



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PBR Electronics, Inc.

File: B-228369

Date: October 16, 1987

DIGEST

The General Accounting Office will not review a protest concerning a determination of the Small Business Administration to issue a certificate of competency except upon a prima facie showing of fraud, bad faith, or willful disregard of vital information bearing on the firm's compliance with definitive responsibility criteria.

DECISION

PBR Electronics, Inc. (PBR), protests the award of a contract to Electro Design Manufacturing, Inc. (EDM), under request for proposal No. DAAH01-87-R-0120, issued by the Department of the Army for HAWK Phase III Mod Kits at Redstone Arsenal, Alabama. The basis for PBR's protest is that EDM is nonresponsible and that the Small Business Administration (SBA) failed to apply definitive responsibility criteria contained in the RFP and erroneously granted EDM a certificate of competency (COC).

The RFP required that offerors "must have successfully manufactured similar military hardware within the past two (2) years" to qualify for award. In addition to this special standard of responsibility certain general standards of responsibility were set forth in the solicitation. Special standards of responsibility are established for specific procurements, and are referred to as "definitive responsibility criteria."

A preaward survey resulted in a recommendation of no award to EDM, and a determination of nonresponsibility was made by the contracting officer in accordance with the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(b) (1986). Pursuant to the requirements of FAR, 48 C.F.R. § 19.602-1(a), upon the determination of nonresponsibility, the contracting officer referred the matter to the SBA for a COC. On August 28, 1987, the SBA certified that EDM, a small business firm, was responsible and the COC was issued. Accordingly, the award was made to EDM on August 31, 1987.

040245

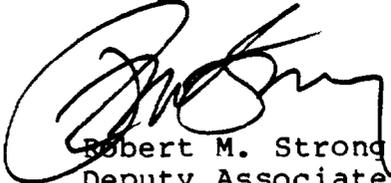
The SBA, not our Office, has statutory authority to review a contracting officer's finding of nonresponsibility and to determine conclusively a small business concern's responsibility by issuing or refusing to issue a COC. Shook's Heating & Cooling, B-224701, Sept. 24, 1986, 86-2 C.P.D. ¶ 349. We will consider protests by third parties concerning the SBA's issuance of a COC only upon a prima facie showing that government officials acted fraudulently or in bad faith or willfully disregarded vital information bearing on a small business firm's compliance with definitive responsibility criteria. National Maintenance, Inc., B-224186; B-224186.2, Nov. 18, 1986, 86-2 C.P.D. ¶ 580. Establishing fraud or bad faith requires the presentation of virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. Shook's Heating & Cooling, supra. PBR neither alleges nor presents evidence that the SBA specifically and maliciously intended to injure it. The "vital information" test is met with respect to definitive responsibility criteria so long as the SBA is aware of the definitive responsibility criteria in deciding to issue the COC. When the Army referred the nonresponsibility determination to the SBA, the SBA was cognizant of the solicitation's definitive responsibility criteria and, with that knowledge, determined that EDM was responsible. Moreover, even if we find that certain information was not considered, our role is limited to suggesting that the SBA reconsider its decision. National Maintenance, Inc., supra.

This Office also recognizes the SBA's authority to consider whether a small business concern is capable of performing despite the fact that it does not meet definitive responsibility criteria. In other words, the SBA's authority is not limited by definitive responsibility criteria included in a solicitation. Therefore, a bidder's compliance with those criteria is not a prerequisite to the issuance of a COC. Id. at 2.

Since the SBA is not bound by definitive responsibility criteria, PBR's allegations that the SBA failed to apply

definitive responsibility criteria provides no legal basis for our Office to consider the SBA's decision to issue the COC to EDM.

The protest is dismissed.



Robert M. Strong
Deputy Associate
General Counsel