

14-3789



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Eagle Security, Inc.

File: R-242397

Date: April 29, 1991

Elizabeth A. Kaiser, Esq., Saul, Ewing, Remick & Saul, for the protester.

Donald A. Morrison, Esq., and David R. Kohler, Esq., for the U.S. Small Business Administration.

Adam C. Striegel, Esq., General Services Administration, for the agency.

Amy M. Shimamura, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The Small Business Administration (SBA) did not act fraudulently, or fail to consider critical information, in declining to issue a certificate of competency to a small business offeror, where the record establishes that SBA has a reasonable basis for concluding that the offeror would not satisfy the solicitation requirement--that the offeror's contract manager work exclusively on the contract--and where the offeror had a sufficient opportunity to present its views to SBA on the issue, even though it did not review all documentation provided to SBA by procuring agency.

DECISION

Eagle Security, Inc., a small business concern, protests the determination of the General Services Administration (GSA) that it is not responsible, and the subsequent denial of a certificate of competency (COC) by the Small Business Administration (SBA) in connection with the rejection of Eagle's offer under request for proposals (RFP) No. GS-03P-90-DWD-0091, issued by GSA for guard services in several federal buildings in center city Philadelphia, for a base year and two 1-year options.

We deny the protest.

Award was to be made under the RFP to the low offeror that satisfied the government's minimum technical requirements. The RFP, as amended, specifically stated that the proposed contract manager must have 5 years of managerial experience and must work exclusively on the contract resulting from the solicitation.

Nineteen proposals, and then best and final offers (BAFO), were submitted. Eagle submitted the second low priced BAFO. After the rejection of the low priced BAFO, Eagle was considered for award. Based upon a pre-award survey and a review of Eagle's BAFO, the contracting officer determined that Eagle was not responsible because of deficiencies in its financial capacity, experience and past performance, and for its inability to meet the RFP requirement that the proposed contract manager work exclusively on the contract. The negative responsibility determination was referred to SBA for a COC review.

After SBA considered information submitted by GSA and interviewed Eagle's president, it declined to issue a COC on December 10. SBA's denial of the COC was based on a determination that the person who was president, owner and contract manager of Eagle was also playing an active role in Quest Investigators, a company owned by the husband of Eagle's president;^{1/} that she therefore could not meet the RFP requirement that the contract manager work exclusively on the contract; and that her prior performance as a contracts administrator for Quest was questionable.

On December 19, Eagle filed this protest with our Office. Eagle contends that GSA acted in bad faith by knowingly providing SBA with misleading and false information regarding Eagle's president, and that SBA failed to consider vital information since it did not provide Eagle with the opportunity to reply to the GSA-supplied information upon which SBA relied in denying the COC.

Our Office will not review a contracting officer's determination that a small business concern is nonresponsible where the firm is eligible for COC consideration and SBA exercised its jurisdiction upon referral, because SBA's determination, not the contracting officer's, regarding whether the firm is responsible and, hence, entitled to a COC, is conclusive. See 15 U.S.C. § 637(b) (1988). Similarly, since SBA, not our

^{1/} The record indicates that Quest Investigators is owned by the husband of Eagle's president.

Office, has the statutory authority to determine the responsibility of a small business concern, we will consider a challenge to SBA's decision to issue, or not to issue, a COC only where the protester alleges that bad faith or fraudulent actions on the part of government officials resulted in the denial of a meaningful opportunity to seek SBA review, or that SBA failed to consider vital information bearing on the firm's responsibility. Pittman Mechanical Contractors, Inc., B-242102, Mar. 13, 1991, 91-1 CPD ¶ ____; Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132.

The record shows that Eagle was fully cognizant, when it met with SBA officials to discuss its COC application, that GSA's primary reason for finding the firm not responsible was the inability of the president of the company, who was proposed as the contract manager, to satisfy the RFP requirement that the contract manager work exclusively on this contract.^{2/} While Eagle asserts that the GSA-supplied information was false and misleading, and that Eagle met the exclusive contract manager requirement, Eagle admits that it discussed this issue with SBA when it met with the SBA representative on December 7. Also, the record indicates that Eagle was given the opportunity at that meeting to review the GSA-provided documentation then in SBA's possession that related to Eagle's president's activities while she was contracts administrator for Quest.^{3/} Eagle had been expressly advised that it had the burden of persuading SBA that it was responsible.^{4/}

^{2/} The record also indicates that Eagle was aware from its discussions with GSA that this was a significant GSA concern.

^{3/} Eagle's president's affidavit only asserts she did not review the documentation that GSA supplied on December 10. She does not claim that she did not review the information previously provided by GSA.

^{4/} In a November 16 letter, SBA advised Eagle that GSA's nonresponsibility determination was based on deficiencies in its performance, planning, experience, and financial capabilities, and that the burden of demonstrating competency to perform the proposed contract in a satisfactory manner was solely Eagle's responsibility. SBA provided Eagle with an instruction sheet to be completed with the COC application, which also specifically advised Eagle that the burden of proof in establishing competency as to its capacity or credit, or both, was the responsibility of the applicant, and that adequate data was required to be promptly furnished to SBA.

Eagle alleges that it was promised in the December 7 meeting a further opportunity to respond to GSA's documentation. Since SBA's representative at the December 7 meeting was called to active duty in the military and sent to Saudi Arabia before SBA submitted its report on the protest, we are unaware of his version of this aspect of the meeting. In any case, the record shows that on December 7 GSA had already (on December 4) denied SBA's request that it be granted more time beyond the December 10 deadline to consider the COC application. See Federal Acquisition Regulation §§ 19.602-2; 19-602-4(c), which requires a COC to be issued within 15 days after receipt unless the agency agrees to a longer period. Since the burden was on Eagle to demonstrate its responsibility, we think it was required to timely provide all relevant information to persuade SBA in this matter; it could not count on GSA to grant SBA an extension to consider the COC application, since the granting of such extensions is entirely discretionary with GSA. See Worthy Indus. Corp., B-240489, Nov. 27, 1990, 90-2 CPD ¶ 428.

There is no evidence in the record that SBA acted fraudulently, or in bad faith, in declining to issue a COC for Eagle's failure to meet the exclusive contract manager requirement, or that it prejudicially failed to give Eagle a meaningful opportunity to present its views on the matters; Eagle simply did not persuade SBA in this matter. See Fastrax, Inc., B-232251.3, supra. To the contrary, while SBA reports that Eagle's president asserted during the December 7 interview that she had not worked for Quest in any capacity since March 1990,^{5/} GSA provided documentation to SBA on December 10 that indicated this was not the case.^{6/} Although it is true that Eagle was not provided with an opportunity to respond to GSA's December 10 submission, Eagle does not deny

^{5/} In her affidavit in response to the agency report, Eagle's president does not deny that she told SBA's representative that she had not worked for Quest since March 1990, although, Eagle's response to the report states that Eagle's president told SBA that she was uncertain when she left Quest; that it was probably March or April. In any case, the GSA documentation submitted on December 10 was obviously submitted to expressly rebut her assertion and indicates that this was SBA's understanding of Eagle's president's position at that meeting.

^{6/} The documents, which were telefaxed to SBA on December 10, included four GSA memoranda to the file concerning Quest's training deficiencies (all dated in April 1990), and three letters from the Quest contract manager (Eagle's president) to GSA regarding training and a contract modification (dated April, June, and July of 1990).

that Eagle's president continued to act on behalf of Quest after that date or that the documentation supplied is not authentic.

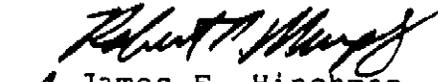
In her affidavit in response to the GSA and SBA reports on the protest, Eagle's president asserts that the last work she performed on behalf of Quest was on August 14, 1990, when Eagle was first formed. However, the record contains various GSA memoranda to the file, all written in November 1990, dealing with Quest's insurance problems. These memoranda indicate that GSA called Quest and left a number of telephone messages for the president of Eagle because GSA was concerned about the cancellation notice it had received from Quest's insurance company. In response to these calls, Quest's secretary stated that she would convey GSA's message to the wife of Quest's president (Eagle's president). In an affidavit, Eagle's president admits that she dropped off Quest's insurance papers to the insurance company on November 27, as a favor to her husband, the president of Quest, although she denies being an employee of Quest.^{7/} We think the record fairly indicates that Eagle's president was the person Quest relied on when its insurance problems arose in November, months after she assumed the dual positions of president and general manager at Eagle, and that SBA could reasonably find that Eagle's president still worked for Quest, and could not exclusively work as the contract manager for this contract. Moreover, we see no reason why SBA could not be reasonably concerned as to whether Eagle's president's dual role as president and contract manager met the RFP requirements, notwithstanding Eagle's assurances that a contract manager would be hired if it were awarded other contracts.

Alternatively, the protester contends that the RFP does not prohibit the contract manager from being active in another, as opposed to the same, company and GSA misled SBA in this regard. Eagle contends that since involvement in more than one company was not prohibited by the RFP, SBA's decision to deny Eagle the COC was based on erroneous information as to the RFP requirements. We fail to see the logic of Eagle's argument. The purpose of the RFP requirement that the contract manager not assume more than one position in the company is to assure that the contract manager work exclusively on the contract. It therefore stands to reason that the contract manager should not function in any capacity for another company as well.

^{7/} GSA states, and the protester has not denied, that Quest's president was ill and unable to run his company.

Based on our review of the record, we find that SBA has not acted fraudulently or in bad faith, nor has it failed to consider vital information concerning Eagle's responsibility. To the contrary, Eagle was given sufficient opportunity to present its views on the specific issues under review by SBA; it simply failed to persuade SBA, the cognizant decision-making authority, that it could satisfy the RFP requirements.

The protest is denied.


James F. Hinchman
General Counsel