

Matter of: S and F Industries--Reconsideration

File: B-255134.2

Date: December 13, 1993

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of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Where protester does not show that original decision contains either an error of fact or law which would warrant its reversal, decision is affirmed.

DECISION

S and F Industries requests that we reconsider our October 1, 1993, dismissal of its protest against the award of a contract under solicitation No. N68711-93-B-3007, issued by the Department of the Navy for maintenance of heating, ventilation, and air conditioning at the Marine Corps Air Station, Yuma, Arizona. The procurement was conducted competitively pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1988 and Supp. IV 1992). In its protest, S and F alleged that, while the SBA determined that S and F was not responsible to perform the requirement and was ineligible for award, the contracting agency's failure to first conduct its own responsibility determination rendered the SBA's conclusion improper. We dismissed the protest because our Office generally has no jurisdiction to review the SBA's stewardship of the small disadvantaged business contracting program. While S and F now concedes that the Navy, in fact, reviewed the firm's responsibility, the protester alleges that the Navy did not

¹Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to provide for the performance through subcontracts designed to assist "developing" small business concerns which are owned and controlled by designated disadvantaged individuals. See 13 C.F.R. Part 124 (1992); New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463.

conduct a complete responsibility determination and requests that our Office review the Navy's responsibility determination.

We affirm our dismissal.

The authority to administer the 8(a) program is vested in the SBA by statute, 15 U.S.C. § 637(a), and SBA has promulgated regulations to implement its authority in 13 C.F.R. Part 124. Under those regulations, while the selection of program participants for award under the 8(a) competitive procedures is primarily the responsibility of procuring agencies, see 13 C.F.R. § 124.311(f)(1), (3), (7), and (8), the SBA alone is authorized to certify itself as competent to perform the requirement based on its determination that the particular 8(a) concern with which it intends to subcontract is responsible to perform the requirement. 13 C.F.R. § 124.313. If a contracting officer has "substantial doubts" as to a particular 8(a) firm's ability to perform, the matter is to be referred to the SBA, which decides whether to certify itself as competent to perform using the 8(a) concern in question. Federal Acquisition Regulation (FAR) § 19.809. Thus, the contracting agency has no authority to independently make an affirmative or negative determination of responsibility of an 8(a) firm or to withhold award from such a firm for reasons of responsibility. Aviation Sys. and Mfg., Inc., B-250625.3, Feb. 18, 1993, 93-1 CPD ¶ 155.

Here, we see nothing improper in the Navy's actions. The agency found that S and F did not have adequate relevant experience in heating, ventilation, and air conditioning services and also had concerns about the realism of the firm's pricing. The agency's determination that the protester did not meet the responsibility standards enunciated in FAR § 9.104-1 is documented. The Navy accordingly referred the matter to the SBA, which, in turn, determined that S and F was not a responsible contractor to perform the requirement. In our view, the contracting agency's actions complied with the applicable regulations implementing the 8(a) program. While the protester apparently disagrees with the conclusions of the Navy and the SBA, the SBA is the sole arbiter in determining section 8(a) eligibility, and its

²The protester cites a District Court opinion, Action Service Corp. v. Garrett, 790 F. Supp. 1188 (D. Puerto Rico 1992), which concluded that the contracting officer is required to make a responsibility determination prior to referring the matter to the SBA. Here, the contracting officer, in fact, made a nonresponsibility determination.

determination cannot be challenged by a program participant or any other party. 13 C.F.R. § 124.311(g); Premier Cleaning Sys., Inc., B-249179.3, July 27, 1992, 92-2 CPD ¶ 51. We therefore will not review the SBA's conclusion that S and F was not responsible to perform the contract.

Under our Bid Protest Regulations, to obtain reconsideration, the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.12(a) (1993). S and F has slightly modified its argument with respect to the Navy's review of its responsibility based on information not previously considered. Nonetheless, since the contracting agency's role is limited under the 8(a) program and the record shows that the Navy complied with the applicable regulations, S and F's argument does not alter our conclusion that the protest was outside the scope of our jurisdiction.

Michael R. Golden
Acting Associate General Counsel