



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: E.M. By Enmanuel of Beverly-Hills, Inc.

File: B-222928.2

Date: August 8, 1986

DIGEST

1. Protest Small Business Administration's failure to issue certificate of competency is dismissed where protester does not show that government officials acted in bad faith or that material information was not considered.
2. Small Business Administration's (SBA) failure to provide protester an opportunity to rebut agency's version of the facts prior declining to issue a certificate of a competency (COC) does not demonstrate bad faith. The regulations encourage complete exchange of information between the contracting agency and SBA to resolve any disagreement about a firm's ability to perform, but do not require that SBA provide COC applicants with an opportunity to present information other than that in their original applications.

DECISION

E.M. By Enmanuel of Beverly-Hills, Inc. (Enmanuel), protests the failure of the Defense Logistics Agency (DLA) to award it a contract under invitation for bids (IFB) No. DLA100-86-B-0055, a total small business set-aside for women's handbags. Enmanuel believes that it was improperly denied a certificate of competency (COC) by the Small Business Administration (SBA).

We dismiss the protest.

Enmanuel submitted the lowest of the five bids received. The contracting officer requested a preaward survey on Enmanuel. The survey identified numerous deficiencies in Enmanuel's quality control procedures and manual including a lack of written in-process inspection instructions, no written procedures for selecting qualified suppliers, inadequate material control practices, no evidence of traceability, and no written procedures for investigating customer complaints and correcting problems. Based on these deficiencies, the contracting officer determined Enmanuel to be nonresponsible based on a lack of capacity. Because Enmanuel is a small business, the matter was referred to the SBA for possible issuance of a COC.

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Upon completion of its investigation, SBA notified the contracting officer that it intended to issue Enmanuel a COC. The SBA indicated that Enmanuel had added procedures to its quality control manual which would eliminate the problems identified in the preaward survey and that delivery problems under other contracts were being or had been corrected.

The contracting officer disputed these findings, but was not able to convince SBA. The contracting officer requested that the SBA Regional Office refer the matter to the SBA Central Office for review. The contracting officer's letter of appeal advised that the changes that Enmanuel had made to its quality control manual were unacceptable and that the manual still did not conform to DLA's minimum requirements. The contracting officer also disputed SBA's findings with regard to Enmanuel's prior performance and production capability.

On April 18, 1986, SBA informed DLA that it had declined to issue a COC due to Enmanuel's lack of capacity. A letter of the same date advised Enmanuel that SBA would not issue it a COC because the firm had failed to correct its quality control system and had been placed on method "C" inspection, "which could further seriously impact on [its] already delinquent contracts."

Enmanuel complains that the SBA acted in bad faith because although it was assured by SBA that it would be given an opportunity to present its version of the facts prior to the SBA's final decision, it was not contacted. Enmanuel asserts that as of the date of its initial protest to our Office on April 23, its quality control system had been approved and it was no longer on method "C" inspection, thus removing SBA's only reason for denying it a COC.

Since the Small Business Administration is vested with conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business' responsibility by issuing or refusing to issue a COC, 15 U.S.C. § 637(b)(7) (1982), we will not review the SBA decision unless there is a showing that it stemmed from fraud or bad faith or that the SBA did not follow its own regulations or did not consider material information. Sealtech, Inc., B-221584.3, Apr. 16, 1986, 86-1 CPD ¶ 373. In order to establish bad faith, a protester must present virtually irrefutable proof that government officials had a specific and malicious intent to harm the protester. The W.H. Smith Hardware Co., B-219327.4, Oct. 8, 1985, 85-2 CPD ¶ 391.

Here, based on its initial investigation of the protester's COC application, SBA determined it would issue a COC. After consulting with the contracting agency and receiving additional information, SBA reconsidered the matter and subsequently concluded that in fact Enmanuel did not have the capacity required to perform the contract and declined

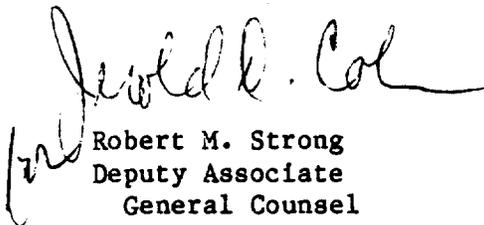
to issue a COC. While the protester objects to the procedure used here, contending that it caused the SBA to decline to issue a COC based on erroneous information and did not provide for the protester's participation in the process, we see nothing in the record that would cause us to review the matter.

Since the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.602-3 (1985), encourages a complete exchange of information between the contracting agency and SBA to resolve any disagreement about a firm's ability to perform, we believe that it was proper for the contracting agency here to inform SBA of its view of the facts and for SBA to consider such information in reaching its final decision. The Swanson Associates, Inc., B-220088.2 et al., Oct. 8, 1985, 85-2 CPD ¶ 396.

Further, regarding SBA's failure to contact the protester during the COC process, there is no statutory or regulatory requirement that SBA provide COC applicants with an opportunity to provide information other than that in their initial applications. See 13 C.F.R. § 125.5(d) (1986). In any event, the protester did not "cure" its inspection system until after SBA informed the contracting agency and the protester that it had declined to issue a COC. The regulations do permit a contracting agency to award a contract to a firm which has been referred to SBA for a COC based on new information which causes the contracting officer to determine the firm responsible. FAR, 48 C.F.R. § 19.602-4(a). However, the contracting officer did not consider the protester's "cure" of the inspection procedures to be sufficient to change his nonresponsibility determination.

Enmanuel makes no showing of fraud, bad faith, or failure of the SBA to follow its regulations, nor has it shown that SBA has failed to consider vital information (as opposed to disagreeing with SBA's conclusion drawn from that information).

We dismiss the protest.


Robert M. Strong
Deputy Associate
General Counsel