



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kirk Bros. Mechanical Contractors, Inc.--
Request for Reconsideration
File: B-228603.3, B-228603.5
Date: February 8, 1988

DIGEST

General Accounting Office will not review a protester's allegation of bad faith on the part of procurement officials in determining that the firm is nonresponsible where the firm had the opportunity but failed to pursue its administrative remedy of applying for a Certificate of Competency from the Small Business Administration.

DECISION

Kirk Bros. Mechanical Contractors, Inc. (B-228603.3) requests that we reconsider our decision in Kirk Bros. Mechanical Contractors, Inc., B-228603, Nov. 12, 1987, 87-2 CPD ¶ 479. In that decision we dismissed Kirk Bros.'s protest that it was unfairly found nonresponsible by the Naval Facilities Engineering Command under invitation for bids (IFB) No. N62472-87-B-4712 because Kirk Bros. had not proffered sufficient evidence to show that the nonresponsibility determination stemmed from bad faith or fraud. In its request for reconsideration, Kirk Bros. argues that it now has additional information in support of its original bad faith allegations. Kirk Bros. also protests the award of the contract to another firm under the same solicitation and requests that the Navy be directed to award it the contract (B-228603.5).

We deny the request for reconsideration and dismiss the protest.

Both the request for reconsideration and the protest are based upon the same factor--the Navy's finding that Kirk Bros. was not a responsible prospective contractor. In our original decision, we had noted that although Kirk Bros. had alleged that the Navy's determination of nonresponsibility was made in bad faith, Kirk Bros. had offered insufficient evidence in support of its assertion. On reconsideration,

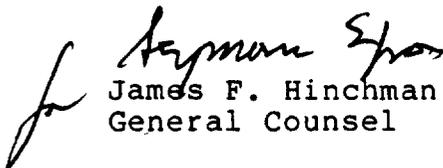
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Kirk Bros. attempts to support its allegation that the Navy's finding of nonresponsibility was made in bad faith. Specifically, Kirk Bros. has offered a copy of correspondence from the Small Business Administration (SBA) regarding the Navy's referral for a Certificate of Competency (COC) determination and Kirk Bros.'s failure to apply for the COC, the Navy's performance evaluation of Kirk Bros. under contract No. N62472-82-C-0099, as well as Kirk Bros.'s rebuttal to the Navy's performance evaluation.

As we noted in our prior decision, the SBA has conclusive authority to review nonresponsibility determinations made with respect to small businesses by issuing or failing to issue a COC. 15 U.S.C. § 637(b)(7) (1982). When a small business is found to be nonresponsible, and the matter is referred to the SBA, the burden is on the firm to apply for a COC from the SBA in order to avail itself of the protection afforded against unreasonable determinations by the contracting officer. Ion Exchange Products, Inc., B-218578, July 15, 1985, 85-2 CPD ¶ 52; Ferrite Engineering Labs, B-225997, Feb. 27, 1987, 87-1 CPD ¶ 231. Where the firm fails to apply for a COC, we will not review the contracting officer's underlying determination of nonresponsibility since such a review would in effect substitute our Office for the SBA, the agency authorized by statute to review nonresponsibility determinations. Ion Exchange Products, Inc., supra; Ferrite Engineering Labs, supra.

Our view that it is the SBA, and not this Office, that must make these determinations, was reinforced in a recent decision in which we held that our review is limited to whether bad faith or fraudulent actions on the part of procurement officials resulted in a denial of the protester's opportunity to seek SBA review of a non-responsibility determination or whether the SBA's denial of a COC was itself made in bad faith. Zan Machine Company, Inc.--Request for Reconsideration, B-229705.2, Jan. 19, 1988, 88-1 CPD ¶ _____. Thus, where, as here, a firm is given the opportunity to apply for a COC but fails to do so, our Office will not review the underlying nonresponsibility determination.

The request for reconsideration is denied and the protest is dismissed.


James F. Hinchman
General Counsel