



The Comptroller General
of the United States

Washington, D.C. 20548

Zimmerhoff

Decision

Matter of: Fastrax, Inc.
File: B-232251.3
Date: February 9, 1989

DIGEST

1. Protester has not shown that the agency's certificate of competency referral to the Small Business Administration, which essentially communicated the agency's version of a disputed contract performance history, was fraudulent or made in bad faith.
2. During a certificate of competency (COC) proceeding, protester was given sufficient notice that its contract performance history was under review and was given an adequate opportunity to, and did in fact, present information on its own behalf with regard to that performance history to the Small Business Administration, which then considered the information in its COC deliberations.
3. Agency was not obligated to furnish the protester with a copy of a preaward survey report for use during a certificate of competency proceeding and, in any event, protester was not prejudiced by not receiving a copy of the report until the proceeding had been concluded.
4. The record indicates that the Small Business Administration considered all information provided to it by the protester during the certificate of competency proceeding; thus, the protester's argument that vital information was not considered is without merit.

DECISION

Fastrax, Inc., protests the decision of the Small Business Administration (SBA) to deny it a certificate of competency (COC) in connection with request for proposals (RFP) No. DLA410-88-R-2775, issued by the Defense Logistics Agency's (DLA) Defense General Supply Center (DGSC) for a consolidated packing system. The protester basically argues

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that SBA was precluded from considering information vital to its responsibility because DGSC acted in bad faith by deliberately misrepresenting its history of contract performance to SBA, and by failing to respond promptly to the protester's request for a copy of the agency's preaward survey so as to effectively preclude Fastrax from timely presenting SBA with an accurate picture of its performance history.

We deny the protest.

Fastrax submitted the lowest-priced offer in response to the RFP by the July 15, 1988, closing date. On July 26, the contracting officer requested a preaward survey to investigate, among other things, Fastrax's performance history on recent DGSC contracts. In conjunction with that survey, an on-site visit was conducted on August 11 at which time performance history was discussed. A preaward survey report was completed on August 19. That survey indicated that Fastrax had been sent cure or show cause notices with respect to performance delays encountered on five DGSC contracts and recommended that Fastrax be found nonresponsible because its history of an inability to control subcontractor performance indicated that the firm would likely be unable to meet the tight performance schedule set forth in the RFP. The survey also incorporated an August 15 letter from Fastrax indicating that it was prepared to remedy problems it had experienced with subcontractor/vendor control and payment during the preceding 12 months on DGSC contracts.

Subsequently, the contracting officer prepared a nonresponsibility determination, incorporating the survey report and elaborating on the nature of the protester's performance problems under four contracts with DGSC, ^{1/} and forwarded both documents to SBA in connection with the COC proceedings. On September 2, SBA informed Fastrax that the determination of nonresponsibility was based on a "lack of capacity and past performance," and invited the firm to apply for a COC, specifically indicating that the burden of proving responsibility rested with the applicant. Fastrax submitted a COC application on September 8, which, with the exception of a listing of government contracts, did not discuss past performance issues. On September 19, SBA conducted its own on-site visit during which, among other

^{1/} The contracting officer did not reference one of the contracts listed in the survey report--DLA410-87-C-0043. Our review of SBA's deliberations indicates that its decision was not predicated on this contract.

matters, Fastrax's problems with schedule delays and subcontractor control under its DGSC contracts were discussed. A report of this visit was prepared on September 20 and discussed at a September 26 meeting of the COC Review Committee, which then recommended denying a COC for poor past performance and poor business practices in dealing with subcontractors.

On September 20, Fastrax was sent a copy of the agency preaward survey report it had requested pursuant to the Freedom of Information Act on September 2; the report was not received until after SBA had decided to deny Fastrax a COC.

The protester maintains that the agency acted in bad faith by deliberately distorting its record of performance under its DGSC contracts, thereby misleading SBA and denying that agency an opportunity to consider information vital to the protester's responsibility. With respect to each of the contracts mentioned in the COC referral, Fastrax sets forth its side of the dispute in detail. In each of the cases, while not denying that the cure/show cause notices were in fact issued or that problems existed with respect to schedule delays or payments to subcontractors, it seeks to place the primary blame on the government for all of the incidents.

For example, in connection with contract No. DLA410-86-C-0028 (contract 0028), Fastrax charges that 2/: contrary to the indication in the agency's COC referral that DGSC was forced to intercede with a subcontractor and pay it directly because Fastrax had not, the agency voluntarily determined to make direct payments against Fastrax's recommendations because the protester had paid the firm what it was owed; contrary to DGSC's assertion to SBA that a show cause order was the result of Fastrax's inability to meet the delivery schedule, DGSC had actually choreographed a scenario specifically designed to support its nonresponsibility determination before SBA by issuing an unjustified cure notice, ignoring the protester's response which indicated that the government was in part responsible for schedule delays, and then subsequently issuing an unjustified show cause order; and, finally, contrary to the agency's assertions to SBA that a possible termination for default was being considered, the agency subsequently agreed to

2/ The character of Fastrax's allegations with respect to its performance history under other DGSC contracts do not materially differ from the cited example.

extend performance by contract modification at no cost to Fastrax.

The protester also argues that DLA intentionally delayed responding to its request for a copy of the preaward survey report and suggests that this action had the effect of denying Fastrax an opportunity to present its views to SBA.

The SBA, and not this Office, has the statutory authority to review a contracting officer's findings of nonresponsibility and to conclusively determine a small business concern's responsibility through the COC process. Oakland Corp., B-230717.2, July 27, 1988, 88-2 CPD ¶ 91. In discharging its statutory authority, SBA has designed the COC process to afford firms protection against allegedly unreasonable determinations by contracting officers in situations where, as here, such matters as contract performance records are in dispute. Zan Co., Inc., B-229705, Dec. 15, 1987, 87-2 CPD ¶ 598, aff'd Zan Machine Co., Inc.--Request for Reconsideration, B-229705.2, Jan. 19, 1988, 88-1 CPD ¶ 50. In referring its nonresponsibility determination to SBA, there is no requirement that a contracting agency submit information in its possession tending to show that a firm is responsible, since the burden is on the firm to prove through its COC application that it is responsible. R.S. Data Systems, 65 Comp. Gen. 74 (1985), 85-2 CPD ¶ 588, aff'd 65 Comp. Gen. 132 (1985), 85-2 CPD ¶ 687.

Our review is limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of the protester's opportunity to seek SBA review, or whether the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing upon a firm's responsibility. Oakland Corp., B-230717.2, supra.

We find that Fastrax has not shown: that DGSC acted in bad faith in referring its nonresponsibility determination to SBA in the manner that it did; that the protester was in any way precluded from presenting information on its behalf relating to DGSC's concerns; or that SBA failed to consider information vital to its responsibility.

Fastrax has placed considerable emphasis in its arguments on the agency's alleged failure to inform SBA of government actions which may have caused some performance delays and subcontractor problems on its DGSC contracts. Our review of the contract performance record supplied by both the protester and the agency generally indicates that, while the government may have contributed to some delays, primarily

in the early stages of some contracts, the performance of each contract was also marked by a subsequent breakdown in the relationship between Fastrax and at least one subcontractor--usually involving nonpayment issues which appear to have contributed to later schedule delays because of subcontractor reluctance or refusal to complete performance without first obtaining government assurances of direct payment.

It is clear to us that what DGSC did in effect was to communicate to SBA its version of the dispute in each case. While the agency may very well have not described each incident in such a manner as to place Fastrax in the best light, it was not required to do so and its description clearly does not rise to the level of fraud or bad faith. See R.S. Data Systems, 65 Comp. Gen. 74, supra.

With regard to contract 0028, the record shows that, contrary to acting in bad faith by fabricating a distorted record about a possible default as is alleged, the agency amended its referral to SBA in a September 20 telephone conversation to indicate that the parties were then in the process of working out their differences short of a termination. Further, there is absolutely nothing in the record before our Office which supports the protester's charge that the cure or show cause notices issued under the contract were unjustified or a part of any agency plan to support its nonresponsibility determination.

Next, we think that Fastrax cannot reasonably argue that it did not know the basis of DGSC's determination. The record shows that the members of the agency preaward survey team discussed with Fastrax's officials that "cure notices and certain issues had arisen under [some] contracts." The protester's own letter of August 15 to the agency, which was included as a part of the preaward survey report and subsequently sent to SBA, acknowledges Fastrax's subcontractor/vendor control and payment problems under DGSC contracts over the preceding 12 months. Also, the SBA letter concerning Fastrax's COC application informed the protester that the DGSC determination was based on "past performance." Since the record shows that the protester has had only six current contracts with DGSC for the type of equipment involved here, each of which had some performance problems, it seems to us that a reasonably prudent contractor should have been aware that these performance problems were the basis for the nonresponsibility determination.

Fastrax was not denied the opportunity to present its version of the events to SBA. The report of SBA's own

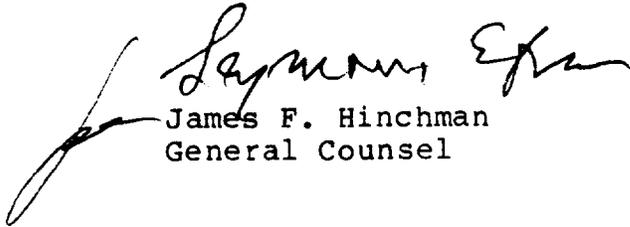
on-site visit with Fastrax reveals that the protester discussed each of the contracts principally at issue at considerable length--informing the SBA representative of its allegations regarding government-caused performance delays with respect to at least two of the contracts. Fastrax specifically discussed subcontractor control/payment problems that had been the primary focus of the COC referral and, contrary to the tenor of Fastrax's protest arguments, it appears that these problems were not viewed at that time by the protester as being exclusively the result of government slow payment as is now alleged.

In our view, then, it is clear that during the COC proceedings, Fastrax knew what areas of concern over its responsibility were at issue and that Fastrax had an opportunity to and did in fact respond to those concerns. Nothing more is required under the COC procedures, Tri Rivers Ambulance et al., B-190326, Apr. 18, 1978, 78-1 CPD ¶ 299; and the issue of whether Fastrax's receipt of the preaward survey report, which adds nothing material to the protester's knowledge of DGSC's concerns, was improperly delayed or not is, thus, irrelevant. In any event, in response to similar allegations of delay or refusal to turn over preaward survey information to offerors, we have held that contracting agencies are not required to release such information for use in COC proceedings. Coast Canvas Products II Co., Inc.--Reconsideration, B-222800.2, May 5, 1986, 86-1 CPD ¶ 435.

Finally, as to Fastrax's argument that SBA acted on the basis of a fundamentally inaccurate record and therefore failed to consider information vital to the protester's responsibility, we note that the protester had the burden and the opportunity to present information to SBA during the COC proceeding seeking to correct the record; to the extent that Fastrax did not present such information to SBA when required, it may not now use the bid protest process to do so. See Sealtech, Inc.--Request for Reconsideration, B-221584.4, June 19, 1986, 86-1 CPD ¶ 563. To the extent that Fastrax is arguing that it did provide vital information to SBA during the COC process which SBA did not consider, we note that the record indicates otherwise; the minutes of the COC Review Committee reflect that they considered the report of the SBA on-site visit which detailed Fastrax's presentation of its version of its past performance history under DGSC contracts. The fact that the protester may disagree with SBA's conclusion drawn from that

information does not constitute a showing that SBA failed to consider information vital to Fastrax's responsibility.
E.M. By Enmanuel of Beverly-Hills, Inc., B-222928.2, Aug. 8, 1986, 86-2 CPD ¶ 171.

The protest is denied.



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General Counsel