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DECISION



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

FILE: B-218116 **DATE:** May 17, 1985
MATTER OF: A.R.E. Manufacturing Co., Inc.

DIGEST:

1. Small Business Administration's Standard Operating Procedure (SOP) represents internal agency policy and guidelines, without the force and effect of law, and GAO does not generally review SBA's compliance with its SOP.
2. Where bidder withdraws certificate of competency application with the Small Business Administration, GAO will not review non-responsibility determination as that would amount to substitution of GAO for the agency statutorily authorized to review such determination.
3. Following reevaluation of bidder's responsibility, which results in continuance of prior negative determination, contracting officer is not required to resubmit matter to the Small Business Administration after bidder withdrew certificate of competency application.

Unifab Industries, Inc. (Unifab), a wholly owned subsidiary of A.R.E. Manufacturing Co., Inc. (ARE), protests the rejection of its bid as nonresponsible under invitation for bids (IFB) No. DAAJ10-84-B-A227 issued by the United States Army Troop Support Command (TROSCOM), St. Louis, Missouri. We deny the protest.

The IFB, a total small business set-aside, was issued on July 18, 1984, for 301 air conditioners. Unifab was the apparent low responsive bidder and a preaward survey was conducted which recommended Unifab for award. Notwithstanding the results of the survey, the contracting officer determined Unifab to be nonresponsible because it lacked adequate financial resources and a satisfactory performance record. The contracting officer advises that Unifab is

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financially dependent upon ARE and that ARE was the apparent low bidder on two other TROSCOM procurements. The contracting officer states that the nonresponsibility determination was based on the fact that if ARE were awarded the contracts, being undercapitalized itself, it would have to drain the working capital of Unifab. Additionally, the contracting officer found Unifab's performance was unsatisfactory on its current contracts with TROSCOM.

On November 15, 1984, the contracting officer referred the matter of Unifab's nonresponsibility to the Small Business Administration (SBA) for consideration of a certificate of competency (COC). By letter dated December 19, 1984, allegedly at the suggestion of SBA officials, Unifab withdrew its application for a COC. Subsequently, the contracting officer met with ARE and Unifab to discuss their performance on existing contracts and, during the course of the meeting, agreed to reconsider Unifab's nonresponsibility determination.

Upon further review, the contracting officer found that Unifab had adequate financial resources. However, with respect to Unifab's unsatisfactory performance record, the contracting officer states the following:

"I had not received any information or evidence that would change my assessment of Unifab's performance record nor had I seen any evidence that Unifab was taking steps to correct the causes of its poor contract performance. . . . There was no indication Unifab had changed or adopted new planning procedures or had changed or hired new personnel to improve its production planning. Although a government technical writer had assisted Unifab [in writing a technical manual required under its existing contract] Unifab has still failed to deliver the other technical manual under that contract, again showing a continued lack of diligence."

Therefore, on January 30, 1985, the contracting officer again determined Unifab to be nonresponsible.

First, Unifab alleges that the contracting officer did not consider the reasons for the delay in its performance as required by Federal Acquisition Regulation § 9.104-3(c), 48 C.F.R. 9.104.3(c) (1984). The regulation provides that a prospective contractor that is or recently has been deficient in contract performance shall be presumed nonresponsible unless the contracting officer determines

that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. Second, Unifab contends that the referral to SBA was procedurally defective because the specific elements of its nonresponsibility--tenacity and perseverance--were not properly identified, which prevented SBA from properly investigating its COC application. Third, Unifab contends that the contracting officer was required to refer the second nonresponsibility determination to SBA for COC consideration. Finally, Unifab argues that the nonresponsibility determination should be referred to SBA, notwithstanding that it withdrew its COC application, because its decision to withdraw was made at the suggestion of SBA officials and that such action violates the SBA's Standard Operating Procedure (SOP) 60-04 paragraph 6f (March 3, 1980), which states that "in no instance shall any office recommend withdrawal of [a COC] application."

Regarding the argument that an SBA official suggested that Unifab withdraw its COC application, Unifab has submitted a deposition given by the official in connection with a matter pending in the United States Claims Court. The pertinent question and response are:

"Q. Do you know why A.R.E. withdrew its request for a COC on A-227?"

"A. I'm not going to say I advised nor requested that they did, but I planted the seed with Mr. Ferrigno that he would stand a better chance of getting COC's on the two than he would on all three of them."

At the time, Unifab and ARE had three COC applications at the SBA.

The SBA's SOP's represent internal SBA policies and guidelines rather than regulations having the force and effect of law. We therefore generally do not review SBA's compliance with its SOP. Integrity Management International Inc., B-212596, Aug. 15, 1983, 83-2 C.P.D. ¶ 216.

Moreover, we cannot say, based on the record before our Office, that the SBA official advised the withdrawal of the COC application. The letter which Unifab sent the SBA advising of the withdrawal states that it has been determined that it would be in Unifab's best interest to withdraw the application. We believe that the withdrawal was a business judgment on the part of Unifab, freely made.

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Since Unifab did not avail itself of the possible protection provided by the SBA statute and regulations against unreasonable determinations by the contracting officer, we will not review the agency's determination because this would amount to a substitution of this Office for the SBA, which is specifically authorized to review such determinations. Wallace & Wallace Fuel Oil Co., Inc., B-214572, Apr. 18, 1984, 84-1 C.P.D. ¶ 444.

Finally, as regards the reevaluation of Unifab's responsibility by the contracting officer, which resulted in a favorable finding concerning financial capacity but unfavorable regarding past performance, there is no requirement that the matter be resubmitted to the SBA. Reuben Garment International Co., Inc., B-198923, Sept. 11, 1980, 80-2 C.P.D. ¶ 191.

The protest is denied.

for *Seymour Spoo*
Harry R. Van Cleve
General Counsel