

DECISION



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

FILE: B-214036.2

DATE: May 22, 1984

MATTER OF: Janel, Inc.

DIGEST:

1. Absent a showing of fraud or bad faith on the part of contracting officials, GAO will not review a contracting officer's determination that a small business concern is nonresponsible where the SBA affirms that determination by refusing to issue a certificate of competency.
2. Allegations unsupported by evidence in the written record are regarded as mere speculation.
3. Where it is clear that a protest involves matters which GAO does not consider, GAO will dismiss protest without holding a conference which would serve no useful purpose.

Janel, Inc. (Janel), protests the contracting officer's (CO's) determination that the firm was nonresponsible and the Small Business Administration's (SBA's) refusal to issue a certificate of competency (COC) in connection with invitation for bids No. DLA120-83-B-1739 issued by the Defense Personnel Support Center, Defense Logistics Agency (DLA), for the purchase of surgical scissors.

We dismiss the protest.

Janel, the apparent low bidder on four solicited items on which it bid, was found nonresponsible based on a pre-award survey showing unsatisfactory technical capability, unsatisfactory production capability, unsatisfactory plant facilities and equipment, unsatisfactory purchasing and subcontracting, and lack of qualification as a manufacturer or a regular dealer under the provisions of the Walsh-Healey Public Contracts Act. The Defense Contract Administration Services Management Area (DCASMA) which conducted the survey concluded that Janel which planned to subcontract out most of the contract work would not be able to meet the required (30-day) delivery schedule.

Since Janel is a small business concern, the DLA, in a letter dated January 11, 1984, referred the matter to the SBA's regional office pursuant to Defense Acquisition Regulation (DAR) § 1-705.4 and § 12-604 (1976 ed.) for possible issuance of a COC and certification of eligibility under the Walsh-Healey Act. On February 14, 1984, the SBA notified the CO of its intention to wait 5 workdays and, if SBA's affirmative recommendation concerning Janel's responsibility was not appealed by the CO, a COC was to be issued. On February 22, 1984, the CO phoned the SBA and asked it to reconsider its position in view of the negative findings of the DCASMA survey report. On February 28, 1984, the SBA made its final determination, denying Janel's application for a COC, stating that "[i]t could not be established that your firm can meet the delivery schedule contained in this solicitation."

Janel denies that it is nonresponsible. Janel contends that "the contracting officer overstepped the bounds of his authority in his dealings with the SBA representative and this [they] submit is tantamount to bad faith." Janel additionally alleges that--

"[i]t was clearly equally wrong for the SBA representative to abdicate his responsibility under his regulations to make an independent decision by reversing his initial affirmative decision under pressure from the contracting officer."

When an agency determines that a small business concern is nonresponsible, it must refer the matter to SBA before the small business bidder can be precluded from award. SBA has statutory authority to make final disposition as to all elements of responsibility. 15 U.S.C. § 637(b)(7)(A) (1982). Therefore, we generally will not review a contracting officer's determination that a small business concern is nonresponsible where the SBA affirms that determination by refusing to issue a COC. Jechura's Military Equipment Company, B-209996, December 15, 1982, 82-2 CPD 539.

We will, however, review the matter when the protester has shown that government officials may have acted fraudulently or in bad faith. Id. Under these circumstances,

protesters bear a very heavy burden of proof and must present irrefutable evidence that the officials acted with a specific and malicious intent to injure them. See Marine Industries Northwest, Inc.; Marine Power and Equipment Company, 62 Comp. Gen. 205 (1983), 83-1 CPD 159. Here, Janel has not made the requisite initial showing in support of its allegation and we, therefore, will not review the matter.

Janel's allegation that the CO overstepped his bounds of authority in his dealings with the SBA representative is without legal basis. On the contrary, DAR § 1-705.4(d) encourages such exchange in stating: "It is the policy of the Department of Defense to endeavor to reach agreement with the SBA regarding the responsibility of a small business concern." DAR § 1-705.4(e) expands upon this by concluding: "Every effort should be made to resolve any differences between the SBA and the Departments through a complete exchange of preaward information developed by each agency." If the CO continued to have doubts about Janel's responsibility after complete and open discussion with the SBA regional office, he could have requested the SBA field office to suspend action and forward the case to SBA, Washington, D.C. See DAR § 1-705.4(f). This was not necessary here because the SBA regional office concurred with the DCASMA survey report in finding that Janel did not have the ability to meet the delivery requirements.

Janel's allegation that the SBA representative abdicated his responsibility to make an independent decision due to pressure by the CO is entirely unsupported by evidence in the written record and, therefore, must be regarded as pure speculation. Ted L. Bidy and Associates, Inc., B-209297, B-209297.2, April 22, 1983, 83-1 CPD 441.

Janel has requested a conference on the protest as provided for in our Bid Protest Procedures. 4 C.F.R. § 21.7 (1983). However, where, as here, the merits of a protest are not for consideration, we believe that no useful purpose would be served by holding a conference. Zimmerman Plumbing and Heating Co., Inc.--Reconsideration, B-211879.2, August 8, 1983, 83-2 CPD 182; Kentucky Building Maintenance, Inc., B-196368, January 16, 1980, 80-1 CPD 49.

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