



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: F.W. Morse & Company

File: B-227995

Date: October 26, 1987

DIGEST

1. General Accounting Office will not review contracting officer's nonresponsibility determination where the matter was properly referred to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures.
2. General Accounting Office review of SBA decision to refuse to issue a COC is limited to evidence of fraud or bad faith on the part of government officials, or of SBA's failure to follow its own regulations or consider material information.
3. SBA consideration of protester's credit, where the contracting officer's nonresponsibility determination was based only on capacity, is not a violation of SBA regulations; COC procedure is not limited to consideration of the deficiencies found by the contracting officer and SBA's conduct of an independent evaluation reasonably may result in refusal to issue a COC for a different reason.
4. To establish bad faith, burden is on protester to provide virtually irrefutable proof that government officials acted with specific malicious intent to injure the protester. Protester's disagreement with SBA's assessment of the viability of the firm's credit structure does not establish bad faith on the part of SBA officials.
5. Contracting officer's providing of allegedly erroneous information to SBA does not demonstrate bad faith since the regulations encourage complete exchange of information between the contracting agency and SBA to resolve any disagreement about a firm's ability to perform.

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DECISION

F.W. Morse & Company protests the determination of the United States Coast Guard pursuant to Office of Management and Budget Circular No. A-76 to continue to perform ship-board electronic systems maintenance for the First Coast Guard District in-house rather than to contract for these services. Morse, a small business, alleges that the Coast Guard improperly determined that Morse was nonresponsible, and acted in bad faith by supplying negative, allegedly inaccurate, information to the Small Business Administration (SBA) for consideration in determining whether to issue a certificate of competency (COC), and that the SBA acted in bad faith and in violation of procurement regulations in its COC consideration. Morse also protests that the Coast Guard improperly conducted the required A-76 cost comparison analysis.

We dismiss the protest in part and deny it in part.

The Coast Guard issued invitation for bids (IFB) No. DTCG24-87-B-10062 on February 10, 1987, with the IFB providing that contract performance was to commence on July 1, 1987, or on the date of award. At bid opening on March 27, Morse's low bid, estimated at \$4,570,860, was the only bid below the estimated \$5,911,500 cost of in-house performance under the projected most efficient organization. On May 27, the contracting officer determined that Morse was nonresponsible because of lack of capacity to perform the contract. The contracting officer's basis included Morse's lack of experience and lack of skilled employees, and Morse's underestimate of the scope of effort required under the contract.

On the same day, the contracting officer referred the nonresponsibility determination to SBA for consideration under the COC procedures. Morse's application for a COC was received by the SBA on June 15. By letter dated July 13, SBA declined to issue a COC to Morse on the basis of both lack of capacity and lack of credit. On July 27, the Coast Guard determined to retain performance in-house.

Morse first alleges that the Coast Guard's nonresponsibility determination has no rational foundation. We have no basis to consider Morse's challenge to the Coast Guard's nonresponsibility determination. Morse argues that the Coast Guard's determination was based on flawed data; however, the SBA, not our Office, has statutory authority to review a contracting officer's finding of nonresponsibility, and the SBA's determination to issue or refuse to issue a COC is

conclusive with respect to all aspects of a small business concern's responsibility. 15 U.S.C. § 637(b) (1982); Federal Acquisition Regulation (FAR), 48 C.F.R. subpart 19.6 (1986); Building Maintenance Specialists, B-220966, Jan. 14, 1986, 86-1 C.P.D. ¶ 39. Our Office will review a COC determination only when a protester's submission indicates that the action may have been taken fraudulently or in bad faith, or that the SBA violated its own regulations or disregarded information vital to a responsibility determination. The Pepperdine Corp., B-225490, Dec. 24, 1986, 86-2 C.P.D. ¶ 717.

To the extent Morse considered the Coast Guard's determination incorrect, it was incumbent on Morse to submit all relevant information and prove through its COC application to the SBA that it is responsible. Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 C.P.D. ¶ 623; Sealtech, Inc., B-221584.3, Apr. 16, 1986, 86-1 C.P.D. ¶ 373. Morse had this opportunity in making its application for a COC and, after due consideration, the SBA refused to issue a COC on the basis of Morse's lack of both capacity and credit.

Morse further argues that the SBA violated FAR, 48 C.F.R. § 19.602-2(a)(2), by considering its credit when the Coast Guard had found Morse nonresponsible solely on the basis of capacity. First, we believe that Morse misconstrues the regulation since it refers only to the scope of SBA's investigation team review, and does not limit the ultimate finding. More significantly, the protester's interpretation would subvert the COC process because it would require SBA, after it concluded that a bidder is lacking in one area of a responsibility, to certify the bidder as responsible simply because the procuring agency did not specify that area as one of its reasons for referral. Skillens Enterprises, 61 Comp. Gen. 142 (1981), 81-2 C.P.D. ¶ 472. While SBA may evaluate information supplied by the contracting officer, it makes its own independent investigation of a firm's responsibility. See 13 C.F.R. § 125.2 (1987). We have explicitly held that it is reasonable, following this independent evaluation, for the SBA to refuse to issue a COC for a reason different than the contracting officer's. Aquasciences International, Inc.--Request for Reconsideration, B-225452.2, Feb. 5, 1987, 87-1 C.P.D. ¶ 127. Accordingly, SBA's review of Morse's credit as well as capacity was proper.

Morse alleges that Coast Guard officials acted in bad faith during the COC consideration process by providing to SBA inaccurate historical information, inaccurate information regarding manning requirements and the contract performance start-up period. However, the Coast Guard merely provided SBA with the basis for the contracting officer's determina-

tion of nonresponsibility. While Morse disagrees with the substance of the Coast Guard's findings concerning capacity, such communications between the contracting agency and the SBA are not only unobjectionable, they are encouraged. FAR, 48 C.F.R. §§ 19.602-1(c) and 3(a), instructs the contracting officer to specify in letters of referral to the SBA the elements of responsibility found lacking and provides that when disagreements arise about a concern's ability to perform, the contracting officer and the SBA shall make every effort to reach a resolution through the complete exchange of information. The fact that a contracting officer's views are negative does not change his responsibility to communicate them or show that he acted in bad faith. Interstate Equipment Sales, B-225701, Apr. 20, 1987, 87-1 C.P.D. ¶ 427.

Morse asserts that SBA officials acted in bad faith because the SBA did not follow the recommendation of one of its specialists to grant the COC, and instead denied the COC because of an alleged desire to uphold the Coast Guard's rejection on any pretext. As SBA points out, while the underlying COC Committee recommendation to deny the COC was not unanimous, the ultimate determination was properly made by the SBA Deputy Regional Administrator, who has an appropriate delegation of authority for this purpose. Morse does not assert that SBA failed to adhere to any of its regulations or procedures in this regard. Morse simply disagrees with the SBA determination that Morse was lacking in credit and capacity because Morse's cash flow and financial condition were not stable enough to justify award, and because Morse lacked the employee expertise to commence performance of the contract within the required 45 day start-up period.

Morse contends that the denial is actually based on the Coast Guard's erroneous advice to SBA that start-up was required within 45 days after contract award. In this respect, we note that as of the date of the COC referral a 45 day start-up period is, in fact, a longer time period than is allowed under the terms of the solicitation, thus, the information actually was favorable to Morse.

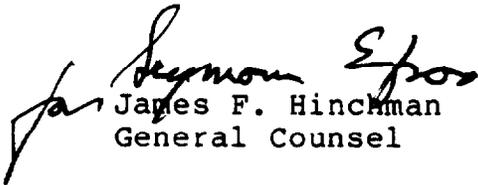
Morse also disputes the SBA's determination that Morse lacked sufficiently firm long term loan commitments, and that it lacked sufficient capitalization. Both of these matters are simply questions of financial judgment. The protester's disagreement with SBA's assessment of what Morse characterizes as a personal investment decision does not provide evidence of the specific malicious intent to injure the protester which is required to establish bad faith. Rather, Morse's contention that SBA was motivated by Coast Guard misinformation and a steadfast resolve to ensure that

the work remain in-house represents Morse's unsubstantiated speculation based on its difference of opinion with SBA's conclusions. Morse has provided no evidence which establishes bad faith or SBA violation of its regulations during the COC process.

Since Morse was rejected as nonresponsible and its COC application was denied, Morse could not be considered for award of the contract. Accordingly, Morse lacks the requisite direct economic interest in the agency's failure to award a contract to be considered an interested party to protest the Coast Guard's cost comparison analysis and the resulting decision to retain the work in house. Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (Supp. III 1985); Bid Protest Regulations, 4 C.F.R. § 20.0(a) (1987), Service Ventures, Inc., B-221261, Apr. 16, 1986, 86-1 C.P.D. ¶ 371.

The protest is dismissed in part and denied in part.

In view of our decision that the protest is without merit, Morse's claims for bid preparation costs and for the costs of pursuing its protest are denied.


James F. Hinchman
General Counsel