



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Joannell Laboratories, Inc.

**File:** B-242415.16

**Date:** March 5, 1993

Paul Shnitzer, Esq., and Kathleen Karelis, Esq., Crowell & Moring, for the protester.  
Donald P. Arnavas, Esq., Wiley, Rein & Fielding, for EC Corporation, an interested party.  
Charles J. McManus, Esq., Eric A. Lile, Esq., and Thomas T. Basil, Esq., for the Department of the Navy.  
Amy M. Mertz, Esq., for the Small Business Administration.  
Linda C. Glass, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

The General Accounting Office's review of a Small Business Administration (SBA) certificate of competency (COC) determination based on the SBA's failure to consider vital information is limited to circumstances where a procuring agency's actions prevent SBA from making a reasonable judgment on the basis of the relevant facts. The SBA did not fail to consider vital information in denying a small business concern's application for a COC where SBA reached a conclusion based on appropriate information furnished by the agency and the protester.

### DECISION

Joannell Laboratories, 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. N61449-90-R-0011, issued by the Department of the Navy as a total small business set-aside for Main Tank Gun/Weapons Effect Signature Simulator (MTG/WESS) Systems, which encompassed both a firing device and pyrotechnic

requirements.<sup>1</sup> Joannell contends that the denial of its COC was based on the SBA's failure to consider vital information bearing on Joannell's responsibility.

We dismiss the protest.

Joannell previously protested the rejection of its low priced proposal as unacceptable and the award of the contract to EC Corporation. We sustained Joannell's protest because we found that the Navy's rejection of Joannell's proposal effectively constituted a determination that Joannell was not responsible. Since Joannell was a small business, the rejection of its proposal without a referral to the SBA for consideration under its COC procedure was improper. Joannell Laboratories, Inc.; Nu-Way Mfg. Co., Inc., 71 Comp. Gen. 348 (1992), 92-1 CPD ¶ 369. We recommended that the issue of Joannell's responsibility be referred to the SBA for a determination under the COC procedures. We further recommended that if Joannell was determined to be responsible, the Navy terminate EC's contract and make award to Joannell if otherwise appropriate.

In response to our decision, the Navy initiated a preaward survey of Joannell. On September 9, 1992, as a result of a preaward survey conducted by the Navy, the preaward team recommended no award because it found that Joannell's production plan was unacceptable. The survey found that Martin Electronics, Inc. (MEI), one of Joannell's proposed subcontractors, had weaknesses in its safety procedures. The survey team also found that Joannell did not have a clear understanding of the terms of the solicitation and appeared to have a poor understanding of the Reliability Audit Limited Production Hardware (RALPH) test to be performed prior to the start of first article testing.<sup>2</sup> The survey

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<sup>1</sup>The simulator is intended to provide the capability to train tank crews and infantry to recognize both hostile and friendly tank fire during training exercises. Using a pyrotechnic device, the simulator will provide up to a 60-shot capability and will simulate the flash, smoke, and noise of tank gun fire.

<sup>2</sup>The RFP had a requirement for the contractor to perform a RALPH test on each of the four MTG/WESS configurations prior to first article submissions. The RALPH test is a preproduction test designed to assure the contractor's capability. The actual test is a combined temperature and vibration test. The testing must be accomplished using the four MTG/WESS configurations and 1,000 ammunition rounds. The RALPH test is to consist of 60 rounds fired per each of the four configurations.

team reported that at the time of the preaward survey, Joannell was not aware of live fire testing which was part of the RALPH test. It was also noted that Joannell had a negative net worth and had a tax lien filed against it by the Internal Revenue Service.

The contracting officer, based upon the negative preaward survey, determined that Joannell was nonresponsible and in accordance with Federal Acquisition Regulation § 19.602-1 (FAC 90-7), referred the matter to the SBA for a COC determination. In his letter to the SBA on September 25, 1992, the contracting officer specifically stated that the main area of concern in the determination of nonresponsibility was in production, citing defects in Joannell's production planning and the negative aspects in MEI's safety procedures. He also attached a copy of the preaward survey report.

After a site visit and a review of the information provided by the Navy and Joannell, the SBA, on October 29, 1992, denied Joannell's COC application. The SBA found Joannell responsible in all areas of concern expressly identified by the Navy except for the RALPH testing--the SBA determined that Joannell did not have a clear understanding of the RALPH testing requirements. The SBA reached this conclusion after it reviewed the Navy's preaward survey which stated concerns about Joannell's understanding of the RALPH test requirement based on a subcontractor's quote. Since Joannell, in its COC application, did not furnish any quote for this testing, the SBA specifically asked Joannell for the subcontractor quote. In response, Joannell submitted a quote from a proposed subcontractor, Associated Testing Laboratories (ATL). After review of the quote and a conversation with ATL officials, the SBA concluded that ATL did not adequately respond to the solicitation performance specifications on RALPH testing and thus did not establish its capability to conduct the testing. Joannell filed this protest with our Office on November 12.

Joannell contends that the SBA failed to consider vital information in Joannell's proposal which outlines the respective roles of Joannell and ATL in the conduct of the RALPH test. Joannell references its proposal which shows that ATL submitted a quote to provide only the facilities for performance of the RALPH tests and that Joannell's own engineers were to conduct the actual tests. Joannell maintains that ATL possesses the facilities necessary for performance of the RALPH test, including temperature and vibration chambers, a pyrotechnic license and a firing range. Joannell argues that if the SBA had reviewed its

proposal showing that its engineers, who were knowledgeable about the RFP requirements, were conducting the RALPH test, Joannell would have been granted a COC.<sup>3</sup>

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)(7) (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. COSTAR, B-240980, Dec. 20, 1990, 90-2 CPD ¶ 509; American Indus. Contractors, Inc., B-236410.2, Dec. 15, 1989, 89-2 CPD ¶ 557. Joannell asks that we review the matter on the grounds that the SBA reached its decision without considering vital information.

The SBA declined to issue a COC to the protester because it concluded that Joannell did not have a clear understanding of the RALPH test requirements. This was based on SBA's belief that the test would be performed by ATL and that the quote submitted by ATL to Joannell did not adequately respond to the solicitation performance specification on RALPH testing. Specifically, ATL's quote contained the following statement: "The RALPH test specification is not available to us at this time." The SBA states that in a telephone conversation with ATL it was advised by an ATL official that he did not have the specification in front of him when he prepared the quote and that he was not aware that units had to be preconditioned through temperature and vibration cycling prior to live fire testing. In addition, the SBA points out that ATL's quotation stated that it would fire 1,000 consecutive rounds without a misfire, which far exceeded the 60 rounds per MTG/WESS unit required by the solicitation. This was further indication to the SBA that ATL did not understand the RALPH test requirements.

SBA's actions with respect to the RALPH testing, and its ultimate decision not to issue a COC, were based on its belief that ATL would be performing the RALPH test requirements. Consequently, the SBA's concerns and questions were directed toward ATL and whether or not ATL had a clear understanding of the test requirements. SBA's

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<sup>3</sup>Joannell also points out that the quote from ATL for the RALPH testing is \$1,575 and when considered in the context of the more than \$30 million procurement, the RALPH testing is a very minor matter that should not have resulted in a COC denial.

belief, however, was incorrect. Joannell did not intend for ATL to perform RALPH testing. It is evident from Joannell's proposal that it intended to perform the tests with its own engineers; ATL was merely to provide the facilities for the testing.

Thus, the question presented is whether under these circumstances the SBA "failed to consider vital information" as that term is used in our cases.

As stated previously, we generally do not review SBA's COC determinations. While our bid protest authority encompasses alleged violations of law and regulation, 31 U.S.C. §§ 3552, 3554 (1988), we have been given no authority to review SBA's judgments concerning the issuance of COCs.<sup>4</sup> Our role in this area therefore is a very limited one. In adopting the "failure to consider vital information" standard, we were concerned that in certain circumstances the SBA, because of how information was presented to or withheld from it by the procuring agency, could be led to issue or not issue a COC when its decision might be otherwise were it given a more accurate picture of the facts bearing on a vendor's responsibility. Initially, our concern was that in deciding to grant a COC, the SBA had not been made aware of specific solicitation requirements. See Kepner Plastics Fabricators, Inc.; Harding Pollution Controls Corp., B-184451, B-184394, June 1, 1976, 76-1 CPD ¶ 351. We were also concerned that SBA could be misled into denying a COC by incomplete, misleading or inaccurate information presented by the procuring agency. See Shiffer Indus. Equip., Inc., B-184477, Oct. 28, 1976, 76-2 CPD ¶ 366; Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132; COSTAR, supra; American Indus. Contractors, Inc., supra.

In both of these situations the meaningfulness of SBA's Small Business Act role that is at issue here--the protection of small businesses from arbitrary nonresponsibility determinations by government contracting officers--is jeopardized by procuring agency actions that prevent SBA from making a reasonable judgment on the basis of all relevant facts. We therefore consider a contracting officer's failure, whether inadvertent or intentional, to provide all vital information bearing on a COC matter to be inconsistent with that official's statutory duty to refer "the matter for a final disposition" to the SBA, 15 U.S.C. § 637(b)(7)(A), and we review allegations of a "failure to consider vital information" in connection with that concern.

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<sup>4</sup>This is properly a matter for review by the federal courts. See Ulstein Maritime, Ltd. v. U.S., 833 F.2d 1052 (1st Cir. 1987); Cavalier Clothes, Inc. v. U.S., 810 F.2d 1108 (Fed. Cir. 1987).

In this case, however, there is no indication that the Navy provided anything to the SBA that was misleading or inaccurate. To the contrary, it appears that SBA was misled primarily by the ATL quote submitted to it by Joannell. This quote states that it is for "RALPH testing of one (1) MTG/WESS unit" and sets forth a price that includes "a test report." The quote further states that Joannell was to "be responsible for transportation of the unit and the rounds to and from" the ATL facility and that "[s]etup and scheduling of test equipment can begin upon receipt of a purchase order and the test items." Another provision stated that if "retesting or additional testing . . . is required by [Joannell, ATL] will require approval to proceed (at an extra cost) from an authorized representative of" Joannell. These and other provisions attached to the quote clearly could be reasonably interpreted as indicating that ATL would perform the test.

Joannell argues that it should prevail here because it didn't do anything wrong--it simply provided the information that was requested of it. Joannell states that it had no reason to provide anything more than it did since it was not aware that its ability to perform the RALPH testing was an issue; on the other hand, Joannell states, the SBA could have avoided its misunderstanding simply by looking at Joannell's proposal, which Joannell made available to the SBA during a site visit by the SBA's industrial specialist.

Our review role in this type of case is limited to circumstances in which an agency misleads the SBA. That did not happen here. SBA simply reached a conclusion based on the appropriate information furnished by the Navy and on information furnished by Joannell and ATL.<sup>5</sup>

In light of the above, we conclude that the SBA did not fail to consider vital information in deciding not to issue a COC, and, consequently, we are without authority to review the matter further. We dismiss the protest.

  
James F. Hinchman  
General Counsel

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<sup>5</sup>We note that, despite Joannell's assertion, it is not clear that Joannell should not have done more than it did--whether or not it knew about the Navy's RALPH testing concerns. Joannell furnished the SBA with a quote that was easily interpreted as a quote for performing the required test, without any explanation that it was simply a quote for the use of facilities.