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E. Fitzmaurice
Proctor

DECISION



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

FILE: B-190873

DATE: January 17, 1978

MATTER OF: L&M Services, Inc.

DIGEST:

1. Where bidder failed to file application with SBA for possible issuance of COC, contracting officer's determination that bidder was nonresponsible is regarded as having been affirmed, since such failure is analogous to SBA refusal to issue COC.
2. Bid preparation costs will not be sustained if bidder fails to pursue procedures necessary to obtain award.
3. By failing to avail itself of COC procedure, bidder also failed to preserve right to protest agency's alleged interpretation of specifications.

By letter dated December 5, 1977, L&M Services, Inc. (L&M) protests being found nonresponsible by the Department of the Army (Army) under Invitation for Bids (IFB) No. DABT39-77-B-0066 and thus being required to apply for a Certificate of Competency (COC) from the Small Business Administration (SBA).

The subject IFB requested bids on a food service contract for Fort Sill, Oklahoma. L&M states that it was notified on October 28, 1977, that it was the apparent low bidder and was then requested to tour the Government's dining facilities. On November 1 and 2, 1977, L&M complied with this request and at that time was first informed that it would have to apply to the SBA for a COC. A pre-award survey was then conducted by the Army on November 8, 1977, and official notification that a COC would be required was received on November 28, 1977. However, L&M argues that the Army has no rational basis for finding it nonresponsible and for this reason has not filed an application for the COC.

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L&M's principal argument against the Army finding of nonresponsibility is that the Army had a "preconceived notion" that no responsible bidder could perform the contract in question for less than \$2.0 million. Since L&M's bid was for \$2,264,157, L&M maintains that the Army assumed that it was nonresponsible and as a result required a COC. L&M contends that this "preconceived notion" was due essentially to an Army study on the current contractor and is thus not an accurate measure of L&M's capabilities.

In addition, L&M also maintains that the finding of nonresponsibility was intended to delay the contract award thus shortening its length and making the contract less desirable than the one initially solicited. L&M supports this claim by pointing out that at the time of the pre-award survey on November 2, 1977, it could see that a COC was going to be necessary and it requested permission to institute COC procedures at that time. L&M alleges that Army officials stated at that time that such a request could not be considered before a formal finding of nonresponsibility and a referral to SFA. L&M was not officially notified that a COC would be required until November 28, 1977, and it objects to this lapse of time and suggests the Army sought to reduce the term of the proposed contract and its profitability.

Finally, L&M also contends that the Army may not have accurately evaluated its bid price because the Army did not understand its own contract requirements. Specifically, L&M claims that the Army initially maintained that the contract prohibited the performance of the baking function in only one of the dining facilities, but later reversed itself. More significantly, L&M argues that the Army has consistently held to an interpretation of the contract specifications which if allowed would grant the Army the freedom to open and close as many dining facilities as it desired, without any adjustment in the contract price, so long as the total meals served for the month did not vary more than 4 percent. Since L&M would be paid on a "per building" price under this contract, such an interpretation could allow the Army to compel L&M to do the same amount of work for less money by simply closing down dining facilities but feeding approximately the same number of personnel.

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Based on the foregoing, L&M submits that the Army's evaluation criteria are improper and that the solicitation is generally defective. It seeks reimbursement of both bid preparation and pre-award survey costs and protests an award to any bidder which is within \$500,000 of its bid and does not have to obtain a COC or whose contract would extend beyond September 30, 1978 (the termination date for the contract under the original solicitation).

A COC is issued by SBA to certify that a small business possesses the capacity and credit to perform a specific Government procurement. Under the Small Business Act of 1977, Pub. L. No. 95-89, § 501, 91 Stat. 551 (1977), the SBA has conclusive authority to issue or deny a COC. R&O Industries, Inc., B-188476, March 25, 1977, 77-1 CPD 215; Indian Made Products Company, B-187461, October 5, 1976, 76-2 CPD 310.

Section 1-705.4(c) of the Armed Services Procurement Regulation (ASPR) provides that if a bid of a small business concern is to be rejected solely because the contracting officer has determined the concern to be nonresponsible as to capacity or credit, the matter is to be referred to SBA for a possible issuance of a COC. Moreover, ASPR § 1-705.4(d) requires that SBA be furnished the pre-award survey findings and protester's effort to cut short the agency's review was inconsistent with this policy. The small business concern is then afforded the opportunity to file an application for a COC, and SBA is allowed 15 working days for processing the COC beginning with the first day after receipt of an acceptable referral. See ASPR § 1-705.4(c); United Engineering, Inc., B-179959, February 15, 1974, 74-1 CPD 75. A small business which fails to file a COC application with SBA does not avail itself of its administrative remedy provided by statute and regulation. This relief is intended to give small business concerns a degree of protection against a contracting officer's unreasonable determination as to their capacity or credit, and we believe a small business concern's failure to avail itself of this process provides a sufficient basis for dismissing any protest to this Office concerning its rejection as a nonresponsible bidder. Cf. Arsco, Inc., B-187050, September 1, 1976, 76-2 CPD 214; Inflated Products Co., Inc.; American Air Filter Company; and Industrial Design Laboratories, Inc., B-181522,

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November 19, 1974, 74-1 CPD 269; Mal'm Resources, Inc.,
B-179738, February 20, 1974, 74-1 CPD 82. Furthermore,
a claim for bid preparation costs will not be sustained
if the bidder fails to pursue procedures necessary to
obtain an award. Scientific Communications, Inc.,
B-188827, December 28, 1977, 77-2 CPD ____.

Moreover, by failing to avail itself of the COC proce-
dure, L&M has also failed to preserve its rights to protest
the agency's alleged interpretation of the specifications
since its objections have been rendered moot and hypothet-
ical.

Accordingly, the protest is denied.


Deputy Comptroller General
of the United States