



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** UAV Systems, Inc.  
**File:** B-255281; B-255281.2  
**Date:** February 17, 1994

Jacob B. Pompan, Esq., Pompan, Ruffner & Werfel, for the protester.

Jack A. Yohe, Jr., for Mistral, Inc., an interested party.

Jeffrey I. Kessler, Esq., and Tony K. Vollers, Esq.,  
Department of the Army, for the agency.

Scott H. Riback, Esq., and John M. Melody, Esq., Office of  
General Counsel, GAO, participated in the preparation of the  
decision.

### DIGEST

1. Agency contacts with Small Business Administration (SBA) during agency's consideration of protester's responsibility without any contacts with protester, does not evidence bad faith by agency; contracting agency and SBA personnel are encouraged by applicable regulations to engage in complete exchange of information during SBA's review, and regulations do not contemplate opportunity for input from contractor except in certificate of competency application.

2. Contracting officer reasonably declined to refer firm's nonresponsibility to SBA for a second time (after denial of certificate of competency) where only additional information provided in support of request that agency reconsider the matter was a letter from protester's attorney containing unsupported assertions that deficiencies relating to the firm's capability to perform had been resolved.

### DECISION

UAV Systems, Inc. protests the actions of the Department of the Army in determining that UAV was nonresponsible under invitation for bids (IFB) No. DAAK01-93-B-0033, issued to acquire quantities of S-250 and S-280 communications shelters. UAV argues that the Army acted in bad faith during its referral of the firm's nonresponsibility to the Small Business Administration (SBA).

We deny the protest.

At bid opening on May 27, 1993, UAV was the apparent low bidder. The Army conducted a preaward survey on July 15, which included a site visit to the protester's facilities. The preaward survey (PAS) team recommended to the contracting officer that UAV be found nonresponsive. There were numerous bases for this recommendation, including that UAV did not have the necessary equipment, employees or technical expertise to perform the contract, and did not have adequate financial resources. Based on the PAS team's findings and recommendation, the contracting officer found UAV nonresponsive on July 30. Because UAV represented that it was a small business, the matter was referred to the SBA on August 2 pursuant to the certificate of competency (COC) procedures outlined in Federal Acquisition Regulation (FAR) subpart 19.6.

During SBA's review of UAV's responsibility, the SBA and the Army agreed to an extension of time--beyond the required 15 days--for SBA's review. See FAR § 19.602-2(a). On September 2, also during SBA's consideration of the matter, there was a telephone conference during which SBA and Army personnel discussed various aspects of UAV's responsibility. On September 13, the SBA declined to issue a COC.

UAV subsequently made a presentation to persuade the SBA to reconsider its position. Apparently as a result of this effort, the SBA called the contracting officer to advise her of UAV's presentation, and also advised her that the SBA could not reconsider the question absent a referral from the contracting officer. The contracting officer advised UAV that she would withhold any award until September 28, and that if UAV wished for her to reconsider the matter or to submit it to SBA for further review, UAV was required to present any additional information to her no later than September 28.

On September 28, UAV's attorney sent a letter to the contracting officer representing that all of UAV's deficiencies had been remedied. Also on September 28, UAV's attorney called the contracting officer to ask whether the letter was sufficient, and to ask for an opportunity to make a presentation to the Army during the following week. The contracting officer advised UAV's attorney that the September 28 letter was under review, but that she would not meet with UAV the following week. After reviewing UAV's September 28 letter, the contracting officer concluded that the firm had not presented additional information that would cause her to reconsider her determination of nonresponsibility. On September 30, the agency made award to the next eligible bidder.

UAV argues that the contracting officer acted in bad faith in connection with the firm's efforts to be found

responsible. First, UAV contends that the agency improperly influenced SBA during the September 2 telephone conference without first seeking clarification of its concerns from UAV, or otherwise permitting the firm an opportunity to rebut matters raised during the conference. UAV maintains that the SBA was prepared to issue a COC until it improperly received this negative information from the agency. Second, UAV contends that the agency acted in bad faith in refusing to permit the firm an opportunity to make the presentation it requested on September 28 and in refusing to refer the matter back to the SBA based on its September 28 letter.

We generally will not review a nonresponsibility determination where a small business is concerned since by law SBA, not our Office, has conclusive statutory authority to determine the responsibility of a small business by issuing or refusing to issue a COC. WesternWorld Servs., Inc., d/b/a The Video Tape Co., B-243808.3, Aug. 12, 1991, 91-2 CPD ¶ 182. In cases where the SBA denies a COC, our review is limited to determining whether the denial was made as a result of bad faith on the part of government officials, or a failure to consider vital information bearing on the firm's responsibility. Id. In order to establish bad faith, a protester must present evidence showing that agency officials acted intentionally to injure the protester. Traffic Moving Sys., Inc., B-248572, Sept. 3, 1992, 92-2 CPD ¶ 152. UAV has not met this standard.

At the outset, we note that the record contains absolutely no evidence showing bad faith on the part of either the Army or SBA. The actions of which UAV complains were in fact proper and consistent with the requirements relating to finding a small business concern nonresponsible. In addition, UAV has not challenged the substantive findings giving rise to the agency's determination of nonresponsibility, nor has it presented any evidence which would lead us to question the bases for that determination.<sup>1</sup>

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<sup>1</sup>UAV also argues that the actions described above, together with another incident occurring on June 15 collectively reflect improper bias on the part of the agency. In this regard, UAV has submitted an affidavit from a consultant which states that on June 15 the contracting officer represented that the awardee (rather than UAV) was the apparent low bidder and would receive the award. Our Office will not attribute improper or prejudicial motives to government officials on the basis of inference or supposition. D&M General Contracting, Inc., B-252282.4, Aug. 19, 1993, 93-2 CPD ¶ 104. Since the record shows that the agency found UAV's bid responsive and properly reviewed

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First, there was nothing improper with the agency's communicating with the SBA during its COC review. Under FAR § 19.602-3(a), agency and SBA officials are encouraged to engage in a "complete exchange of information"-- notwithstanding that the agency's position in these circumstances necessarily is that the referred offeror is nonresponsible--in order for the two agencies to reach agreement on the disposition of a particular firm's COC application. Such an exchange thus does not constitute evidence of agency bad faith. Interstate Equip. Sales, B-225701, Apr. 20, 1987, 87-1 CPD ¶ 427. The fact that UAV was not afforded an opportunity for input during this exchange also was unobjectionable; there is no legal requirement that a firm be afforded an opportunity to provide the SBA with information relating to its responsibility other than in its COC application. E.M. By Emanuel of Beverly-Hills, Inc., B-222928.2, Aug. 8, 1986, 86-2 CPD ¶ 171. Accordingly, there is no basis for our Office to find that there was anything improper about the September 2 telephone conference.

The contracting officer's refusal to submit the matter of UAV's responsibility to the SBA for a second time after receiving the firm's September 28 letter was also unobjectionable.<sup>2</sup> Where a firm requests that the agency reconsider its responsibility after the SBA has denied a COC but before award, the agency need not resubmit the matter to the SBA where it concludes that information on which the request was based does not materially alter the initial nonresponsibility determination. R.T. Nelson Painting Serv., Inc., 69 Comp. Gen. 279 (1990), 90-1 CPD ¶ 202. There was no new information here. The only information provided to the contracting officer was a letter from UAV's attorney. This letter contained numerous assertions concerning the firm's alleged resolution of the many issues surrounding its nonresponsibility, but did not include documentation or other support for these assertions. For example, the agency noted as part of its nonresponsibility determination that UAV lacked much of the equipment necessary for contract performance. The firm did not

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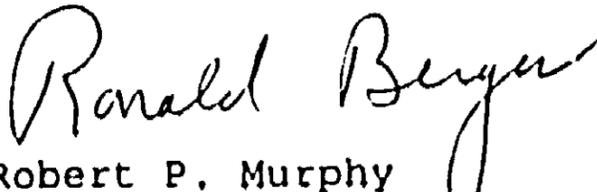
<sup>1</sup> (...continued)

and forwarded the matter of its responsibility to the SBA in accordance with applicable procedures after the alleged statement was made, we find that the allegation, even if true, does not establish improper bias in favor of the awardee.

<sup>2</sup>In addition, the Army was not required to delay award further to provide UAV additional time to make a presentation to it. See generally International Ordnance, Inc., B-246772.2, Apr. 2, 1992, 92-1 CPD ¶ 342.

respond directly to this concern in its September 28 letter, which stated only that "[a]ll other production related problems have been corrected." (UAV still has not submitted evidence reflecting resolution of the agency's concerns in connection with this protest.) The contracting officer therefore acted reasonably in not reversing her initial nonresponsibility determination, and thus was not required to refer the matter back to the SBA for further consideration.

The protest is denied.

*for*   
Robert P. Murphy  
Acting General Counsel