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DECISION



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

FILE: B-1844/7

DATE: October 28, 1976

MATTER OF: Shiffer Industrial Equipment, Incorporated

DIGEST:

Where record does not show that agency failed to disclose information vital to decision in report upon which Small Business Administration refused to issue certificate of competency to protester, GAO cannot conclude that SBA action was subject to question by GAO.

Invitation for bids (IFB) N00600-75-B-0037 was issued by the Naval Supply Systems Command (NAVSUP), Washington, D.C., to procure a conveyor system at the Naval Air Station, Jacksonville, Florida. At bid opening on December 17, 1974, Shiffer Industrial Equipment, Inc., was revealed to be the low bidder. Shiffer has protested the determination that it is not responsible for award under this IFB and the refusal by the Small Business Administration (SBA) to issue a certificate of competency (COC).

After bids were opened, the procurement activity requested a preaward survey by the Defense Contract Administration Services Region (DCASR) to determine Shiffer's responsibility. On January 7, 1975, DCASR recommended award to Shiffer. The DCASR report included a December 30, 1974, memorandum by a NAVSUP official who was familiar with a similar Shiffer project at Pearl Harbor, Hawaii, and who was a member of the preaward survey board. This official's memorandum concluded:

"Based upon the performance of Shiffer Ind. Equip. Inc. to date and the questions asked during this pre-award, it is the opinion of the undersigned, said contractor lacks technical capacity/competency and production capacity to perform IFB N00600-75-B-0037. No award is recommended."

This conclusion was based upon alleged difficulties Shiffer was experiencing in performance under its Pearl Harbor contract. However, the DCASR production engineering report, after reviewing the points raised in the NAVSUP memorandum, found Shiffer to be

technically capable of performing the proposed contract. It was DCASR's opinion that the areas of difficulty cited by NAVSUP could be resolved by dialogue between the Navy and Shiffer.

On January 6, 1975, a second NAVSUP technical expert, who also had worked with Shiffer on the Pearl Harbor contract, submitted an internal NAVSUP memorandum also recommending that award of the Jacksonville contract not be made to Shiffer, for reasons virtually identical to those stated in the December 30 memorandum of the first NAVSUP official. This second NAVSUP opinion was supported by a memorandum of a January 3, 1975, telephone conversation with an Air Force procurement official who was said to have been dissatisfied with Shiffer's performance under two Air Force contracts. The Air Force official is also said to have doubted Shiffer's technical ability to perform the Jacksonville work.

On March 24, 1975, the Navy procurement activity made a request to DCASR for a second preaward survey of Shiffer. This request was prompted by the NAVSUP conclusions, a protest from the second low bidder questioning Shiffer's ability to perform, and a congressional inquiry on behalf of the second low bidder. In its report dated April 28, 1975, DCASR again found Shiffer responsible and recommended award. Again one of the NAVSUP officials, a participant in this second survey, vigorously asserted in an April 14, 1975, memorandum that Shiffer lacked the technical ability to perform the Jacksonville contract. The April 28 DCASR report comments extensively upon the points raised in the April 14 NAVSUP memorandum. The chairman of the preaward board wrote a separate memorandum in which he concluded:

"In summary, it is felt that the NAVSUP representatives did not differentiate or understand the difference between the contractor's technical capability and his technical approach. The contractor's technical capability has once again been substantiated. His technical approach on the other hand should only be judged on his ability to meet the specifications and not the means of arriving there unless otherwise stated in the procurement package. The bid package (N00600-75-B-0037) is completely silent in all areas under question as to the technical approach desired. Only the final objective is stated. As a result the technical approach is left up to the imagination of the contractor. If a specific approach is desired it should be identified in the specifications. Shiffer Industrial Equipment, Inc. is considered technically capable to perform on this IFB."

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On May 28, 1975, NAVSUP wrote to the Navy procuring activity to the effect that Shiffer's staff lacked essential engineering personnel and that Shiffer's technological approach was unrealistic, that Shiffer's production expertise was poor, and its production capacity was insufficient. On June 2, 1975, the contracting officer determined that Shiffer was nonresponsible for lack of necessary technical capability and lack of adequate labor resources. The contracting officer acknowledged that this determination was based on the inputs of the two NAVSUP officials who had technical cognizance of this subject area.

By letter of June 3, 1975, the Navy procuring activity notified the SBA of this determination as required by Armed Services Procurement Regulation (ASPR) § 1-705.4(c). The letter enclosed a copy of the IFB, the abstract of bids, the contracting officer's determination of nonresponsibility, the NAVSUP technical evaluation of May 28, 1975, and the two DCASR preaward surveys, with dissenting NAVSUP memoranda. By letter of July 7, 1975, the SEA declined to issue Shiffer a COC. The SBA explained to Shiffer:

"You are currently under a contract for a pallet packing line at the Naval Supply Center, Pearl Harbor, Hawaii. Your performance to date on that contract does not give reasonable confidence that you can overcome your problems in a timely manner on that contract and be able to perform on the proposed procurement, which is significantly more complex. Further, NAS, Jacksonville, is one of the largest industrial air stations in the Navy and the shipping and packing floor can only be closed for the shortest possible time. Problems such as you are currently experiencing in the submission of layout drawings for the Hawaii contract and subsequent rejections cannot be afforded on the Jacksonville contract. While it is our opinion that, given enough time, your company could probably perform, specifications require that the entire system be installed and checked out within 270 days after award of a contract. Considering the time element, the complexity of the required system, and your performance on your current contract does not give the reasonable assurance needed for issuance of a Certificate of Competency."

This prompted Shiffer's protest of July 23, 1975, to our Office. Shiffer bases this protest on:

" * * * the fact that the SBA denied giving us a COC based on erroneous information furnished them by the Navy. Based on discussions with * * * the Chicago SBA office, it was learned that the main reasons for not giving us the COC was because of the information given them by the Navy, referring to the problems we were having with the Pearl Harbor job. * * * However, the problems with the Pearl Harbor job are not caused by us, but by NAVSUP 03222 in their interpretation of the specifications."

Shiffer contends that NAVSUP furnished inadequate specifications and insisted on unworkable technological approaches for the Pearl Harbor contract. Therefore, Shiffer asserts, many of NAVSUP's statements blaming Shiffer for the problems at Pearl Harbor are completely untrue. Shiffer also complains that NAVSUP statements evidence a lack of technical ability and little or no research. Shiffer further charges that the NAVSUP personnel have shown bias against Shiffer and have tried to discredit Shiffer unfairly.

In Gallery Industries, Inc. - Request for Reconsideration, B-185963, June 16, 1976, 76-1 CPD 383, where the responsibility question had reached SBA, we reaffirmed "the position of our Office to make appropriate recommendations in COC situations where the record discloses that information vital to a responsibility determination has not been considered." See also Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 31; Kepner Plastics Fabrication, Inc., et al., B-184451, B-184394, June 1, 1976, 76-1 CPD 351.

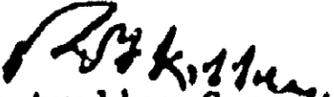
Here Shiffer contends that the SBA's nonissuance of a COC is based on NAVSUP allegations of Shiffer's incompetence at Pearl Harbor which the Navy later contradicted. It is true that the Navy stated in March 1975 that it was "too early to evaluate performance" on the Pearl Harbor contract and stated in April 1976 that it had found Shiffer's work at Pearl Harbor "satisfactory". However, the record does not establish that the Navy procuring activity report to the SBA failed to disclose any essential facts. Although the SBA, like the Navy contracting officer, chose to emphasize the lack of confidence in Shiffer engendered by NAVSUP reports regarding Shiffer's performance under the Pearl Harbor contract, it was provided with the two DCASR precaward surveys favorable to Shiffer and critical of the NAVSUP conclusions, as well as the May 28, 1975, NAVSUP technical report and the June 2, 1975, Navy determination of nonresponsibility, which represented the Navy's evaluation and

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resolution of the conflicting views. We therefore do not find that the Navy submission to the SBA failed to disclose information vital to SBA's decision regarding the issuance of a COC, Gallery Industries, Inc. - Request for Reconsideration, supra. The SBA also had the benefit of information supplied by Shiffer in its "Application for a Certificate of Competency," made pursuant to 13 Code of Federal Regulations § 124.8-16(b). The instructions for execution of the application explicitly place the burden of proof for establishing competency on the applicant.

The protest is therefore denied.

Deputy


Comptroller General
of the United States