

Pietrovito



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: COSTAR
File: B-240980
Date: December 20, 1990

Donald P. Young, Esq., and David B. Stinson, Esq., Saul, Ewing, Remick & Saul, for the protester.
Jeffrey I. Kessler, Esq., and Susan L. Mahone, Esq., for the Department of the Army.
David R. Kohler, Esq., and Robb N. Wong, Esq., for the Small Business Administration.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The protester, a small business concern, was not afforded a fair opportunity for the Small Business Administration (SBA) to consider its application for a certificate of competency (COC) where the central reason for the SBA's denial of a COC was the protester's failure to have a complete quality assurance program, including full work instructions, in place before the date of contract award, and where the procuring agency failed to inform SBA that a complete quality assurance program was not required before contract award and that all offerors had been so informed during discussions.

DECISION

COSTAR, a joint venture of JL Associates, Inc. and Tero Tek International, Inc., protests the decision of the Small Business Association (SBA) to deny it a certificate of competency (COC) in connection with request for proposals (RFP) No. DAAJ09-89-R-0585, issued by the Army Aviation Systems Command, Department of the Army, for the maintenance, overhaul, and storage of an estimated 250 UH-1H aircraft. COSTAR contends that the denial of its COC was based on false information provided by the Army to the SBA in bad faith and that SBA failed to consider vital information bearing on COSTAR's responsibility.

We sustain the protest.

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The RFP contemplated the award of a fixed-price requirements contract to the lowest priced, technically acceptable offeror, for a base year and four 1-year options. The RFP stated the government's estimate for the base year as 20 aircraft and informed offerors that the base year quantity could be delivered to the contractor within 90 days of a delivery order. The contractor was required to deliver overhauled aircraft at the rate of 2 per month beginning 180 days after receipt of the aircraft or government furnished property, whichever was received later.

RFP clause E-2 required the contract work to be in compliance with military specification MIL-Q-9858A, "Quality Program Requirements."^{1/} In pertinent part, the RFP provided:

"The contractor shall comply with the specification titled Quality Program, MIL-Q-9858A excluding paragraph 3.6, Cost Related to Quality, and paragraph 6.6, Statistical Quality Control and Analysis, in effect on the contract date, which is hereby incorporated into this contract."

"Contract date" was defined in the RFP to be the effective date of the contract.

The Army received 15 proposals, including that of COSTAR, and found all of the proposals to be technically acceptable and in the competitive range. Oral and written discussions were conducted with the offerors, and revised proposals received. COSTAR was the apparent lowest priced, technically acceptable offeror under the RFP.

Preaward surveys (PAS) were conducted by the Defense Logistics Agency, with Army participation, on the 4 lowest priced offerors, including COSTAR. As a part of its PAS, COSTAR orally presented its capabilities and discussed its responsibility with the PAS team. The PAS team found COSTAR unsatisfactory in the following areas: (1) production capability, (2) quality assurance capability, (3) government property control, (4) transportation, (5) packaging, (6) plant safety, (7) flight operations, and (8) the Walsh-Healey Public

^{1/} The comprehensive quality assurance program, required by MIL-Q-9858A, must be tailored by the contractor to a particular procurement and requires that all work affecting quality (i.e., purchasing, receiving, handling, machining, assembling, fabricating, processing, inspecting, and shipping) be prescribed in written instructions, which provide criteria for performing the work. Under MIL-Q-9858A, all supplies and services are controlled at all points to assure conformance to contract requirements.

Contracts Act, and recommended "no award." The contracting officer, based upon the negative PAS, determined that COSTAR, a small business concern, was nonresponsible, and, in accordance with Federal Acquisition Regulation (FAR) § 19.602-1 (FAC 84-58), referred the matter to the SBA for a COC determination.

After a site visit and a review of the information provided by the Army and COSTAR, the SBA, on July 27, 1990, denied COSTAR a COC. The central reason for this decision was SBA's determination that COSTAR would not have a complete MIL-Q-9858A quality assurance program, including all work instructions, in place by the time of contract award. In its letter to COSTAR, the SBA also expressed "concern" that Tero Tek, one of the COSTAR joint venturers, had unresolved^{2/} problems in its MIL-I-45208A quality assurance program, that Tero Tek had delivery problems on a helicopter rotor hub contract with the Army, and that the credentials of COSTAR's proposed quality assurance manager were not immediately verifiable. On the other hand, the SBA found COSTAR acceptable in the areas of technical capability; plants, facilities and equipment; material availability; production/performance capability; and the Walsh-Healey Act.

COSTAR initially protested to the Army that the agency had provided incorrect information to the SBA concerning (1) whether the contractor must have a complete MIL-Q-9858A quality assurance program in effect at the contract effective date and (2) Tero Tek's MIL-I-45208A program and performance on the rotor hub contract. COSTAR also objected to the contracting officer's rejection of the SBA's request for additional time to consider COSTAR's application.^{3/} COSTAR requested that the Army return the matter, with correct information, to the SBA for further consideration of its COC application. The Army denied COSTAR'S agency-level protest on August 24, and COSTAR protested to our Office on August 30.

^{2/} Military specification MIL-I-45208A, "Inspection System Requirements," is a quality assurance program that requires inspection and tests necessary to substantiate product quality conformance. It is a significantly less comprehensive quality assurance program than that required by MIL-Q-9858A.

^{3/} SBA is required to investigate and determine whether or not to issue a COC within 15 working days after receipt of notice from a procuring agency that a small business concern is nonresponsible, unless the SBA and the agency agree to an extension. FAR § 19.602-2(a) (FAC 84-50). The Army denied SBA's request for additional time because "[g]ranting this request would constitute re-opening negotiations, which would violate federal acquisition regulations."

Award of a contract was made to Southern Aero Corp., the third lowest priced offeror, on August 27.^{4/} On November 30, 1990,- the agency determined that it would be in the best interests of the government not to suspend contract performance pending our decision on the protest.

We generally do not review SBA's decision to issue, or not to issue, a COC since SBA has the statutory authority to conclusively determine the responsibility of a small business concern. 15 U.S.C. § 637(b) (1988); Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112. We will do so where a protester alleges that 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 that the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing on the firm's responsibility. Id.

Here, COSTAR protests that the Army provided incorrect information concerning the required effective date for the MIL-Q-9858A plan to the SBA, and that the SBA, in reliance on this false information, failed to consider vital information (that is, that the contractor need not have a complete MIL-Q-9858A program in place before contract award) bearing on COSTAR's responsibility. COSTAR contends that the RFP does not state when the contractor must have a complete MIL-Q-9858A plan in place and that during discussions offerors, including COSTAR, were informed that they need not have a complete MIL-Q-9858A program in place at time of award.

SBA states that it was informed by the Army that the contractor must have a complete MIL-Q-9858A program, including full work instructions, before the date of contract award. SBA states that it also independently interpreted RFP clause E-2 to require a complete MIL-Q-9858A program before award. SBA, in denying the COC, found that COSTAR could not meet this "requirement" because it had only completed work instructions for a portion of the contract work and that "all documentation would not be ready until some 30 days after award of the contract." (Emphasis added.)

The Army denies that it informed SBA that clause E-2 requires a complete MIL-Q-9858A program before award. Rather, the Army contends that since offerors were informed during discussions to expect delivery of aircraft immediately after award, the contractor must have at contract award an overall plan for

^{4/} The Army determined that VERTEC, Inc., the second lowest priced offeror, was nonresponsible, and the SBA declined to issue VERTEC, Inc., a small disadvantaged business, a COC.

implementing MIL-Q-9858A, along with written instructions for the receipt and inspection of aircraft. The Army states that during discussions offerors were told that they must show in the PAS that they could have a complete MIL-Q-9858A program, which the Army stated was only possible if the contractor was already working under an existing MIL-Q-9858A program, or that they could implement the system as required. Thus, the Army admits "there would be portions of the overhaul process, which would occur well into the manufacturing cycle, which therefore need not have written [MIL-Q-9858A] procedures upon award."

It is clear that clause E-2 did not require a complete MIL-Q-9858A program prior to award, as was believed by the SBA, and, despite the Army's denials, that this interpretation may have been confirmed or suggested by Army officials.^{5/} In any case, the record shows that SBA was not informed of the Army's discussions with offerors to the effect that they need not have a complete MIL-Q-9858A program in place at time of award or of the agency's actual requirements concerning the MIL-Q-9858A program, even though the Army was aware that the SBA had concerns on this issue.

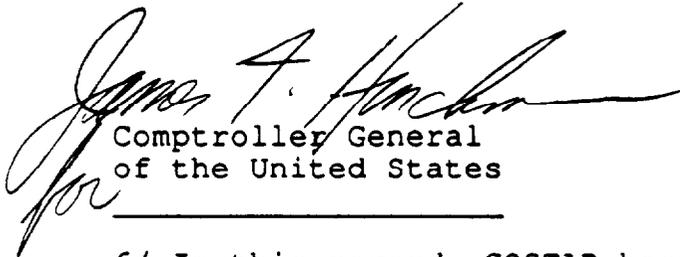
The SBA found that COSTAR had completed a portion of the work instructions for the MIL-Q-9858A program and that COSTAR would complete all of the documentation for this program in approximately 30 days after contract award. As the Army acknowledges, it would be highly unusual to require contractors to have a complete MIL-Q-9858A program in place before contract award as each MIL-Q-9858A program must be tailored to a particular procurement and the work instructions drafted for each aspect of the contract work. Under the circumstances, we believe that SBA may have found that COSTAR satisfied this RFP requirement, and may have issued a COC, if it had been aware of the agency's actual requirements. In this regard, although we are mindful of the fact that SBA had expressed other "concerns" regarding COSTAR's

^{5/} The agency admits that its contracting officer and other technical personnel discussed clause E-2 of the RFP and the phrase "in effect on the date of award" in a telephone conference call with SBA's industrial specialist. However, the Army asserts that its personnel "do not remember Clause E-2 being cited as the basis for MIL-Q being in effect on the date of award." SBA's industrial specialist, however, states that he believed from this telephone conversation that the Army and the RFP required a complete MIL-Q-9858A program before contract award; he also communicated this belief to COSTAR.

responsibility,^{6/} the record shows that the overriding reason for SBA's refusal to issue the COC was COSTAR's failure to meet the "requirement" for a complete MIL-Q-9858A program before award.

Thus, the record reveals that vital information relied upon by the SBA in deciding not to issue the COC was in fact erroneous. The protester was not afforded a fair opportunity for SBA to review the matter based upon correct information. See American Indus. Contractors, Inc., B-236416.2, Dec. 15, 1989, 89-2 CPD ¶ 557. Accordingly, we sustain the protest.

We recommend that the Army, unless it decides to take other corrective action,^{7/} resubmit the matter of COSTAR's responsibility to SBA for further consideration in light of the correct information. If SBA issues a COC on behalf of COSTAR, then the Army should terminate Southern Aero's contract for the convenience of the government and award a contract to COSTAR. We also find that COSTAR is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990). COSTAR should submit its claim for such costs directly to the Army. 4 C.F.R. § 21.6(e).


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^{6/} In this regard, COSTAR has presented evidence showing that information presented by the Army to SBA concerning Tero Tek's MIL-I-45208A program and prior experience was also incorrect. For example, SBA stated it was concerned about Tero Tek's "unresolved" deficiencies in Tero Tek's MIL-I-45208A program. COSTAR states, and the Army does not rebut, that the only identified deficiency in Tero Tek's MIL-I-45208A program was resolved within a month after receipt of a quality deficiency report and this occurred more than a year prior to COSTAR's COC application here.

^{7/} Dyncorp, the fourth lowest priced offeror under the RFP evaluation scheme, protested that the evaluation scheme was defective and that Dyncorp would be the low priced offeror if the proposals were properly evaluated. While we dismissed the protest of this solicitation impropriety as untimely filed, we notified the Secretary of the Army that the evaluation scheme appeared defective so that the Army could take such action as it found appropriate. See Dyncorp, B-240980.2, Oct. 17, 1990, 70 Comp. Gen. ____, 90-2 CPD ¶ ____.