



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## Decision

**Matter of:** Inter-Continental Equipment, Inc.  
**File:** B-230266  
**Date:** March 4, 1988

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### DIGEST

1. Where a small business concern is determined to be nonresponsible by a contracting officer, General Accounting Office will not review the subsequent refusal by the Small Business Administration (SBA) to issue a certificate of competency absent a showing of possible fraud or bad faith on the part of the contracting officials or of SBA's failure to consider vital information bearing on the firm's responsibility.
2. Agency may examine past failure to comply with the Cargo Preference Act in making responsibility determination.

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### DECISION

Inter-Continental Equipment, Inc. (ICE), protests the rejection of its bid under invitation for bids No. DAAK01-88-B-A056, issued by the Army Troop Support Command, St. Louis, Missouri, on the basis that ICE is a nonresponsible bidder. ICE also protests the Small Business Administration's (SBA's) refusal to issue a certificate of competency (COC).

We dismiss the protest.

The Army rejected ICE's bid as nonresponsible based on an unsatisfactory performance record. Because ICE is a small business concern, the agency referred its nonresponsibility determination to the SBA for consideration under its COC procedures, as required by 15 U.S.C. § 637(b)(7) (1982). The SBA initially intended to issue the COC, but the Army appealed to the SBA not to issue a COC because of information received from the United States Maritime Administration that ICE had not been complying with Federal Acquisition Regulation (FAR) § 52.247-64, "Preference for Privately Owned U. S. Flag Commercial Vessels," on Navy contracts. The regulation implements the Cargo Preference Act of 1904, 10 U.S.C. § 2631 (1982).

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The SBA investigated and concluded that ICE had not complied with the Cargo Preference Act on current and previous Navy contracts, and that ICE had not responded to repeated requests from the Maritime Administration to propose actions which would bring it into compliance with the Act. As a result, the SBA refused to issue the COC.

The SBA, not this Office, has the statutory authority to review a contracting officer's finding of responsibility and then to determine conclusively a small business concern's responsibility. Our Office limits its review of the denial of a COC to instances in which the protester makes a showing of either possible fraud or bad faith on the part of the contracting officials or that SBA failed to consider vital information bearing on the firm's responsibility. Spheres Co., B-225755, June 5, 1987, 87-1 CPD ¶ 573.

ICE alleges that the Army and the SBA violated procurement regulations and showed bad faith in finding ICE nonresponsible, and that the Maritime Administration showed bad faith by influencing the contracting officer and SBA. ICE contends that the Maritime Administration's interference is part of a pattern of punitive treatment, citing the Maritime Administration's actions in other procurements for which ICE has competed.

To establish bad faith, our Office requires the presentation of virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. Midwest Security Agency, B-222424, Apr. 7, 1986, 86-1 CPD ¶ 345. ICE falls far short of meeting this standard. Communications between the SBA and agencies concerning the issuance of a COC, including discussions which may influence the SBA's decision, are proper. Id.

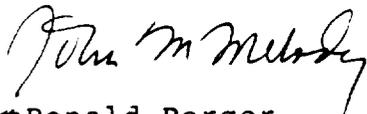
ICE also complains that it had been referred to SBA based on capacity to perform, but SBA's denial of a COC was made on a different basis. However, it is reasonable, following an independent evaluation, for the SBA to refuse to issue a COC for a reason different from the contracting officer's. AquaSciences International, Inc.--Request for Reconsideration, B-225452.2, Feb. 5, 1987, 87-1 CPD ¶ 127.

ICE argues that the SBA violated procurement regulations when they used the Cargo Preference Act as a basis for finding ICE nonresponsible. We have held that whether a bidder is capable of complying with a federal statute concerns the bidder's responsibility. See Yale Materials Handling Corp.--Reconsideration, B-226985.2 et al., June 17, 1987, 87-1 CPD ¶ 607. In fact, ICE itself has protested to

this Office that awardees in other procurements would not comply with the Cargo Preference Act. See Inter-Continental Equipment, Inc., B-224433, Sept. 24, 1986, 86-2 CPD ¶ 345; Inter-Continental Equipment, Inc., B-224824, Oct. 10, 1986, 86-2 CPD ¶ 424.

Finally, ICE contends that the Maritime Administration's continued interference with ICE's contracts created a de facto debarment, leaving ICE with no ability to correct the situation in the future. A debarment, however, prevents a firm from competing for government contracts for a specified period of time. FAR § 9.406-4. A finding of nonresponsibility, on the other hand, pertains only to the contract in question and does not bar the firm from competing for future contracts and receiving awards if it is otherwise qualified and convinces the agency that the firm's past problems have been corrected. Firm Reis GmbH, B-224544, B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. We note that ICE has refused to respond to the Maritime Administration's requests to propose actions to comply with the Cargo Preference Act, and that there appears to be nothing to prevent ICE from successfully competing in the future if ICE agrees to cooperate with the Maritime Administration.

The protest is dismissed.

  
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