

DECISION



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

119472

FILE: B-207846.2

DATE: September 20, 1982

MATTER OF: GAVCO Corporation--Request for
Reconsideration

DIGEST:

GAO affirms prior decision dismissing protest of SBA's denial of a COC when additional allegations by protester fail to make prima facie showing that contracting agency and SBA acted fraudulently or in bad faith in determining protester to be nonresponsible.

GAVCO Corporation has requested reconsideration of our decision, GAVCO Corporation, B-207846, June 29, 1982, 82-1 CPD 633, in which we dismissed its protest of the rejection of its bid submitted in response to invitation for bids No. DACA65-82-B-0020, issued by the Army Corps of Engineers. For the reasons stated below, our prior decision is affirmed.

GAVCO's low bid was rejected because the contracting officer determined that the firm was not a responsible prospective contractor and upon referral of the matter to it, the Small Business Administration (SBA) declined to issue GAVCO a Certificate of Competency (COC). In dismissing GAVCO's protest, we stated that we will not question SBA's denial of a COC "unless there is a prima facie showing of fraud or bad faith on the part of Government officials or SBA willfully did not consider certain vital information bearing on a small business bidder's responsibility, thereby implying bad faith." Since GAVCO had made no such showing, its protest was dismissed.

In its most recent correspondence with our Office, GAVCO requests that we reopen our file because, GAVCO states, subsequent to the writing of its original letter of protest on June 8, 1982, it discovered additional information which demonstrates that the Corps of Engineers and the SBA acted in bad faith. Specifically, GAVCO states that: (1) SBA supposedly based one reason for its denial

of a COC upon information obtained from a proposed subcontractor, but the subcontractor has advised GAVCO that it never was contacted by SBA; (2) GAVCO anticipates that the Corps of Engineers will find it responsible to perform another contract, an action inconsistent with the rejection of GAVCO's bid in this procurement; and (3) the Corps awarded the present contract to a firm which is behind schedule in completing a similar project.

In requesting that we reopen our file, therefore, GAVCO is relying on additional information which it says it has discovered since the writing of its June 8, 1982 initial letter of protest. GAVCO's request was not received in our Office until August 13, 1982, more than two months after its initial protest and six weeks after our decision was issued. In view of the length of time which has transpired, and the vagueness of GAVCO's account of when it obtained this information, we have some doubts as to whether it has been timely presented under the 10-working-day deadline imposed by our Bid Protest Procedures, 4 C.F.R. §§ 21.2(b) (1), 21.9(b) (1982). Apart from timeliness, moreover, we believe GAVCO has fallen short of the prima facie showing of fraud or bad faith which is a prerequisite to our review.

With regard to GAVCO's first basis for reconsideration, we note that in its initial letter of protest dated June 8, 1982, GAVCO stated:

"On June 7, 1982, we received the SBA's letter dated 3 June 1982, in which they would not issue our firm a Certificate of Competency for this project. Their reasons for these actions were 'Your firm's current performance history, especially with the Norfolk District Corps of Engineers is unsatisfactory. Your sub-contractors do not quote firm starting and completion dates on individual buildings and this could develop into a critical situation when considering availability of these buildings.'

They failed to point out that our other forty or so contracts we currently have are in good standing and performance."

In its initial protest, however, GAVCO did not take specific exception to SBA's conclusion that GAVCO's "subcontractors do not quote firm starting and completion dates on individual buildings" nor did it present any evidence that this conclusion was in error. GAVCO's complaint was that SBA had placed undue emphasis on two recent contracts under which the firm had experienced difficulty and did not adequately consider other contracts which the firm successfully completed.

In its request that we reopen our file, GAVCO does not demonstrate that the SBA erred in concluding that the firm's "subcontractors do not quote firm starting and completion dates on individual buildings." Its objection is that someone at SBA advised GAVCO that its conclusion was based upon a conversation with a subcontractor who denies having spoken with the SBA. In other words, GAVCO is taking issue with the SBA's statement of the source of its information rather than the accuracy of SBA's conclusion. Under these circumstances, we do not believe GAVCO has shown prima facie that the SBA's denial of a COC was the result of bad faith.

Moreover, the fact that the Corps may find GAVCO responsible to perform one contract but not to perform another also does not constitute a prima facie showing of bad faith. Responsibility determinations are to be made based upon the circumstances of each procurement which exist at the time the contract is to be awarded. The fact that in May GAVCO was found not to be responsible for the performance of one contract does not preclude a determination in August that it is capable of satisfactorily performing another.

Similarly, the award of a contract to another company which allegedly is behind schedule in performing a similar contract is not a prima facie indication of bad faith. Recent unsatisfactory performance does not automatically result in a determination that a bidder is nonresponsible; the contracting officer must make a business judgment as to whether the delinquent performance under the prior contract is such that it indicates that problems will be encountered during the performance of the contract about to be awarded. Apart from alleging on August 10 that the other firm is "way behind" in its performance of a similar contract, GAVCO does not indicate whether this delinquency existed at the time the present contract was awarded or arose at some later

time, the possible cause for the delinquency, and whether that cause is also present in this procurement. Absent more specific information, we cannot conclude that it was an act of fraud or bad faith for the contracting officer to conclude that the other firm was responsible.

GAVCO expresses the feeling that it has been "railroaded" by the Corps and SBA, which it sees as making inconsistent judgments concerning its responsibility and that of its competitor. As we pointed out in our initial decision, however, GAVCO has the burden of making a prima facie showing of fraud or bad faith, evidence of which must include proof that the agency had the malicious and specific intent to injure the protester. JWM Corporation, B-200070.2, May 29, 1981, 81-1 CPD 422. Determinations of responsibility are inherently judgmental, and two people can reach opposite conclusions as to a firm's responsibility based on the same facts without either acting fraudulently or in bad faith. We do not believe GAVCO's rather general allegations make a prima facie showing of fraud or bad faith, and our prior decision dismissing the protest is affirmed.

Larry R. Van Cleave
Comptroller General
of the United States