

25. memo



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marlow Services, Inc.

File: B-229990.3

Date: April 19, 1989

DIGEST

There is no legal requirement that the contracting agency request Small Business Administration (SBA) reconsideration of a nonresponsibility determination where, following determination that bidder is nonresponsible and SBA declination to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by bidder and reasonably determines that reversal of the nonresponsibility determination is not warranted.

DECISION

Marlow Services, Inc., protests the Department of the Army's failure to refer the agency's affirmation of its initial nonresponsibility determination regarding Marlow under invitation for bids (IFB) No. DAKF24-88-B-0001, to the Small Business Administration (SBA) for a second certificate of competency (COC) review. The solicitation, a small disadvantaged business set-aside, was issued by Fort Polk, Louisiana, for a full food service (FFS) and dining facility attendant (DFA) services contract for a base period and two 1-year option periods. The proposed contract would require the contractor to furnish DFA services at 10 dining facilities, 3 of which have 2 dining areas, and FFS at specified locations.

We deny the protest.

Fifteen bids were received by the June 3, 1988, bid opening date. Marlow became the apparent low bidder after correction of a mistake increased the lowest bid. The contracting officer, however, found Marlow nonresponsible based upon a negative pre-award survey which indicated that Marlow did not have the financial resources and experience to perform the required services, and the contracting officer's own

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assessment that Marlow's bid, considerably lower than the government's estimate, evidenced a lack of understanding of contract requirements. The nonresponsibility determination was referred to SBA for review under the COC procedures pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7) (1982). On September 30, SBA declined to issue a COC because Marlow failed to demonstrate that it had the financial resources necessary to implement contract performance.

In an October 3 letter to the agency protesting award to any other bidder, Marlow attempted to show that it had the financial resources necessary for contract performance. The contracting officer, responding in an October 11 letter, refused to reconsider the nonresponsibility determination, stating that the determination was not based on financial capacity alone, but on Marlow's failure to understand contract requirements and its performance history as well. The contracting officer also advised Marlow that the firm's request for reconsideration should be sent to the SBA.

Subsequently, on November 23, Marlow informed the contracting officer of a \$250,000 loan that had been approved by the Louisiana Economic Development Corporation (LEDC) and again requested that the contract be awarded to it. The contracting officer refused, advising the protester, on November 28, that the nonresponsibility determination would not be reconsidered.

Marlow also informed SBA of the LEDC loan and requested that a COC be issued to its firm. SBA declined, in a December 2 letter to Marlow, stating that its prior decision not to issue a COC was a final ruling and that it was the contracting officer's prerogative to resubmit Marlow's case to SBA.

On December 9, Marlow filed a protest with our Office, contending that its firm was entitled to contract award as the low bidder. We summarily dismissed the protest because the record indicated that the firm had been denied a COC by SBA and our Office generally does not review SBA's COC decisions. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(3) (1988).

Concurrently, Marlow also requested that the Army refer its case back to SBA for a second COC review. The Army denied the request on December 21, stating that the agency's decision not to reconsider the firm's nonresponsibility determination would not change.

On December 19, prior to receiving the Army's negative response to its request for SBA referral, Marlow filed this

protest with our Office, objecting to the Army's failure to grant SBA additional time to reconsider the firm's responsibility in light of the \$250,000 loan.

On January 30, 1989, while Marlow's current protest was pending in our Office, and notwithstanding the agency's repeated statements to the contrary, the contracting officer reconsidered the initial nonresponsibility determination. Based on a review of the terms of the \$250,000 loan and other information, the contracting officer affirmed the initial determination. The contracting officer also determined that it was not in the government's best interest to refer the affirmation of Marlow's nonresponsibility determination to SBA for a second COC review.

Reconsideration Of Nonresponsibility Determination

Marlow contends that the contracting officer's reconsideration of the nonresponsibility determination was improper and unreasonable. In support of its contention, Marlow alleges that the contracting officer only reluctantly undertook the review at the last minute; that the scope of review should have been limited to Marlow's financial resources since SBA, by declining to issue the COC on financial grounds only, implicitly overruled the agency on the other two grounds relating to the firm's capacity--understanding contract requirements and performance history; and that the contracting officer failed to notify Marlow of his decision to conduct the reconsideration and did not allow Marlow the opportunity to submit additional information with regard to the firm's financial resources.

In response, the contracting officer disputes that the reconsideration of Marlow's nonresponsibility was a perfunctory review, stating that the reconsideration was based upon the information that was used to make the original nonresponsibility determination; the documents Marlow provided SBA for COC review, many of which had not been previously considered by the Army, and other information. The contracting officer also states that the information reviewed did not reflect any improvement in Marlow's failure to provide the minimum staffing or necessary supplies and equipment; to show a performance history that could resolve the agency's concern regarding Marlow's ability to handle a contract of this type and magnitude; and to show that the necessary finances were available to perform the contract.

Under the Small Business Act, 15 U.S.C. § 637(b)(7), no small business may be precluded from the award of a contract based solely on a contracting officer's nonresponsibility

determination without referral of the matter to SBA for a COC review. The SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business bidder's responsibility by issuing or declining to issue a COC. 15 U.S.C. § 637(b)(7)(A); Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5. However, where new information probative of a small business concern's responsibility comes to light for the first time prior to contract award, the contracting officer may reconsider a nonresponsibility determination even though SBA already may have declined to issue a COC. Reuben Garment International Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191.

In this case, the Army chose to reassess Marlow's nonresponsibility determination in light of the new information. Our review in these circumstances is limited to determining whether the contracting agency's reassessment was reasonable. Eagle Bob Tail Tractors, Inc., B-232346.2, supra. In this regard, the record indicates that the agency's reconsideration of Marlow's responsibility in light of the new information was reasonable. Basically, the contracting officer affirmed the initial nonresponsibility determination because Marlow failed to refute the negative findings regarding understanding the contract requirements, performance history, and financial capacity cited in the initial determination.

As a preliminary matter, Marlow contends that the contracting officer's review of the nonresponsibility determination should have been limited to financial resources because SBA overruled the agency on the two other grounds relating to the firm's capacity.

In this regard, SBA states that although SBA may consider all areas of responsibility during a COC review, there is no statute, regulation or informal procedure which requires that the COC Review Committee consider additional grounds for referral after it has already decided to deny the COC on one ground. In this case, SBA states that the minutes of the committee's meeting on Marlow's application show that the committee did not vote on the other two grounds for the referral--Marlow's failure to understand contract requirements and performance history--once it had decided to deny the COC on financial grounds. Thus, SBA states, even though the letter denying the COC cites only one of the grounds for referral, there is no basis for concluding that SBA reached a favorable result on any of the other grounds. In our view, since the record shows that SBA's decision was based on Marlow's financial capability, Marlow's contention that

SBA overruled the agency on the other two grounds is without merit.

In any event, even if the contracting officer's review were limited to the financial resources area, the record shows that he reasonably determined that Marlow lacked the financial capacity to perform the contract. Specifically, the contracting officer determined that the \$250,000 loan had not been disbursed to Marlow and was contingent upon LEDC's verification of the collateral securing the loan and approval of repayment terms which had yet to be specified. The contracting officer noted that if the contract were to be awarded and Marlow cannot meet the conditions for the disbursement of the loan funds, the contract will have been awarded to a contractor without adequate financial resources to meet contract requirements. Additionally, since the agency was notified that Marlow's checks for supplies and insurance had been rejected by a financial institution due to insufficient funds, the contracting officer reasonably doubted Marlow's ability to obtain adequate financial resources.

In its comments, Marlow does not refute the agency's statement regarding the two checks that were not honored by the financial institution. Further, while the protester asserts that the contracting officer, in bad faith, did not conduct a full review of its financial capabilities, Marlow does not specify which "financial capabilities," other than the loan and other information already considered, the contracting officer failed to review. With regard to the three conditions applicable to the \$250,000 loan, Marlow contends that the conditions reflect the normal business policies of financial institutions, but fails to provide any evidence supporting its contention. Under the circumstances, we have no basis for concluding that the agency's assessment of the protester's financial capacity was unreasonable.

As noted above, the initial nonresponsibility determination also was based on concerns about Marlow's understanding of the contract requirements and its performance history. In reconsidering the initial determination, the contracting officer reexamined his conclusions in these two areas as well. With regard to understanding the contract requirements, the contracting officer again found that Marlow's estimate of 158,395 staffing hours for DFA services per year was below the minimum of 162,335 DFA staffing hours required by the contract; that the 8,385 hours for FFS was considerably below the government estimate of 14,368 hours; and that the estimate of the value of supplies required for

contract performance was \$18,733, or \$89,267 less than the government estimate of \$108,000.

Marlow argues that the contracting officer's assessment of the shortage in staffing hours, which the agency estimated converts into a dollar shortage of \$25,374, totally disregards Marlow's previous submission of proof that income to support contract performance would be enhanced by Job Training Partnership Act (JTPA) training funds and union orientation funds.

The record indicates that Marlow anticipates using participants in the JTPA Dislocated Worker Program in the performance of the contract. Presumably, using participants in this program may generate savings in terms of staffing costs; however, there is no evidence in the record that JTPA or union orientation funds will actually be provided to the firm, as Marlow states. In any event, we fail to see the relevance of Marlow's argument because the dollar shortage calculated by the Army merely represents the disparity in staff hours between Marlow's and the Army's estimate. In order to assist prospective bidders, the IFB clearly set forth the estimated minimum hours per day per dining facility for DFA services. Notwithstanding this guidance, Marlow's estimate was 3,940 hours below the government's estimate. In view of Marlow's low estimate, we find that the contracting officer was justifiably concerned that Marlow did not fully understand the contract requirements.

With respect to FFS, Marlow argues that since the solicitation did not specify minimum staffing needs, the agency cannot now question the firm's proposed staffing for these services unless the firm's estimate is deficient on its face.

While the IFB did not specify the minimum staffing hours required for FFS, it did require that the contractor provide all resources necessary for FFS. To aid prospective bidders in this regard, the IFB included six pages of detailed information on the estimated workload at one location, including the total number of days of operation, seating capacity, number and type of serving lines, and a projection of the estimated number of persons to be served, by meal period (breakfast, lunch, dinner), for the contract base period and 2 option years. The IFB also stated that FFS would be provided for 200 persons per meal at 3 other dining facilities.

The agency reaffirmed its finding that Marlow's estimate of 8,384 staffing hours for FFS was considerably below the government estimate of 14,368 hours and that based on

Marlow's average hourly wage of \$11.05, this represented a \$66,123 cost difference in the agency's and Marlow's estimates (\$158,766 less \$92,635). In view of the amount of information that was provided on FFS, and given the fact that Marlow's estimate was only 58 percent of the government's estimate, we find that the contracting officer's concern about Marlow's understanding of the requirements in this area was reasonable.

With respect to the value of supplies required for contract performance, the IFB specified the types and amounts of supplies required, by facility. In this area too, the agency reasonably found that Marlow's estimate of \$18,733 evidenced a lack of understanding of contract requirements since it was substantially below the government's estimate of \$108,000.

Finally, with regard to Marlow's performance history, the record supports the contracting officer's conclusion that the firm lacks the experience for a contract of this magnitude. For example, in an attachment to its bid, Marlow listed five food service contracts, three of which are contracts, valued from \$900 to \$1,200, for catering services for one evening; the fourth contract, for \$32,000, was for FFS at a club; and the fifth, a \$78,000 contract was for FFS and DFA services for an American Legion Post. Marlow's bid for the protested contract, which was deemed too low at approximately \$4,650,000, represents, in dollar terms, a significant departure from the firm's earlier FFS contracts. In view of the above, the contracting officer was justifiably concerned that the firm lacked the prior experience necessary for performance of the contract.

Based on the above, we conclude that the agency reasonably assessed the new information regarding Marlow's finances in its reconsideration of the initial nonresponsibility determination, and reasonably decided to allow that determination to stand.

Referral to SBA

With regard to referral of the contracting officer's affirmation of Marlow's nonresponsibility to SBA, we have held that where the contracting agency has reassessed the bidder's responsibility in light of new information and has determined that the information either was substantially the same as previously considered or, if not previously considered, did not materially alter the initial nonresponsibility determination (and accordingly did not warrant reversal of the initial determination), the contracting officer is not legally required to refer the matter to SBA

for a second COC review. Eagle Bob Tail Tractors, Inc., B-232346.2, supra.

Marlow contends, however, that our Office should review the agency's refusal not to refer the matter back to SBA because the contracting officer acted in bad faith. Specifically, Marlow alleges that the agency orally had promised to refer its case back to SBA if its firm submitted additional financial information, but that when information on the \$250,000 loan was submitted, the agency declined to review the nonresponsibility determination. Additionally, the protester alleges that the agency knew that SBA had no authority to request agency referral of Marlow's case, yet continually stated that it would grant SBA additional time for evaluation of Marlow's case if SBA requested it.

In response, the Army denies that it promised to resubmit Marlow's case to SBA and states that the correspondence between Marlow and the Army shows that the Army consistently stated that it would not refer the matter to SBA. The Army further states that given that all newly submitted information was evaluated and the nonresponsibility determination was reconsidered, the protester suffered no harm even if conflicting information regarding referral to SBA had been provided to Marlow.

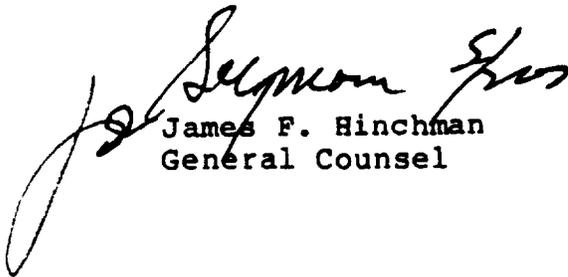
In order to show bad faith, a protester must submit evidence that the contracting agency acted with specific and malicious intent to injure the protester. O'Gara-Hess & Eisenhardt Armoring Co.--Reconsideration, B-232508.2, Sept. 29, 1988, 88-2 CPD ¶ 302. Using that standard, we find no evidence of bad faith in the record here.

Although Marlow contends that the Army orally promised to resubmit the nonresponsibility determination to SBA if the firm submitted new information on its finances, the protester has provided no evidence supporting the allegation. In fact, the record indicates that the Army consistently maintained that the nonresponsibility determination would not be reconsidered in letters dated October 11, November 28 and December 21. The Army's October 11 letter, stating that the agency would look favorably upon an SBA request for additional time to consider Marlow's case, may have given the protester the impression that SBA had the prerogative to reopen the case. However, that impression should have been dispelled by SBA's December 2 letter, which advised Marlow that it was the prerogative of the contracting officer to direct the case to SBA if he determines that the referral is in the government's best interest and there is time to hold up the procurement for an additional 15 days. While there may have been a conflict in the advice

provided by the two agencies with regard to SBA referral, that is not enough to support a finding of bad faith, since there is no evidence in the record that the Army or SBA acted with a specific and malicious intent to injure the protester. In any event, the agency did eventually consider the new information and reasonably found that a reversal of the nonresponsibility determination was not warranted.

Given our finding that the agency's reconsideration was reasonable, and the lack of any indication that the contracting officer's determination that it was not in the government's best interest to refer the affirmation of Marlow's nonresponsibility to SBA was made in bad faith, we see no basis to require the Army to refer Marlow's case to SBA for a second COC review.

The protest is denied.



James F. Hinchman
General Counsel