



Decision

Matter of: Short Electronics, Inc.

File: B-231610

Date: September 13, 1988

DIGEST

General Accounting Office will not review Small Business Administration (SBA) denial of a certificate of competency where the protester does not show either fraud or bad faith on the part of contracting officials, or that SBA failed to consider vital information bearing on the firm's responsibility.

DECISION

Short Electronics, Inc., protests the award of any contract under invitation for bids (IFB) No. DAAB07-87-B-U559, issued by the Communications-Electronics Command (CECOM), Department of the Army for crystal oscillators for use in AN/VRC-12 radios. We deny the protest.

Four of the eight bids received in response to the solicitation were rejected for various reasons, leaving the fifth low bidder, Short, in line for award. On January 19, 1988, after an initial pre-award survey, the Defense Contract Administration Services Management Area (DCASMA), San Francisco, recommended award to Short.

The CECOM engineer who participated in the on-site survey, however, recommended against award on the basis that (1) there existed a pressing need for additional oscillators, (2) Short's resources were fully committed to satisfying current contractual obligations, and (3) Short's prior performance record (including that relating to the supply of spare parts for AN/VRC-12 radios) was unsatisfactory.

With respect to Short's performance record, the contracting officer noted that CECOM contract administrators had reported in August 1987 that approximately 12 of 18 CECOM contracts with Short were delinquent due to contractor-caused delays. A subsequent March 1 status report on 15

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CECOM contracts with Short indicated that Short was delinquent on 10 of the 15 and had made little improvement since August 1987. The contracting officer concluded that the initial pre-award survey did not adequately consider Short's history of contract delinquency. Specifically, it appeared that DCASMA, in concluding that Short's record of performance was satisfactory, had viewed Short as being on-schedule when contract delivery schedules had been revised after Short had failed to meet the contracts' original delivery schedules. At the same time, the delinquency of other contractors and increased demand had resulted in a critical need for timely delivery of the oscillators. Based on these considerations, the contracting officer requested DCASMA to resurvey Short.

The second DCASMA pre-award survey, dated March 29, found that Short had the technical capability to perform, but recommended no award because production capability was deemed unsatisfactory based on Short's prior performance history and because Short had failed to provide any financial information. The contracting officer thereupon found Short nonresponsible, and on April 19 referred the matter to the Small Business Administration (SBA) for a certificate of competency (COC) review.

By letter of May 12, Short filed an agency-level protest, objecting to the conducting of a second pre-award survey and claiming its results were based on inaccurate data. On May 20, SBA declined to issue a COC to Short, citing (1) a production backlog, leaving no reasonable assurance that Short would perform the proposed procurement without adversely impacting existing contracts, and (2) Short's inability to reconcile direct costs in prior years, making approval of progress payments, and thus Short's financial capability, questionable. Short then filed this protest with our Office.

Short principally argues that the analysis in the second survey was faulty in that it incorrectly considered contracts completed in 1987 as delinquent. CECOM responds, however, that the data evaluated was derived from the most recent automated listing available, and it appears from the record that on a number of past and current contracts, Short's performance ultimately was considered non-delinquent only because the agency extended the delivery schedule after delinquent performance. For example, agency records indicate that at least three or four of Short's six current contracts for parts for the AN/VRC-12 radio were extended after the agency waived its right to terminate the contract for default because of contractor-caused delays. In making a responsibility determination, the contracting officer may

reasonably consider prior performance unsatisfactory where the contractor did not make timely delivery under the original delivery schedule and avoided delinquency only because the agency revised the delivery schedule and allowed it to continue performance. Numax Electronics Incorporated, B-227925, Oct. 22, 1987, 87-2 CPD ¶ 385.

In any event, the SBA, not our Office, has the statutory authority to review a contracting officer's finding of small business nonresponsibility, and the SBA's determination to issue or refuse to issue a COC is conclusive with respect to all aspects of the small business concern's responsibility. See 15 U.S.C. § 637(b) (1982); Federal Acquisition Regulation (FAR) § 19.601; Cosmodyne, Inc., B-224009, Nov. 18, 1986, 86-2 CPD ¶ 623. If Short considered CECOM's non-responsibility determination to be incorrect, it had the opportunity to demonstrate that through its COC application. Cosmodyne, Inc., B-224009, supra.

With respect to the SBA's denial of a COC, our Office limits its review to instances in which the protester makes a showing of either possible fraud or bad faith on the part of contracting officials or that the SBA failed to consider vital information bearing on the firm's responsibility. Coliseum Construction, Inc., B-229691, et al., Mar. 1, 1988, 88-1 CPD ¶ 213. Short contends in this regard that the SBA declined to issue a COC because it was "intimidated" by a negative interim Defense Contract Audit Administration (DCAA) report on Short's accounting system and eligibility for progress payments. The record indicates, however, that this was the most recent report available, and since it appears to have been prepared by DCAA in connection with the second pre-award survey, the report was relevant and entirely proper for the SBA to consider. See FAR § 19.602-1(c). Moreover, the SBA has stated that it considered Short's lack of capacity by itself, irrespective of the credit issue addressed by the DCAA report, sufficient justification for denying the COC. We find no basis for questioning the SBA's position. Thus, it appears that the report had only a limited bearing on the determination in any event.

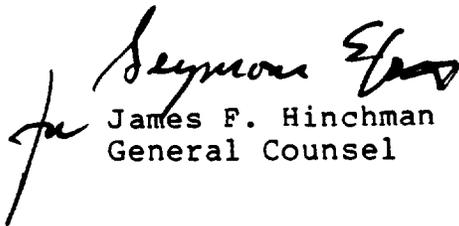
Short also alleges that CECOM and SBA officials made a concerted effort to prevent Short from obtaining the contract, as evidenced by the initial delay in the award and the subsequent agency request for a second DCASMA survey. Procurement officials, however, are presumed to act in good faith, and in order to show otherwise, the protester must submit virtually irrefutable proof that the officials had a specific and malicious intent to harm the protester.

See Ingram Barge Co. B-230672, June 28, 1988, 88-1 CPD ¶ 614. Short has made no such showing. As already stated, the record shows that CECOM's reconsideration of Short's responsibility was based, not upon some improper motivation, but upon information indicating a history of delinquent performance not adequately considered by DCASMA in the first survey.

Similarly, there is no indication that SBA disregarded any reasonably available information in making its COC decision. SBA does acknowledge that it learned after its May 20 COC denial that Short in fact already had resolved the progress payment problem cited in the DCAA report. However, the SBA did not ignore this information; rather, Short failed to notify the SBA that the issue had been resolved. In any event, as indicated above, the SBA states that even had Short been found responsible as to credit, its lack of capacity was a sufficient basis upon which to deny a COC.

Short requests an investigation of its claims. However, our Office does not conduct investigations under our bid protest function to provide support for a protester's allegations. Maico Hearing Instruments, Inc., B-229925, Jan. 15, 1988, 88-1 CPD ¶ 42.

The protest is denied.


James F. Hinchman
General Counsel