by small business concerns." In essence therefore, it appears that Octagon is protesting that the procurement should not have been set-aside for small business participation in the first instance. Our Bid Protest Procedures

B-184669

set out in title 4 of the Code of Federal Regulations § 20.2(b) (1) (1975) provide in pertinent part that "protests based on alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening * * *." Accordingly, we believe that Octagon's protest was untimely filed and is not for consideration on its merits.

Nevertheless, we note that pursuant to Octagon's protest to the contracting officer and under ASPR 1-703 (c) (1974) the contracting officer has properly requested that appropriate Small Business Administration Regional Offices comment on the small business eligibility of both Continental and BWI for purposes of future procurement actions. Since under 15 U.S.C. 637 (b) (6) (1970) SBA, and not GAO, is granted conclusive authority to determine whether a concern qualifies as a small business, we would be without authority to render a decision on this matter.

Accordingly, the protest is dismissed.


Paul G. Dembling
General Counsel