



Comptroller General
of the United States

Washington, D.C. 20548

Matter of: RBE, Inc.
File: B-252635
Date: July 16, 1993

Sam Zalman Gdanski, Esq. for the protester.
Maj. Bobby G. Henry, Jr. for the Department of the Army.
David R. Kohler, Esq. for the Small Business Administration.
Jacqueline Maeder, Esq. and Robert C. Arsenoff, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Protest is sustained where protester was denied a fair opportunity to obtain certificate of competency review by the Small Business Administration based upon incorrect information provided by the agency during the course of the review.

DECISION

RBE, Inc. protests the decision of the Small Business Administration (SBA) to deny it a certificate of competency (COC) in connection with invitation for bids (IFB) No. DAKF24-93-B-0009, issued by the Department of the Army for the construction of a munitions warehouse at Fort Polk, Louisiana. RBE contends that the denial of its COC was based on incorrect information provided by Army contracting officials to SBA.

We sustain the protest.

The IFB, issued November 23, 1992, contemplated the award of a fixed price contract for the construction of a munitions warehouse. The cover sheet of the solicitation stated that the contractor was to begin contract performance within 10 calendar days after receipt of the notice to proceed and complete performance within 160 calendar days. This 160-day performance period was mandatory; however, in section F of the IFB, "Deliveries or Performance," the solicitation stated that the contractor was to begin contract performance within 10 calendar days after receipt of the notice to proceed and complete the work within 120 calendar days.

Twelve bids were received by the December 29 bid opening; RBE was the apparent low bidder. Following a preaward survey, the contracting officer determined that RBE was nonresponsible due to its lack of capacity, credit and repeated failure to perform in accordance with contract requirements.

Since RBE is a small business, on January 12, 1993, the contracting officer referred the nonresponsibility determination to SBA for COC proceedings pursuant to Federal Acquisition Regulation § 19.602-1.

Between February 2 and February 4, SBA conducted its own independent evaluation of RBE. During that time, the SBA industrial specialist discussed the conflicting performance periods contained in the solicitation with the Army's contracting personnel. The industrial specialist was informed by Army contracting personnel that "the job had to be completed in 120 days" and, following this oral clarification, SBA evaluated RBE based on the 120-day performance period.

By letter dated February 5, the COC Review Committee notified RBE that it would not issue a COC solely because it found that RBE lacked the capacity to perform the contract "in a timely manner in accordance with the specifications of the solicitation."

By letter dated March 3, the Army notified RBE that it had awarded the contract to Priola Construction Corporation, the second-low bidder, with a 160-day performance period.

RBE alleges that the Army provided incorrect information concerning the mandatory performance period to SBA and that SBA, in reliance on that information, failed to consider vital information (i.e., that the contractor need not complete the construction work in 120 days) bearing on RBE's responsibility. RBE contends that it was held "to a different [performance] standard" than the awardee.

¹The industrial specialist specifically asked contracting personnel if, because of the ambiguity in the solicitation, the agency was considering canceling the solicitation and re-advertising it with a consistent performance period. According to the industrial specialist, the contracting officer stated that the Army "had to have the job done in 120 days and . . . did not have time to cancel the solicitation and re-advertise it."

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); Joanell Labs., Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207; Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112. We will do so, however, where the protester alleges that the SBA's denial of a COC resulted from the contracting officer's failure to provide SBA with vital information bearing on the firm's responsibility. Bullard-Lindsey Contracting Co., Inc., B-252027, May 18, 1993, 93-1 CPD ¶ ____; Joanell Labs., Inc., supra; COSTAR, B-240980, Dec. 20, 1990, 90-2 CPD ¶ 509; Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132.

Here, SBA declined to issue a COC to the protester because it found that RBE lacked the capacity to perform the contract "in a timely manner in accordance with the specifications of the solicitation." The record shows that a primary consideration of SBA in deciding not to issue a COC was its belief that contract performance was to be completed in 120 days.² This belief, as noted above, was based upon the information from the Army that "the job had to be completed in 120 days." The Review Committee specifically requested clarification regarding the ambiguous performance period and was informed by the industrial specialist, based on his discussion with Army contracting personnel, that the performance period was 120 days. While RBE had assured the industrial specialist that it could meet the 120-day performance requirement, the record shows that the Committee questioned whether the firm was capable of successfully performing the contract in 120 days, a period one committee member termed "a very short time frame."

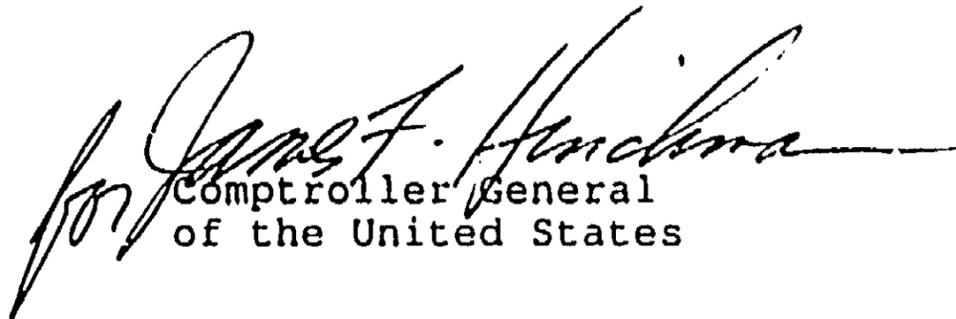
In its report on the protest, the Army does not deny the industrial specialist's statement that he was informed that the contract performance period was 120 days and that RBE's capacity to perform should be evaluated on the 120-day period. The Army also does not explain why it awarded the contract with a 160-day performance period after telling the industrial specialist that "the job had to be completed in

²In terms of RBE's performance record, the COC Review Committee found that RBE had satisfactorily completed two recent contracts and was on schedule in performing a current contract. The committee also found that RBE "has the ability to financially perform on the contract."

120 days." The agency simply states that "SBA had all [the] pertinent information to do a comprehensive analysis."³

SBA, however, did not have all pertinent information--it was informed by the Army that the performance period was 120 days when in fact it was 160 days. That this information was vital to the ultimate SBA decision is clear from the record; the Review Committee specifically focused on the 120-day period, with one member noting that RBE has problems planning its work and that "120 days is a very short time frame." We find, therefore, that the Army's failure to provide SBA correct information regarding the 160-day performance period deprived the protester of a fair opportunity to have SBA review its responsibility on the basis of accurate, directly relevant information. We therefore sustain the protest. COSTAR, supra; American Indus. Contractors, Inc., B-236410.2, Dec. 15, 1989, 89-2 CPD ¶ 557.

Since award has been made and the work is substantially underway, termination of the awardee's contract and the resubmission of the matter of RBE's responsibility to SBA for further consideration are not feasible. However, because the agency's improper actions deprived the protester of a fair opportunity to compete for the award, RBE is entitled to recover its bid preparation costs. 4 C.F.R. § 21.6(d)(2). RBE is also entitled to the costs of filing and pursuing its protest. 4 C.F.R. § 21.6(d)(1). In accordance with 4 C.F.R. § 21.6(f), RBE's certified claim for such costs, detailing the time expended and costs incurred, must be submitted directly to the Army within 60 days after receipt of this decision.


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³The Army also argues that RBE's protest of its failure to receive a COC based on inconsistent specifications is untimely since the protest of allegedly defective IFB provisions which were apparent from the face of the solicitation should have been protested prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1993). The agency misconstrues RBE's protest--it is not a protest of defective specifications, but of its responsibility evaluation under a 120-day performance standard while award was made based on a 160-day performance standard.