



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: SPM Manufacturing Corporation
File: B-228078.2
Date: April 18, 1988

DIGEST

1. Where Small Business Administration (SBA) has declined to exercise its certificate of competency (COC) jurisdiction because protester is a manufacturer offering a foreign item, we will review the contracting officer's initial determination of nonresponsibility to determine whether it was unreasonable or made in bad faith.
2. The provisions of a settlement agreement between the agency and the protester with regard to its contract performance for products it manufactured do not substantially affect the issue of protester's responsibility to supply imported goods which require no manufacturing.
3. While the reasons underlying Small Business Administration's decision to issue certificates of competency (COCs) to the protester to supply manufactured products may constitute information bearing on protester's responsibility to supply products imported in final form, which the agency must consider in its reevaluation of the protester's responsibility, the issuance of the COCs, standing alone, does not compel a finding that the protester is responsible.
4. Where preaward financial survey conducted approximately 5 months before award contains numerous informational deficiencies and a concurrently prepared plant facilities report contains negative information only with respect to products protester manufactured, the contracting agency should reevaluate its determination that protester was not responsible to supply products which require no manufacturing.

DECISION

SPM Manufacturing Corporation protests the award of a fixed-price annual requirements contract for black linoleum desk pads to Sainberg & Company, Inc., under invitation for bids

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IFB) No. 2FY-EAL-A-A4993-S, issued by the General Services Administration (GSA) for various office supplies. The protester objects to GSA's determination that it is not a responsible firm to supply the commodity in question.

We sustain the protest.

Bids were opened on April 28, 1987. SPM was the apparent low bidder to supply an estimated 9,636 black linoleum desk pads at an evaluated price of \$41,800.44; Sainberg was the apparent second-low bidder at \$45,855.86. SPM was also the apparent low bidder on two other commodities under the IFB: an estimated 132,560 paperboard desk pads at \$177,701.60; and an estimated 61,420 blotter desk pads at \$439,897.34. In June, GSA concluded two preaward surveys with respect to SPM's overall responsibility to supply all three commodities. On the basis of the surveys, the contracting officer found SPM to be nonresponsible and forwarded the matter to the Small Business Administration (SBA) for certificate of competency (COC) proceedings. SBA denied SPM's application for a COC with respect to all three commodities on July 30. SPM protested the denial of a COC to our Office.

On November 5, while the first protest was pending, SPM and GSA concluded a settlement agreement regarding various cases, unrelated to the procurement at issue in the protest, which were then before the General Services Board of Contract Appeals (GSBCA) and the U.S. District Court. As part of the settlement, GSA agreed that there were no quality control system deficiencies at SPM with regard to the contracts covered by the settlement as of the effective date of the agreement. As a result of its review of that settlement agreement and other matters, SBA concluded that there was "no longer a factual basis" to support GSA's determination that SPM was nonresponsible in connection with the procurement at issue in the protest. Accordingly, on November 10, SBA requested GSA to reevaluate its determination. SPM then withdrew its protest (B-228078).

On November 13, GSA responded to the SBA request by reaffirming its determination that SPM was nonresponsible. On December 14, SBA issued COCs with respect to SPM's ability to supply two of the items involved in the protest, the paperboard and blotter desk pads. Accordingly, SPM was awarded a contract for those commodities. With respect to the third item, black linoleum desk pads, however, SBA declined to exercise its COC jurisdiction, finding that SPM was a nonmanufacturer proposing to provide imported items and was, therefore, ineligible for COC

consideration.^{1/} GSA then awarded the black linoleum desk pad contract to Sainberg on December 14, and SPM filed this protest 4 days later.

Initially, the agency argues that SPM's challenges to GSA's determination of nonresponsibility are untimely because they are, in effect, challenges to its June 1987 preaward surveys which were made available to the protester in September 1987. We disagree. SPM's protest concerns GSA's affirmation of its nonresponsibility determination on November 13, following SBA's request that GSA reassess SPM's responsibility. SBA's review of GSA's determination was not completed until December 14. Since the protest was filed 4 days later, it clearly is timely. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1987).

We will not question a contracting officer's determination of nonresponsibility unless the protester can show bad faith on the agency's part or the lack of a reasonable basis for the determination. Brussels Steel America, Inc., B-225556 et al., Apr. 16, 1987, 87-1 CPD ¶ 415. A determination of nonresponsibility is not necessarily impaired if only one aspect of a firm's capability may have been incorrectly evaluated. See Southwest Marine, Inc., B-225559, et al., Apr. 22, 1987, 87-1 CPD ¶ 431. However, a nonresponsibility determination will not be found to be reasonable where it is based primarily on unreasonable or unsupported conclusions in preaward surveys. R.J. Crowley, Inc., B-229559, Mar. 2, 1988, 88-1 CPD ¶ ____.

As a preliminary matter, the protester here argues that GSA is required to find that it is responsible to supply imported pads in light of SBA's COC determination regarding the two much larger contracts for manufactured pads. We disagree. While the underlying reasons for SBA's action may constitute information bearing on SPM's responsibility which GSA now should consider, we recognize that the evaluation process is inherently judgmental and that two evaluators may reach opposite conclusions as to a firm's responsibility without either acting unreasonably or in bad faith. Alan Scott Industries, B-225210.2, Feb. 12, 1987, 87-1 CPD ¶ 155. For the reasons set forth below, however, we believe that GSA's determination of nonresponsibility was primarily based

^{1/} In such circumstances, we will review a contracting officer's determination of nonresponsibility even though a small business is involved. See Wallace & Wallace, Inc., et al.--Reconsideration, B-209859.2 et al., July 29, 1983, 83-2 CPD ¶ 142.

on unsupported and unreasonable conclusions reached during the preaward survey.^{2/}

Many of the problems in this case stem from the fact that, until December 14, when the SBA elected to treat the three commodities for which SPM was the apparent low bidder as separate and distinct matters, issues concerning the protester's ability to supply black linoleum desk pads were consolidated with, and to a considerable degree subsumed by, issues concerning its ability to supply paperboard and blotter desk pads. Unlike the paperboard and blotter desk pads, which are manufactured products consisting of several pieces requiring skilled fabrication to meet detailed dimensional requirements, the black linoleum desk pads are of unitary construction and are imported in final form from European suppliers. At SPM, they are merely unboxed, checked for hardness, and then repackaged for shipment to GSA. Thus, findings with respect to SPM's ability to perform proper fabricating and exercise proper quality control on products it manufactures (and with respect to consequent delivery problems for such products) have little or no bearing on SPM's ability to simply import, repackage, and ship black linoleum desk pads.

GSA's initial evaluation of SPM's responsibility, concluded approximately 5 months prior to award, cites a number of deficiencies. The financial survey criticized the firm's cash and debt situation, but noted that this conclusion was based in part on a possibly misdated balance sheet. Apparently no attempt was made by GSA evaluators to obtain clarification of the date. The financial survey also questioned the firm's compliance with loan and bond covenants, but noted that GSA had yet to obtain a letter from SPM's bank on the matter--a letter that the evaluators characterized as "crucial in this case." We note that the minutes of SBA's first COC Committee meeting in the matter of SPM (made available to GSA during the first protest) indicate that bank letters dated July 9, 1987, expressed "strong support for not only the two contracts in question, but also for overall operations" at SPM. The financial survey also questioned the status of SPM's trade accounts, but noted that written trade surveys could not be obtained because of incomplete street addresses. Again, apparently

^{2/} In reaching this conclusion, we are not persuaded by the protester's argument that the provisions of its settlement agreement with GSA are determinative of its responsibility to supply black linoleum desk pads. That agreement mostly involves commodities other than linoleum desk pads. In addition, the agreement does not address SPM's financial capacity.

no further attempt was made by the GSA evaluators to obtain the addresses in question.

Moreover, when, approximately 5 months after the initial financial survey was performed, SBA requested that GSA reexamine its nonresponsibility determination, GSA should have attempted to resolve the questions raised in the survey and obtain current information regarding SPM's financial status. See Federal Acquisition Regulation (FAR), § 9.105-1(b)(3); 51 Comp. Gen. 588 (1972). There is no indication in the record that GSA did so. Rather, the November 13, 1987, "re-evaluation" reiterates its initial findings with respect to SPM's allegedly precarious financial condition and suggests that this condition may be exacerbated by the settlement agreement which requires the firm to pay the government \$105,000 in monthly installments over 1 year. Since, as discussed above, GSA's initial financial survey of SPM was at best incomplete, and GSA later made no effort to obtain more current information on SPM, we cannot conclude that the payments required under the settlement agreement, standing alone, are sufficient to call SPM's financial status into question.

The plant facility survey likewise contains little support for GSA's conclusion that SPM could not satisfactorily supply black linoleum desk pads. Its negative recommendations are almost exclusively predicated on problems with SPM's manufactured goods, including poor workmanship and the lack of an adequate quality control system, both of which allegedly resulted in delivery problems. No delivery problems involving black linoleum desk pads are mentioned. Our review of the entire record discloses that, while SPM was delinquent with respect to a partial order involving 242 of the pads in question in November 1986, there is nothing further to support a conclusion that its ability to perform concerning black linoleum pads was impaired.

In several instances the plant facility survey actually lends support to the protester's contention that it is responsible to supply black linoleum desk pads. GSA found, for example, that SPM's monthly capacity for supplying the commodity was one million (well in excess of the government's yearly needs), and that SPM had no commercial commitments whatsoever to supply the commodity. Accordingly, we see no basis for GSA's assertion that production under government contracts may suffer seasonally as the attentions of SPM's skilled labor and quality control officials turn to commercial customers. Further, contrary to GSA's assertion that production of all desk pads is heavily dependent on skilled labor, the pads imported in final form require none. Finally, in June 1987, GSA found

that SPM already had a 3-4 months supply of the fully fabricated imported pads on hand.

Since the record demonstrates that GSA's determination that SPM was not responsible to supply it with black linoleum desk pads was primarily based on unsupported conclusions reached during the preaward survey, the protest is sustained. In view of our finding, we need not discuss the other basis upon which SPM objected to the nonresponsibility determination, bad faith on the part of GSA officials. We recommend that GSA promptly conduct another analysis of SPM's responsibility in accordance with the considerations set out in this decision and using current information. If that analysis results in an affirmative determination of responsibility, the present contract should be terminated and an award made to SPM. In addition, we find that SPM is entitled to its costs of filing and pursuing the protest, including attorney's fees. 4 C.F.R. § 21.6(d)(1).

The protest is sustained.



Acting Comptroller General
of the United States