

DECISION

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

118858

FILE: B-205933

DATE: July 1, 1982

MATTER OF: The Willard Company

DIGEST:

1. GAO will not review the issuance of a certificate of competency by the Small Business Administration (SBA) absent a showing of fraud or bad faith on the part of Government officials. Bad faith is not shown merely because a party other than the SBA reasonably would conclude, based on the same factual record, that a certificate of competency should not be issued.
2. The contract in an advertised procurement must be awarded to the low responsive, responsible bidder. Therefore, the fact that the second low bidder believes that it is more responsible than the low responsive, responsible bidder is not relevant to the selection decision.

The Willard Company protests the award of a multi-year contract to Polaris Marine Corporation under invitation for bids (IFB) N00024-81-B-2002 issued by the Naval Sea Systems Command (NAVSEA) for 69 thirty-six foot personnel landing craft. Polaris submitted the low bid of \$106,746 per craft. Willard submitted the next low bid of \$117,412. NAVSEA found Polaris to be nonresponsive and referred the matter to the Small Business Administration (SBA) under the certificate of competency (COC) program. The award followed the SBA's issuance of a COC to Polaris.

Willard protests that the SBA willfully disregarded the facts regarding Polaris' capability to meet the contract so that bad faith should be inferred. In this respect, since the SBA's COC determination is conclusive as to a firm's responsibility, 15 U.S.C. § 637(b)(7) (Supp. III 1979), our Office generally will not review the decision to issue a

COC absent a showing of fraud or bad faith on the part of Government officials, J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD 322.

After the contract was awarded, Polaris stopped performance and filed in the United States District Court for reorganization under Chapter 11 of the Bankruptcy Act. Nonetheless, we deny the protest because we find neither fraud nor bad faith by Government personnel.

The contract in issue is the third ship construction contract awarded to Polaris by NAVSEA since 1980. In January of 1980, NAVSEA awarded Polaris a contract for 75 thirty-six foot landing craft similar to the ones here. That award followed the SBA's issuance of a COC to Polaris after the contracting officer found the firm nonresponsible. In June of that same year, the Navy awarded Polaris a contract for 16 forty-foot utility boats; the SBA was not involved in that award since Polaris was found responsible. Polaris has failed to meet the delivery schedule in either contract, and at the time of the recent COC deliberations the firm was in severe financial straits. Willard argues that the SBA simply could not in good faith issue a COC to a firm under these circumstances.

In response to the protest, the SBA has furnished to our Office the records of the agency's COC survey. The survey is detailed and reflects in-depth consideration of Polaris' capabilities and financial condition. The COC survey shows, for example, that the SBA was fully aware of Polaris' unsatisfactory performance on the other two Navy contracts. The survey concedes that Polaris itself was the cause of many of the difficulties, but also acknowledges NAVSEA culpability in that (a) NAVSEA inadvisably, in the SBA's view, placed the utility boat contract with Polaris "during the critical start-up of construction" on the first landing craft contract, and (b) there were numerous "drawing/specification errors/problems, contract changes" in connection with the first landing craft contract. The survey also notes that Polaris recently began to meet the schedule with respect to the January 1980 contract for landing craft, and that deliveries under the instant contract were not to begin until the scheduled completion of the utility boat contract. The survey concludes that despite performance problems in connection with the other two NAVSEA contracts, current circumstances indicated that Polaris in fact possessed the present ability to meet its obligation under the new contract.

The survey also acknowledges that Polaris was in serious financial difficulty. After thorough examination, however, the SBA concluded that Polaris had made adequate financial arrangements with respect to securing funds to perform the contract.

We find no bad faith on the SBA's part. The decision whether or not to issue a COC is based in large measure on subjective judgments. See Skillens Enterprises, B-202508.2, December 15, 1981, 81-2 CPD 472 at p. 5; Uniflite, Inc., B-197365, January 23, 1980, 80-1 CPD 67. In our view, the extensive COC survey records in this case show not that the SBA willfully disregarded facts about Polaris' responsibility, but rather fully considered them and judged that under current circumstances the firm in fact was capable of satisfactory performance. We will not infer bad faith merely because another party reasonably might reach a different conclusion based on the same factual record.

Willard alternatively argues that the SBA should have investigated Willard's responsibility and that award then should have been based on the relative capabilities of Willard and Polaris. Since this was an advertised procurement, however, NAVSEA had to award the contract to the low responsive, responsible bidder. 10 U.S.C. § 2305 (1976). Willard does not suggest that Polaris' bid was not responsive, and the SBA conclusively determined Polaris to be responsible. That Willard believes it is more capable than Polaris thus is of no consequence.

Willard complains about a \$1.8 million settlement between the Navy and Polaris regarding Polaris' claims under the landing craft contract that was awarded in January 1980. The settlement was being negotiated during the period of the COC review. Willard complains that the settlement included an agreement by NAVSEA not to appeal the SBA's issuance of a COC on the contract now in issue.

In this regard, the record shows that the initial decision to issue the COC was made by the SBA's Seattle regional office. The matter then was referred to the Associate Administrator for Procurement Assistance at the SBA's Central Office for approval, in accordance with SBA procedures where the value of a procurement exceeds \$500,000. The Associate Administrator concurred with the regional office's decision, and issued the COC. Apparently, the appeal that Willard

asserts NAVSEA agreed not to pursue refers either to attempting to persuade SBA's Central Office to overrule the regional office's recommendation to issue the COC, or to requesting reconsideration of the Central Office's decision if the Central Office ultimately accepted the regional office's recommendation.

We find no legal merit to Willard's complaint. First, we know of no legal requirement that a contracting agency, after properly referring a nonresponsibility determination to the SBA, "appeal" a COC in either manner noted. Moreover, we view as mere speculation the assertion that NAVSEA would have "appealed" the COC but for Polaris' agreement to the \$1.8 million settlement. Willard's characterization of the settlement is taken from a Polaris letter to NAVSEA dated after the settlement was executed, which reflects only Polaris' understanding of what NAVSEA agreed to do and not to do. The actual settlement document itself does not mention the COC matter. According to NAVSEA:

"NAVSEA decided not to appeal the issuance of the Certificate of Competency, because, after reviewing the SBA Regional Office files * * * (which included a financial plan submitted by Polaris), NAVSEA realized that there was very little likelihood of a successful appeal and, therefore, an appeal would only further delay contract award. Therefore, NAVSEA determined that its interest would best be served by awarding the follow-on LCPL [landing craft] contract to Polaris at the earliest possible date."

(The SBA's regional office files on the COC that NAVSEA refers to include clear recognition of the on-going settlement negotiations.) Finally, we know of no legal reason precluding NAVSEA (or the SBA) from considering the effect of the settlement on Polaris's ability to perform the new contract.

As stated above, our review of a protest against the issuance of a COC is limited to whether the Government's actions reflect fraud or bad faith, and the protester has the burden of proof in that respect. Vanguard Industrial Corporation, B-204455, January 6, 1982, 82-1 CPD 17. The record before our Office shows that the contracting agency properly referred the nonresponsibility determination to the SBA and furnished the agency all relevant facts, and

we have concluded that the issuance of the COC was a proper exercise of the SBA's judgment and discretion. The protest is denied.

for *Milton J. Rowland*
Comptroller General
of the United States