

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of SEIMS RENTAL & SALES )  
CO., INC. ) Docket Nos.  
 ) 1555 and 1548  
Under DGS Project RFQ 62715 )

January 17, 1991

5% Small Business Preference - Appellant has the burden of proof to demonstrate that the 5% Small Business Preference was erroneously applied to a bidder qualified on the Small Business Vendor list pursuant to COMAR 21.11.01.01(8).

APPEARANCE FOR APPELLANT: Edgar T. Silver, Esq.  
Baltimore, MD

APPEARANCE FOR RESPONDENT: Michael P. Kenney  
Assistant Attorney General  
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APPEARANCE FOR INTERESTED  
PARTY: Tidewater Machinery, Inc. Barry Herman  
Riviera Beach, MD

OPINION BY MR. MALONE

This is a timely appeal<sup>1</sup> from a final decision of the Department of General Services (DGS) procurement officer denying Seims Rental & Sales Co., Inc.'s (Appellant) bid protest that the 5% Small Business Preference was erroneously applied to another bidder.

Findings of Fact

1. DGS issued Request for Quotations (RFQ) for the procurement of towable air compressors. At the top of page one of the RFQ in bold type was "SMALL BUSINESS PREFERENCE 5%". Six (6) bids were received by the August 20, 1990 deadline and were evaluated by the Department

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<sup>1</sup>Appellant originally filed an appeal involving the identical matters, facts and parties docketed under MSBCA 1548. However, the State procurement officer and their counsel rescinded its original "final decision" to allow further review. A second final decision dated November 14, 1990 was issued by DGS and a second timely appeal was filed by Appellant on November 23, 1990 under MSBCA 1555. These appeals were consolidated to avoid duplication. At the hearing, MSBCA 1548 was merged into MSBCA 1555.

of Transportation (DOT). (DGS acts for DOT in some procurements.)

2. After evaluation the relevant bids were:

Seims Rental & Sales (Appellant)	\$138,481.00
Tidewater Machinery, Inc.	\$139,330.00
John C. Louis Co., Inc.	\$144,239.00

The Department of General Services maintains a list which is called the "Small Business" vendor list. Tidewater Machinery, Inc. was listed by DGS as a small business. Small business must apply and meet all statutory criteria before being designated a Small Business. DGS is required to use this list to identify vendors eligible for percentage preference as a small business. This list is presumed to be correct and a procurement officer's reliance on it is expected. Any interested person can challenge the assignment of a small business firm to the "Small Business" vendor list by procedure outlined in COMAR 21.11.01.01(8). As a small business properly listed, the procurement officer applied the 5% Small Business Preference in accordance with State Finance and Procurement Article Section 14-206, et. seq.<sup>2</sup> Applying the 5% clearly makes Tidewater Machinery, Inc. (Tidewater) the low bidder,

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<sup>2</sup>The method for calculation of the 5% is given in SF §14-207 which states:

§ 14-207. Special procedures for source selection.

(a) Designated procurements. - The Secretary of General Services, the Secretary of Transportation, and the Chancellor of the University of Maryland System each may designate, for the Small Business Preference Program, procurement of certain supplies, services, or construction related services that have been requested through or with the approval of the Secretary or Chancellor.

(c) Award of procurement contract. - The Secretary of General Services, the Secretary of Transportation, or the Chancellor of the University of Maryland System shall award a procurement contract designated for a small business preference and to the small business that:

(1) is a responsible bidder; and

(2) submits the lowest responsive bid from a small business if the difference between that bid and the lowest responsive bid submitted by a responsible bidder who is not a small business does not exceed the percentage preference established under § 14-206 of this subtitle. (1989), ch. 5 § 9.)"

Again in COMAR the method is given at 21.11.01.01B. which states in relevant part:

B. Small Business Preference.

displacing Appellant.

3. Appellant challenges the award alleging Tidewater is a mere "front" of a non-party and not a bona fide small business. There was no testimony or records provided to the Appeals Board to sustain this allegation.

4. The procurement officer investigated the ownership of Tidewater and its asset value to test it as a small business against the criteria given in COMAR 21.01.02.01 (80) "Small Business."<sup>3</sup>

Tidewater's personal property return for January 1, 1990 was reviewed as was its corporate ownership and operation. The record before the Appeals Board clearly reflects Tidewater as a qualified small business. The fact Tidewater carries no inventory and contracts out its warranty and service work does not by itself disqualify it as a small business. On the contrary, Tidewater orders directly from the manufacturer. There was nothing revealed in the record or at the hearing that any third party company not

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<sup>3</sup>(80) "Small business" means a firm which meets the following criteria

- (a) It is independently owned and operated;
- (b) It is not a subsidiary of another firm;
- (c) It is not dominant in its field of operation;
- (d) Its wholesale operations did not employ more than 50 persons, and its gross sales did not exceed \$1,000,000 in its most recently completed fiscal year;
- (e) Its retail operations did not employ more than 25 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year;
- (f) Its manufacturing operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year.
- (g) Its service operations did not employ more than 100 persons, and its gross sales did not exceed \$500,000 in its most recently completed fiscal year; and
- (h) Its construction operations did not employ more than 50 persons, and its gross sales did not exceed \$2,000,000 in its most recently completed fiscal year.

qualified as a small business controlled or directed Tidewater's business. Tidewater is a small family business independently owned and operated. Due to its size it does not dominate the portable air compressor market. Also the record is void of any evidence which would demonstrate Tidewater was a subsidiary or mere conduit of any other firm. No challenge was ever made to Tidewater's being listed as a small business under COMAR 21.11.01.01(8).

#### Decision

Appellant fails to meet the burden of proof necessary to demonstrate an erroneous application of the 5% Small Business preference. Appellant's mere allegation that a non-party somehow controls Tidewater is not supported by the record.

The evidence supports the procurement officer's final decision. The fact that Tidewater has no substantial assets and is owned and operated by family members out of their residence are the types of revelations you would expect when investigating a small business.

Appellant's allegation that Tidewater has no control over its business operation stands without factual support. The Board has ruled consistently that a procurement officer's decision will not be changed absent some clear error. Therefore the appeal is denied.