



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: ESCO Air Filters
File: B-225552.2
Date: March 12, 1987

DIGEST

1. In the absence of a showing of bad faith or fraud, or that vital information was not considered, General Accounting Office will not question a determination by the Small Business Administration not to issue a certificate of competency following a finding by the contracting agency that a small business was nonresponsible.
2. To establish bad faith, the protester must prove that government officials had a specific and malicious intent to injure the firm. Burden of showing the Small Business Administration (SBA) acted in bad faith to deny the protester an opportunity to file for a certificate of competency is not met where the record shows that the SBA, with the cooperation of the contracting agency, granted several extensions to the filing deadline to assure the protester ample time to file its application.
3. The granting of an extension for filing a certificate of competency application is a matter solely within the contracting agency's discretion, with the government's interest in proceeding with the acquisition, not the bidder's interests in obtaining an extension, the controlling consideration.

DECISION

ESCO Air Filters protests the refusal of the Small Business Administration (SBA) to allow sufficient time for ESCO to file an application for a certificate of competency (COC) in connection with invitation for bids No. N00104-85-B-0923, issued by the Department of the Navy for a quantity of air filters. ESCO, the low bidder and a small business, alleges that the SBA acted in bad faith and failed to follow its own regulations in not granting ESCO's last request for an extension to file despite being granted permission by the Navy for such an extension. We deny the protest.

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The Navy initially determined ESCO to be nonresponsible on December 20, 1985, based on an unsatisfactory financial capability rating. The Navy then referred the matter to the SBA for a COC determination. On February 10, 1986, the Navy conducted a second pre-award survey concerning ESCO's technical and production capability and gave ESCO an unsatisfactory rating for quality assurance. With this finding, the Navy requested the SBA to initiate action to complete the COC, which had been placed on hold pending the results of the second pre-award survey. A deadline of June 12 was established for ESCO to file its application for a COC, but ESCO was granted an extension to June 24. On June 26, the SBA notified the Navy that it had closed its file on the case because ESCO had failed to file an application.

ESCO subsequently complained to the Navy that it had not been given fair opportunity to establish that it was a responsible contractor. While denying that ESCO had been unfairly treated, the Navy nevertheless conducted a third pre-award survey on ESCO on the basis that the company's responsibility position might have improved. On September 16, ESCO again was given a negative rating for financial capability and quality assurance. By letter dated October 8, the Navy again requested the SBA to initiate COC procedures.

After receiving the Navy's letter, the SBA opened a new COC file on ESCO and established a deadline of October 24 for ESCO's filing of a COC application. However, because it had not yet received all the necessary procurement documents from the Navy, the SBA temporarily suspended the case and granted ESCO an extension of time to file pending receipt of the documents. After these documents were received, the SBA neglected to notify ESCO of a new filing deadline, and ESCO instead was informed by letter dated November 6 that the SBA was closing the case for failure to file a timely COC application.

After a complaint from ESCO that ESCO had not been notified of a new closing date for its COC application, the SBA reopened the case and asked the Navy for additional time to render a COC decision. The Navy extended the deadline for an SBA decision until December 3. The SBA then attempted to contact ESCO on three separate occasions about the new deadline for a COC determination but was unsuccessful. Finally, on November 19, ESCO contacted the SBA and was informed that the firm had until November 26 to file an application for a COC so that the SBA could meet its December 3 deadline for a COC determination. After ESCO argued that it needed more time, the SBA agreed to a November 28 filing deadline.

On November 28, ESCO informed the SBA that it had not completed its application and that it needed still more time. The SBA told ESCO that it could not give any more time beyond December 1 since even that would leave only 2 days for the SBA to render a decision on the COC. ESCO failed to file a COC application by December 1. The SBA called the Navy and was advised that no further extensions would be given. On December 2, ESCO told the SBA that it had persuaded the Navy to agree to a time extension, but when the SBA called the Navy, the SBA again was advised that no further extensions of time would be given. Therefore, the SBA closed the case for lack of a COC application from ESCO.

ESCO filed a protest with our Office on December 10, alleging that the Navy improperly had refused to discuss or meet with ESCO about the findings made in the Navy's pre-award surveys, and that the Navy improperly had refused to consider ESCO's willingness to post a performance bond equal to the amount of its bid in answer to any questions the agency might have as to ESCO's financial capability. In addition, ESCO alleged that it was not given the opportunity to appeal the pre-award survey findings to the SBA. When an agency makes a determination that a small business firm is nonresponsible, it is required by law to refer that determination to the SBA for consideration under the SBA's COC procedures. Consequently, when the Navy notified us immediately after filing that it had referred ESCO's nonresponsibility determination to the SBA, we dismissed the protest. See Bid Protest Regulations, 4 C.F.R. § 21.4(f)(3) (1986).

On December 18, ESCO requested that we reconsider our dismissal because we had erroneously assumed that the firm was contending that the Navy had not given it an adequate opportunity to pursue a COC. ESCO emphasized that it instead was contending that the SBA had acted in bad faith to prevent ESCO from having a fair opportunity to apply for a COC. We will review COC determinations when a protester's submission indicates that SBA action on a referral for a COC may have been taken fraudulently or in bad faith or that the SBA disregarded information vital to a responsibility determination. The Pepperdine Corp., B-225490, Dec. 24, 1986, 86-2 C.P.D. ¶ 717. In view of ESCO's request, and since the facts set out above were not known to us at that time, we reopened ESCO's protest on the issue of whether the SBA had acted in bad faith to prevent ESCO from filing an application for a COC, and we requested reports on the matter from the SBA and the Navy.

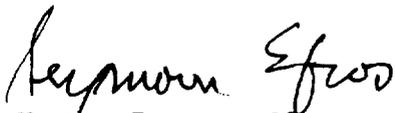
There is nothing in the protest reports that indicates the SBA acted in bad faith. To establish bad faith, a protester

must prove that government officials had a specific and malicious intent to injure the firm. A.R.E. Manufacturing Co., Inc., B-217515, et al., Feb. 7, 1985, 85-1 C.P.D. ¶ 162. Here, the events that transpired after ESCO's initial negative pre-award survey show just the opposite of bad faith--that the SBA, with the cooperation of the Navy, made extraordinary efforts to assure ESCO ample time to file for a COC.

With regard to the SBA's refusal to grant another filing extension beyond December 1, 1986, we consistently have taken the position that it is the responsibility of the small business firm determined to be nonresponsible to file a timely, complete and acceptable COC application with the SBA. SALJ of America, Inc., B-217258, Apr. 9, 1985, 85-1 C.P.D. ¶ 408; Darian Industries, Inc., B-221828 et al., Apr. 24, 1986, 86-1 C.P.D. ¶ 401. Further, the granting of an extension for filing and processing a COC application is a matter solely within the contracting agency's discretion, and the bidder's interests are not controlling. Lasanta Sportswear, Inc., B-218893, et al., June 3, 1985, 85-1 C.P.D. ¶ 634. This is because the government has an overriding interest in proceeding with the acquisition. Id. Our Office therefore does not review the refusal to grant a filing extension for a COC. See SALJ of America, Inc., B-217258 et al., supra.

As to ESCO's charge that the SBA failed to follow its own regulations, this is essentially based on allegations that on more than one occasion after extending the COC filing deadline the SBA failed to notify ESCO of the new deadline. We do not see how this hindered ESCO from completing its COC application, however, especially with regard to the last extension obtained by the SBA to November 28. The record shows that the SBA informed ESCO on November 19 that ESCO had until November 28 to submit a COC application. We see no reason why ESCO could not have submitted an application by November 28 had the company begun working on it on November 19. In any event, we believe that given that the Navy first referred its nonresponsibility determination on ESCO to the SBA in early 1986, ESCO, in effect, had nearly a year to file for a COC. We see no reason to object to the SBA's decision to refuse to grant ESCO further time because the company was still unable to complete a COC application.

ESCO's protest is denied.

for 
Harry R. Van Cleave
General Counsel