



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Sun Environmental, Inc.  
File: B-228491  
Date: October 29, 1987

### DIGEST

1. The General Accounting Office will consider protests by third parties concerning the Small Business Administration's issuance of a certificate of competency 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.
2. The Small Business Administration, has statutory authority to review a contracting officer's finding of nonresponsibility and then to determine conclusively a small business firm's responsibility by issuing or refusing to issue a certificate of competency.

### DECISION

Sun Environmental, Inc. (Sun), protests the award of a contract to Soresi Chemical Group (Soresi) under solicitation No. GS-11P87MKC7458, issued by the General Services Administration (GSA) for transformer removal and replacement. The basis for Sun's protest is that Soresi's bid was nonresponsive, and that the Small Business Administration (SBA) improperly issued a certificate of competency (COC) to Soresi. The protest is dismissed.

The solicitation specified that the Project Manager and Construction Superintendent must have had at least 10 and 8 years, respectively, of related experience. Sun alleges that Soresi offered a Project Manager and a Construction Superintendent, each with only 3 years of experience. Apparently, the contracting officer determined that Soresi was nonresponsive and in accordance with Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(b) (1986), referred the matter to the SBA for a COC. The protester asserts that

040518

134 Jole

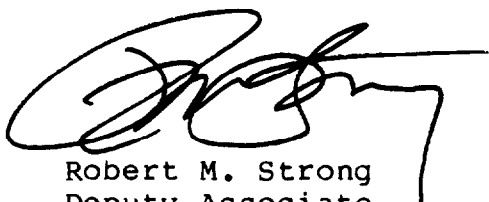
by issuing a COC to Soresi, the SBA waived the express requirements established in the solicitation and thereby caused bids to be evaluated on other than a common footing.

Our Office 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, B-224701, Sept. 24, 1986, 86-2 ¶ 349. Sun neither alleges nor presents evidence that the SBA specifically and maliciously intended to injure it, therefore it has not made a prima facie showing of bad faith or fraud.

Furthermore, 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. National Maintenance, Inc., supra. The issuance of a COC is thus an affirmative determination of the firm's ability to perform the contract, and this Office 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.

Since the SBA has statutory authority to review a contracting officer's finding of nonresponsibility and then to determine conclusively a small business firm's responsibility by issuing or refusing to issue a COC, Shook's Heating & Cooling, supra, and because the SBA is not bound by definitive responsibility criteria, Sun's allegations that the SBA waived the solicitation's requirements and thereby placed the bidding on unequal footing, provides no legal basis for protest.

The protest is dismissed.



Robert M. Strong  
Deputy Associate  
General Counsel