**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Holiday Inn-Laurel--Protest and Request for Costs

File: B-270860.3; B-270860.4

Date: May 30, 1996

Nick Merza, Holiday Inn-Laurel, and James H. Roberts III, Esq., Manatt, Phelps & Phillips, for the protester.
J. William Bennett, Esq., for Convention Marketing Services, Inc., an intervenor.
Capt. Bryant Banes, Thomas J. Duffy, Esq., and Col. Nicholas Retson, Department of the Army, for the agency.
Denise Benjamin, Esq., and David R. Kohler, Esq., for the Small Business Administration.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protester is entitled to the costs of filing and pursuing its protest challenging the Army's evaluation of its technical proposal where the agency failed to promptly or adequately investigate the clearly meritorious protest allegations questioning the propriety of the evaluation, but only took corrective action when the General Accounting Office asked it to review various improprieties readily apparent in the evaluation documents provided with the agency report.

2. Protest that contracting agency improperly failed to award the contract to the protester after the Small Business Administration (SBA) issued the firm a certificate of competency (COC) is sustained where the record shows that shortly after SBA issued its decision to deny the COC it learned that decision might be erroneous; it immediately requested and received additional time to review that decision from the contracting agency; and the contracting agency failed to take any contract action until after it received SBA's final decision to issue the COC.

DECISION

Holiday Inn-Laurel requests that we declare it entitled to reimbursement of the reasonable costs of filing and pursuing its protest of the evaluation of its proposal under request for proposals (RFP) No. DAHC36-95-R-0012, issued by the Department of the Army for the provision of meals, lodging, and transportation to support the Baltimore Military Entrance and Processing Station in Baltimore, Maryland. Holiday Inn-Laurel also protests the Army's refusal to award it the

contract in light of the fact that the Small Business Administration (SBA) issued the firm a certificate of competency (COC).

We conclude that Holiday Inn-Laurel is entitled to the costs of filing and pursuing its prior protest, and we sustain its current protest.

BACKGROUND

On May 26, 1995, the Army issued this solicitation to award a fixed-price, indefinite quantity contract to the offeror submitting the lowest-priced, technically acceptable offer. The RFP established a performance period of 1 base year, with up to 4 option years. Proposals would be evaluated under six equally important factors, each of which contained various subfactors. After evaluating the four proposals it received, the Army excluded the proposal of Holiday Inn-Laurel, the incumbent contractor, from the competitive range.

Holiday Inn-Laurel protested the Army's action in our Office. The Army's report rebutted the protest and provided evaluation documents to support its position. In its comments, Holiday Inn-Laurel raised several new allegations derived from these documents. Among other things, the firm alleged that the Army had improperly evaluated its proposal under the site visit factor; improperly determined that Holiday Inn-Laurel had little past experience; improperly required it to submit past performance evaluations when the Army possessed such evaluations; and improperly evaluated its orientation plan. In response to our request to review the allegations concerning the site visit factor and the firm's past performance, the Army took corrective action by reopening discussions and including the protester's proposal in the competitive range. We dismissed the protest as academic on October 11.[1]

The Army conducted discussions, evaluated the revised proposals it received, and determined that Holiday Inn-Laurel's proposal, at a price of $2,741,250, would not be considered for award because its technical proposal was rated marginal and its past performance was poor. The contract was awarded to CMS @ Holiday Inn Express at a price of $3,455,250.

---

[1]Holiday Inn-Laurel subsequently requested that we find it entitled to the costs of filing and pursuing its protest. We declined to do so since the record showed that the firm's comments raised new allegations; the corrective action was clearly linked to these new allegations and not to the initial protest allegation, which was not clearly meritorious; and the corrective action was taken 5 working days after the comments were filed. Holiday Inn-Laurel--Entitlement to Costs, B-265646.4, Nov. 20, 1995, 95-2 CPD ¶ 233.

On January 4, 1996, Holiday Inn-Laurel protested the Army's action to our Office. Among other things, the firm asserted that the Army had improperly evaluated its technical proposal as marginal, and, more specifically, that the Army had improperly evaluated its technical proposal with respect to past performance. The firm also challenged the Army's past performance evaluation to the extent that it constituted a nonresponsibility determination.[2]

Shortly after the protest was filed, the contracting officer determined that Holiday Inn-Laurel's poor past performance and its alleged falsification of past performance information in its technical proposal justified a finding that it was nonresponsible. Since the firm is a small business concern, in accordance with Federal Acquisition Regulation (FAR) § 19.602-1(a)(2), the Army referred the matter to the SBA on January 19 for review under its COC procedures. The Army also issued a stop-work order to the awardee.

In its February 8 report, the Army summarily rebutted the protest allegations and referred to the enclosed evaluation documents. Our review of those documents showed that the evaluation was flawed. Contrary to the RFP's mandate, the Army had not weighted the technical evaluation factors equally. Moreover, the evaluators had improperly downgraded the protester's proposal based on its past performance under numerous evaluation factors and subfactors which did not provide for the evaluation of past performance. See J.A. Jones Management Servs., Inc., B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244.

On February 13, our Office asked the Army to address these concerns. In its February 21 response, filed the day before Holiday Inn-Laurel was to have filed its comments, the Army advised us that it had taken corrective action and reevaluated the proposals consistent with our concerns. As a result, Holiday Inn-Laurel was determined to be the lowest-priced, technically acceptable offeror, and thus in line for award. However, the Army did not make award to the firm because it had been determined nonresponsible, and SBA's decision on the COC was still pending.

---

[2]Holiday Inn-Laurel also filed a supplemental protest consisting solely of challenges to the evaluation of the awardee's proposal. While the firm's request for costs does not specify the protest or protests for which the firm seeks recovery, its language clearly refers to the allegations raised in the initial protest. As discussed below, considering that the corrective action at issue here was taken in response to the allegations raised in the initial protest, and considering that these allegations are entirely severable from those raised in the supplemental protest, our recommendation that Holiday Inn-Laurel recover the costs of filing and pursuing its protest is limited to that initial protest. See Interface Flooring Sys. Inc.--Claim for Attorneys' Fees, 66 Comp. Gen. 597 (1987), 87-2 CPD ¶ 106; Sperry Marine, Inc.--Claim for Costs, B-245654.3, May 17, 1994, 94-1 CPD ¶ 312.

Under the circumstances, we dismissed the protests as academic with respect to the technical evaluation challenge, and as premature with respect to the nonresponsibility determination challenge since SBA had not yet acted.

On March 6, Holiday Inn-Laurel filed this request for costs with our Office, arguing that the Army had unduly delayed taking corrective action in response to the firm's meritorious protest. On that same day, SBA declined to issue the firm a COC, but then subsequently issued the COC, as discussed further below. Holiday Inn-Laurel protests the Army's refusal to acknowledge the SBA's issuance of the COC and award the contract to the firm as the lowest-priced, technically acceptable, responsible offeror.

REQUEST FOR COSTS

When an agency takes corrective action prior to our issuing a decision on the merits, we may recommend that the protester recover the reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1996). We will make such a recommendation where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.

Holiday Inn-Laurel's protest alleged that the Army had improperly evaluated its proposal as marginal, and more specifically alleged that its proposal had been improperly evaluated with respect to past performance. The Army does not dispute that its corrective action was taken in response to our queries bearing directly upon issues implicit in those allegations--the improper weighting of the technical evaluation factors and the improper consideration of past performance in conjunction with factors and subfactors unrelated to past performance. As a result, we conclude that the Army's corrective action was taken in response to Holiday Inn-Laurel's clearly meritorious protest. The determinative question, then, is whether the corrective action was prompt under the circumstances. Ostrom Painting & Sandblasting, Inc.--Entitlement to Costs, 72 Comp. Gen. 207 (1993), 93-1 CPD ¶ 390; Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, B-255078.3, July 22, 1994, 94-2 CPD ¶ 41. We conclude that the Army unduly delayed taking corrective action here.

Notwithstanding the allegations raised in the protest, and the evaluation documents within its possession which clearly showed the improprieties noted above, the Army proceeded to file a report disputing the protester's position and arguing that the protest was without merit and should be dismissed or denied. The agency report is bereft of any evidence that the Army reviewed these underlying evaluation documents. Had the Army undertaken a reasonable investigation into the propriety of the technical evaluation, it would have seen that the competitive range

determination, which describes the weighting scheme used in the evaluation, clearly confirms that the agency failed to comply with the RFP's statement that all six factors were of equal importance. Had the Army undertaken a reasonable investigation into the propriety of the past performance evaluation of the protester's proposal, it would have seen that each evaluator improperly downgraded the firm, often significantly, for its perceived poor past performance in areas not calling for such review, thus greatly--and improperly--exaggerating the importance of past performance in the overall evaluation. See J.A. Jones Management Servs., Inc., supra.

Hence, had the Army promptly undertaken a reasonable factual investigation before filing its report on the protest, the merits of Holiday Inn-Laurel's contentions would have been clear at the outset. See Tucson Mobilephone, Inc.--Request for Entitlement, 73 Comp. Gen. 71 (1994), 94-1 CPD ¶ 12; Carl Zeiss, Inc.--Request for Declaration of Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274. Our conclusion is confirmed by the fact that these same errors were present in the evaluation at issue in the prior protest, and should have been corrected at that time. Indeed, after the Army took its initial corrective action, this Office advised the Army that the weighting scheme used in the evaluation did not comply with the RFP's instructions. See Griner's-A-One Pipeline Servs., Inc.--Entitlement to Costs, supra. In view of the fact that the Army took corrective action only after the protester undertook the expense of preparing its comments on the protest, we recommend that Holiday Inn-Laurel be reimbursed the costs of filing and pursuing its protest. Tucson Mobilephone, Inc.--Request for Entitlement, supra. Holiday Inn-Laurel should submit its claim for costs, detailing and certifying the time expended and costs incurred, directly to the agency within 90 days of receipt of this decision. 4 C.F.R. § 21.8(f)(1)).

PROTEST

Background

The contracting officer determined that Holiday Inn-Laurel was nonresponsible on the basis of its allegedly poor performance on the prior contract for these services. His determination rests upon the firm's problems complying with the contract's overflow housing, menu selection, and transportation requirements; recurring issues of discourteous treatment to applicants, including possible racial bias; and a belief that the firm falsified information in its technical proposal by "whiting out" its identity from a complaint letter. In determining whether to issue a COC, SBA's industrial specialist analyzed the information provided by the Army in its referral package, as well as the information submitted by Holiday Inn-Laurel in its COC application. SBA also conducted its own facility and financial surveys. The specialist found that each area of review was satisfactory, save for the firm's

performance capability, as reflected in the nonresponsibility determination, and recommended against issuance of a COC.

On March 5, SBA's COC committee met and unanimously voted to deny a COC on the basis of the firm's past performance, with specific reference to applicant complaints of discourteous treatment. As to the Army's other concerns, the committee noted that the firm had used unapproved facilities for overflow housing, but that these facilities had been approved under a prior contract and were not unacceptable; the firm had difficulty understanding the proper menu variety but made changes when asked to do so; the firm initially had difficulty resolving transportation problems but had done so; and the "whiting out" of the firm's name in a complaint letter was merely an attempt to comply with the RFP's requirement to delete all proposal references to the offeror's identity.

By letter dated March 6, SBA declined to issue the COC. Holiday Inn-Laurel was advised that it could meet with SBA staff to discuss the reasons for its decision and did so, by telephone, on March 8. SBA's area director states that, during that conversation, Holiday Inn-Laurel's representatives expanded upon the information furnished and explained why it believed that the Army's nonresponsibility determination was unfounded and based upon an overly harsh assessment of its performance under the contract. The area director states that this information was extremely compelling and worthy of further review to ensure that the decision to deny the COC was not erroneous.

Accordingly, on that same afternoon, SBA's acting supervisory industrial specialist telephoned the contracting officer. After ascertaining that the stop work order had not yet been lifted, the parties agree that the supervisory industrial specialist asked the contracting officer for additional time to review the case to ensure that the decision was sound, considering the possibility of litigation with a finding adverse to both SBA and the Army. Both the supervisory industrial specialist and the area director, who was listening to this conversation on a speakerphone, state that the contracting officer was specifically advised that he did not have to provide SBA with this additional time, but, in his discretion, could accept the COC denial as the final decision at that time. The contracting officer does not dispute this account. Notwithstanding this advice, the contracting officer agreed not to lift the stop work order until March 14 to give SBA time to review the matter. SBA's March 12 letter to the contracting officer, sent to confirm this conversation, states that "[d]uring this period [to March 14], SBA will again review certain materials relevant to the case. If we do not advise you otherwise by the aforementioned date and time, you may consider our decision to decline the COC as final and binding." The contracting officer did not respond to this letter.

During SBA's review it determined that fewer than one percent of the applicants had complained of rude or discourteous treatment or poor service, a rate better

than that demonstrated by the current contractor to date. It also found no evidence of racial bias. The area director states that he had initially believed that the complaints were unsolicited--and that the rude treatment alone compelled their submission--but now learned that they were part of an evaluation survey given to all applicants. SBA also noted and discounted the Army's other reasons for the nonresponsibility determination. As a result, SBA determined to issue the COC to Holiday Inn-Laurel on March 14.

That afternoon, SBA's supervisory industrial specialist telephoned the contracting officer and advised him of SBA's intention to issue the COC and its rationale for doing so. In accordance with FAR § 19.602-3(a), the contracting officer asked to submit new or additional information bearing on Holiday Inn-Laurel's use of overflow facilities and the total number of written complaints of rude or discourteous treatment of applicants, and the parties agreed that further action would be suspended pending SBA review of this additional information. By letter of March 15 to the contracting officer, SBA confirmed this conversation. The contracting officer did not respond to this letter.

On March 18, a new contracting officer[3] telephoned SBA's supervisory industrial specialist to check on the status of SBA's action because she was concerned that the interim contract was soon to end and the Army needed continued performance of these services. The contracting officer stated that she had no additional information to furnish SBA at this time. When asked if she would accept SBA's decision to rescind the COC denial, she replied that she "could not tell the SBA what to decide one way or another." She also informed SBA that a decision had to be made. SBA's March 19 letter to the contracting officer to both confirm this conversation and to formally issue the COC states, "You indicated that you have elected not to appeal issuance of the COC." In her March 21 letter of response to SBA, the contracting officer did not deny having made this election, nor did she state her intention to appeal.[4] Instead, she asserted that neither she nor the prior

---

[3]While this contracting officer was "new," SBA's supervisory industrial specialist states, and the contracting officer does not deny, that she was privy to at least part of his March 14 telephone conversation with the previous contracting officer.

[4]While the parties dispute whether the new contracting officer specifically elected to accept the COC's issuance without an appeal, the contracting officer states that she repeatedly advised SBA that she needed a final decision. However, the regulations do not contemplate an appeal after the final decision, but before. When the contracting officer and SBA's area office cannot agree as to whether a COC should be issued, the contracting officer may ask that the matter be referred to SBA's Central Office for review. FAR § 19.602-3(a). If the Central Office agrees with the

(continued...)

contracting officer had authorized the reconsideration of the denial, and that she considered that denial to be final. She also lifted the stop work order. This protest followed.

Analysis

Holiday Inn-Laurel and SBA argue that since SBA has conclusive authority to determine a small business firm's responsibility, the Army is bound to abide by its decision to issue the COC here and award the contract to Holiday Inn-Laurel. SBA asserts that the Army agreed to allow SBA to review its initial decision denying the COC and took no position to the contrary until after it received the final decision to issue the COC. The Army counters that SBA is prohibited from reconsidering its decision denying a COC except in circumstances not present here.[5]

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1994), SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business firm's responsibility by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7)(A); R.T. Nelson Painting Serv., Inc., 69 Comp. Gen. 279 (1990), 90-1 CPD ¶ 202. SBA's determination must be accepted by the agency as "conclusive." See Tomko, Inc., 63 Comp. Gen. 218 (1984), 84-1 CPD ¶ 202.

SBA regulations governing the COC process state that, when a COC is denied, the firm is advised that it may meet with SBA representatives to discuss the reasons for the denial. 13 C.F.R. § 125.5(g). In part, that provision states that "such conference will be for the sole purpose of enabling the applicant to improve or correct deficiencies and will not constitute a basis for reopening the case in which the [COC] was denied." The Army contends that this language flatly prohibits SBA from reconsidering its denial of a COC. However, SBA interprets this provision

---

[4](...continued)
area office, the contracting agency may appeal that agreement to the Central Office, which will make the final decision. FAR § 19.602-3(c), (d). Although SBA states that the contracting officer was advised of her option to refer the matter to SBA's Central Office, she did not do so. Since she had already declined to accept any of the options to resolve the matter with the area office, her insistence on receiving a final decision effectively waived her right to appeal to SBA's Central Office.

[5]The Army acknowledges that a contracting officer presented with new or additional information regarding a firm's responsibility may refer the matter back to SBA for its review. See West State, Inc., B-255692, B-255693, Mar. 23, 1994, 94-1 CPD ¶ 211; UAV Sys., Inc., B-255281; B-255281.2, Feb. 17, 1994, 94-1 CPD ¶ 121; Reuben Garment Int'l Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191.

solely as a notice to COC applicants that the debriefing is not intended as an appeal process for unsuccessful applicants, not as a bar to further SBA review following the issuance of an initial decision under the circumstances here.

We think that SBA's interpretation of 13 C.F.R. § 125.5(g) is reasonable when the provision is read as a whole and in context. The purpose of section 125.5(g) is to explain the procedures available to small businesses after denial of a COC, specifically, notification of the reasons for the denial as well as a face-to-face meeting to elaborate on SBA's rationale in the interest of enabling the small business to improve or correct its deficiencies. In this context, the language to which the Army points ("such conference . . . will not constitute a basis for reopening the case") reasonably may be read as limited to indicating that the post-decision conference available under the regulation does not give rise to a right of appeal of the COC denial by the small business. We see no reason to interpret this provision more broadly as a divestiture by SBA of the authority to correct an erroneous decision in appropriate circumstances.[6] See American Trucking Ass'ns, Inc. v. Frisco Transp. Co., 358 U.S. 133 (1958) (administrative bodies have the inherent authority to correct mistakes resulting from oversight or inadvertence).

Where SBA does not notify a contracting agency of its intent to issue a COC until after the prescribed or agreed-upon time period for issuing a COC decision, but the contracting officer nevertheless receives such advice from SBA prior to taking any contract action, the agency is bound by the COC determination. Age King Indus., Inc., B-225445.2, June 17, 1987, 87-1 CPD ¶ 602. Similarly here, we conclude that SBA was not prohibited from reviewing its initial denial of the COC after it learned that the decision might be erroneous, and before the stop work order was lifted. Although the Army could have proceeded to lift the stop work order after it received the initial denial of the COC, FAR § 19.602-4(c), it did not do so, instead delaying action pending reconsideration by SBA.[7] When the Army subsequently was

---

[6]Even if we did not agree with agency's interpretation of the clause, we are required to give deference to an agency's reasonable interpretation of its regulations. See Udall v. Tallman, 380 U.S. 1 (1965); Israel Aircraft Indus., Ltd.--Recon., B-258229.2, July 26, 1995, 95-2 CPD ¶ 46.

[7]The contracting officer does not dispute that SBA specifically advised him on March 8 that he could accept the COC denial as the final decision at that time. Moreover, while we do not question the contracting officer's statement that he interpreted his March 8 conversation with SBA to mean that SBA only needed more time to "firm up" the denial decision, and that SBA did not mention a possibility of reversal or reconsideration, SBA's March 12 letter confirming this conversation put him on notice that SBA did not share this understanding and clearly contemplated reversal of the decision as a possibility.

advised of the decision to issue a COC, it could not disregard it, given that the stop work order had not been lifted and the government otherwise would not be materially prejudiced by honoring the COC. Age King Indus., supra. This result is consistent with the contracting officer's basic responsibility under the RFP to make award to the responsible offeror offering the lowest priced, technically acceptable proposal, and with the statutory scheme that vests conclusive authority for determining a small business's responsibility in SBA. Id.

Under the circumstances here, we conclude that the Army must consider SBA's issuance of the COC as conclusive. See 15 U.S.C. § 637(b)(7); Age King Indus., Inc., supra. Accordingly, we recommend that the Army terminate the contract to CMS and make award to Holiday Inn-Laurel as the lowest-priced, technically acceptable, responsible offeror. We also recommend that the agency pay the protester the costs of filing and pursuing this protest, including attorneys' fees. 4 C.F.R. § 21.8(d)(1). In accordance with 4 C.F.R. § 21.8(f)(1), Holiday Inn-Laurel's certified claim for such costs, including the time expended and costs incurred, must be submitted directly to the agency within 90 days after receipt of this decision.

The protest is sustained.

Comptroller General
of the United States