

Fitzmaurice

DECISION



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

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FILE: B-210609

DATE: June 9, 1983

MATTER OF: Kari-Vac, Inc.

DIGEST:

1. GAO will not dismiss a protest because of the protester's failure to submit an additional statement in support of its initial protest within 5 working days after receipt of GAO's letter of acknowledgment since GAO's Bid Protest Procedures require that the protester be expressly notified of this requirement and, due to an administrative error, GAO's acknowledgment letter failed to do this.
2. GAO will not dismiss a protest on the grounds that, when the protester submitted a statement of the specific grounds upon which its protest was based, it indicated disagreement with the Small Business Administration (SBA) decision not to issue a certificate of competency (COC). While, as a general rule, GAO does not review such matters, the protester's additional statement alleged that SBA had acted in bad faith, an allegation which GAO will review.
3. Although the protester made no showing that SBA had acted in bad faith, it did present evidence that SBA's original refusal to issue a COC was because of SBA's determination that the protester was not eligible for the COC program but, because of new information presented by the protester, SBA is now willing to reopen the matter of the protester's responsibility if the contracting agency will resubmit the matter to SBA.
4. Contrary to the agency's belief, it cannot refuse to resubmit the matter of the protester's responsibility to SBA. Original SBA decision was not a final determination and, since SBA and not the contracting

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agency has the statutory authority to make a final disposition with respect to the protester's responsibility, GAO recommends that the agency resubmit the matter to SBA.

Kari-Vac, Inc. (Kari-Vac), protests the determination by the General Services Administration (GSA) that it is a nonresponsible bidder and, therefore, is not entitled to the award under invitation for bids (IFB) No. 9FCB-OLK-A-A0641/83.

We sustain the protest.

The IFB solicited cleaning equipment such as vacuum cleaners and floor polishers. This equipment will be available under the Federal Supply Schedule (FSS), FSC79, part I, section "A." Kari-Vac was the low bidder, and GSA conducted a preaward survey. The preaward survey team concluded that Kari-Vac was incapable of performing the contract because of poor performance on current and past contracts and indications of financial weakness as evidenced by its poor credit rating, poor payment history, and a large number of tax liens and judgments against the company.

Since Kari-Vac is a small business, GSA referred the matter to the Small Business Administration (SBA)--the agency with conclusive authority to determine all elements of responsibility for small business concerns--for possible issuance of a certificate of competency (COC). SBA, however, declined to issue a COC, citing the fact that Kari-Vac's president was on 3 years' probation. Based on the failure of SBA to issue a COC, GSA finalized its determination that Kari-Vac is a nonresponsible bidder and, therefore, not entitled to the award. No award has been made.

Kari-Vac argues that it is a responsible bidder, that GSA's preaward survey fails to consider the true reasons for its past financial problems, and that it is now eligible for a COC and, therefore, should have the question of its responsibility referred again to SBA for issuance of the COC. Kari-Vac notes that it has been informed by SBA's Regional Counsel that it was not actually denied a COC but, rather, the question of Kari-Vac's eligibility for a COC was suspended in view of Kari-Vac's president being placed on probation for a period of 3 years for social security

violations. It is apparently SBA's policy not to consider COC applications for potential contractors who are under court supervision. Kari-Vac, however, points out that the Federal District Court has now removed Kari-Vac's president from probation and that, in light of this information, SBA has informed the protester that it is now eligible for a COC and that it should contact GSA and attempt to have the agency request another COC.

Based on the foregoing, Kari-Vac believes that it is entitled to the award as the low responsive, responsible bidder.

GSA disagrees. At the outset, GSA argues that Kari-Vac's protest should be dismissed for the protester's failure to state a basis for protest in a timely manner. In other words, GSA notes that Kari-Vac's initial telegram only stated that Kari-Vac was the low bidder on various items under the IFB and nothing more. Since it is GAO's policy in such a situation to require the protester to furnish additional information, which states its basis for protest, within 5 working days after receipt of GAO's acknowledgment letter, and since Kari-Vac failed to do this, GSA concludes that Kari-Vac's protest should be dismissed as untimely. In addition, GSA points out that, when Kari-Vac did finally furnish another statement, this statement was again quite terse and only indicated that Kari-Vac was protesting SBA's refusal to issue a COC--a matter which, as a general rule, our Office does not review. Thus, GSA sees this as another basis for dismissing the protest.

As to the merits of Kari-Vac's protest, GSA argues that, since SBA has conclusive authority to determine all elements of responsibility for small business concerns, and since SBA has refused to issue a COC in this case, GAO has no basis for questioning the SBA determination and, therefore, should dismiss the protest on this ground.

On the other hand, in regard to the Federal District Court's decision to release Kari-Vac's president from probation, GSA argues that this has no impact on the question of Kari-Vac's responsibility. GSA notes that it did not base its nonresponsibility determination on the conviction and probation of Kari-Vac's president, but on Kari-Vac's poor contract performance and its weak financial situation which, according to GSA, has not improved. In GSA's opinion, then, Kari-Vac's "new information" does not alter the initial nonresponsibility determination and it has no legal obligation to request that SBA reconsider whether a COC should be issued.

Under our Bid Protest Procedures, if our Office determines that an additional statement in support of the initial protest is required, the protester is required to furnish both our Office and the contracting agency a copy of this statement not later than 5 working days after receipt of notification from GAO of the need for such an additional statement. 4 C.F.R. § 21.2(d) (1983). We agree with GSA that Kari-Vac's initial protest did not state a basis for protest. However, due to an administrative error, our Office did not send Kari-Vac notification that an additional statement in support of the initial protest was required. Rather, we sent Kari-Vac a letter which simply acknowledged receipt of its protest. Thus, Kari-Vac was not on notice that it was required to furnish an additional statement. In light of this, section 21.2(d) of our Bid Protest Procedures does not apply, and Kari-Vac cannot be penalized for not furnishing an additional statement within 5 working days after its receipt of our letter of acknowledgment.

After our Office discovered its error, Kari-Vac was requested to submit a statement of the specific grounds upon which its protest was based. In response, Kari-Vac sent a short telegram which stated that SBA had "rejected our COC * * * without proper procedure and just cause." Although our Office generally does not review SBA's COC determinations, we will review a protest--such as Kari-Vac's--which alleges that SBA failed to consider information vital to its COC determination. See Skillens Enterprises, B-202508.2, December 15, 1981, 81-2 CPD 472. Thus, we do not agree with GSA that Kari-Vac's protest deserved to be dismissed when the protester indicated that it disagreed with SBA's refusal to issue a COC. Before we could dismiss the protest, we needed a further explanation of the basis for SBA's negative COC determination. Through the agency report and Kari-Vac's comments on that report, we have obtained the additional information we needed.

As GSA has indicated, under 15 U.S.C. § 637(b)(7) (Supp. III, 1979), SBA has conclusive authority to determine all elements of a small business concern's responsibility by issuing or declining to issue a COC. Our Office will not question SBA's refusal to issue a COC unless the small business can show that there was fraud or bad faith on the part of Government officials. D. J. Findley and Company, B-209417, October 27, 1982, 82-2 CPD 375.

From the facts set out above, it is clear that SBA declined to issue a COC because Kari-Vac's president was on probation at the time SBA made the determination. There is no evidence of fraud or bad faith. Consequently, our

Office has no basis to question SBA's decision that Kari-Vac was "not eligible for COC assistance because of recent legal actions." D. J. Findley and Company, supra.

However, it also appears that SBA never considered the specific reasons for GSA's nonresponsibility determination. Kari-Vac has presented our Office with a detailed rebuttal to the conclusions GSA reached in its preaward survey. In addition, SBA has informed Kari-Vac that, in view of the recent court decision to release Kari-Vac's president from further court supervision, Kari-Vac is now considered eligible for a COC and SBA is willing to reopen Kari-Vac's case if GSA agrees to refer the matter to SBA. GSA, however, has refused to make the referral on the grounds that its original nonresponsibility determination was not based on Kari-Vac's president being under court supervision, but because of Kari-Vac's previously poor contract performance and its present weak financial situation. Thus, in GSA's opinion, the release from court supervision is not "new information" which requires the contracting agency to reassess a bidder's responsibility, and it therefore will neither reconsider Kari-Vac's responsibility on its own nor ask SBA to consider the possible issuance of a COC.

In reaching this conclusion, GSA relies on our decision in the matter of Reuben Garment International Co., Inc., B-198923, September 11, 1980, 80-2 CPD 191. There, we held that where the contracting agency, following a determination that the bidder was nonresponsible and a negative COC determination by SBA, reconsiders its nonresponsibility determination in light of new information presented by the bidder and determines that the bidder remains nonresponsible, the agency has no legal obligation to request SBA reconsideration. However, we find that Reuben Garment is not controlling here.

Our Office was presented with a situation analogous to Kari-Vac's in United Terex, Inc., B-206090, March 22, 1982, 82-1 CPD 268. There, SBA initially determined that the protester was not eligible for a COC because the firm was not going to perform a significant portion of the work with personnel on its own payroll. However, the protester submitted further information which indicated that the protester could overcome SBA's initial objections. Consequently, SBA asked the contracting agency to defer its proposed award and resubmit the matter of the protester's responsibility, noting that the basic question for eligibility had not been part of the agency's COC referral. The agency, however, refused to resubmit the matter to SBA, arguing that it had reviewed the protester's "new information" and found that it

did not alter the original nonresponsibility determination and, moreover, that it was under no legal obligation to resubmit the matter to SBA. In support of this decision, the agency, like GSA, cited Reuben Garment. We held, however, that the agency's reliance on Reuben Garment was misplaced since the case presented was not similar to those situations where SBA declined to issue a COC based on consideration of factors related to responsibility. We stated that "SBA's denial of a COC based on the bidder's eligibility under the COC procedure rather than the bidder's nonresponsibility does not affirm the contracting officer's nonresponsibility determination." In addition, we noted that SBA's willingness to reconsider the protester's eligibility and its request to the agency that it resubmit the matter of the protester's responsibility further indicated that SBA's decision did not constitute a final determination. We recommended that the agency resubmit the matter to SBA.

We reach the same conclusion here. SBA denied Kari-Vac a COC because of its determination that Kari-Vac was not eligible for the COC program due to the court supervision of Kari-Vac's president. SBA did not review the specific reasons for GSA's nonresponsibility determination and has recently indicated a willingness to reopen the matter of Kari-Vac's responsibility. In view of these facts, we find that SBA's original refusal to issue a COC did not constitute a final determination. United Terex, Inc., supra. We recommend, therefore, that the matter be resubmitted to SBA since it is SBA, not the contracting agency, which has the statutory authority to make a final disposition with respect to Kari-Vac's responsibility.

By separate letter of today, we are notifying GSA of our recommendation.

for 
Comptroller General
of the United States