



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Small Business Administration; Control Corp.--
Reconsideration

File: B-253410.4; B-253410.5

Date: December 5, 1995

Charles D. Ablard, Esq., and Jeff H. Eckland, Esq., Faegre & Benson, for the protester.

Joseph J. Petrillo, Esq., and William E. Conner, Esq., Petrillo & Associates, for Control Data Systems, Inc., an interested party.

Theresa McKenna, Esq., Department of the Navy, David R. Kohler, Esq., and Audrey H. Liebross, Esq., Small Business Administration, for the agencies.

Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requests for reconsideration are denied where the requests are based upon arguments that should have been raised during the initial protest.

DECISION

The Small Business Administration (SBA) and Control Corp. request reconsideration of our July 5, 1995, decision¹ denying Control's protest of the Navy's decision not to award Control a contract for computer maintenance services pursuant to request for proposals (RFP) No. N00123-92-R-0118. Both the SBA and Control contend that we erred in holding that the contracting officer was not required to terminate Control Data Systems, Inc.'s (CDS) contract and award a contract to Control because the SBA was untimely in issuing a certificate of competency (COC) to Control. We deny the requests for reconsideration.

During the procurement, the Navy found Control's proposed vendor-developed diagnostics to be inadequate, and therefore determined the proposal to be technically unacceptable. The Navy gave Control two separate opportunities to demonstrate the capabilities of its systems maintenance diagnostics, but Control was unsuccessful in demonstrating that its proposed systems diagnostics worked properly. Accordingly, the contracting officer notified Control that its proposal was

¹For a detailed discussion of the lengthy history of the procurement, the protest arguments, and the rationale for our decision, see Control Corp., B-253410.3, July 5, 1995, 95-2 CPD ¶ 127.

considered technically unacceptable and awarded the contract to CDS. Because Control was a small business concern, the SBA became involved and scheduled yet another demonstration test for the firm. Despite the fact that Control's diagnostics again failed to correctly diagnose computer systems failures, the SBA issued a COC to the firm.² Ultimately, more than a year and a half after awarding the contract to CDS, as part of the settlement agreement to resolve a lawsuit filed by CDS, the Navy decided not to terminate CDS' contract, to allow CDS to continue to perform the work through the end of the second option period, and to initiate a new procurement for computer maintenance services needed there after.

Control protested the Navy's decision to our Office. The gist of Control's protest was that the Navy's determination that Control's proposal was technically unacceptable was, in reality, a finding that Control was nonresponsible and that, since Control was a small business offeror, the matter of its responsibility was appropriate for the SBA's review under its COC procedures. Both Control and the SBA argued that, because the SBA issued a COC on behalf of Control after the Navy disqualified Control's proposal as technically unacceptable, the Navy was required to terminate CDS' contract and make an award to Control for the remainder of the requirement.

In resolving the protest, we did not decide whether Control's disqualification was a matter of technical unacceptability or nonresponsibility because we concluded that the SBA's issuance of a COC to Control was untimely. We found that the matter was governed by Federal Acquisition Regulation (FAR) § 19.602-4(c), which states that:

"The contracting officer shall proceed with the acquisition and award the contract to another appropriately selected and responsible offeror if the SBA has not issued a COC within 15 business days (or a longer period of time agreed to with the SBA) after receiving the referral."

While we recognized that the Navy had awarded the contract to CDS before the matter was referred to the SBA for a COC determination, since the Navy had not agreed to wait more than 15 days for the SBA to issue a COC, we held that the contracting officer properly decided to let CDS perform through the end of the next option period and to resolicit for the expanded services required after that.

To obtain reversal or modification of a decision, the requesting party must convincingly show that our prior decision contains errors of fact or law, or present information not previously considered that warrants its reversal or modification.

²The COC was issued approximately 1 year after the matter was first referred to the SBA and more than 1 year after the contract was awarded to CDS.

4 C.F.R. § 21.12(a) (1995). Our Office will not reconsider a decision based upon arguments that could have and should have been raised at that time since the goal of our bid protest forum--to produce fair and equitable decisions based on consideration of all parties' arguments on a fully developed record--otherwise would be undermined. See American Management Sys., Inc.; Department of the Army--Recon., 70 Comp. Gen. 510, 514, 91-1 CPD ¶ 492, and cases cited. Thus, parties that withhold or fail to submit all relevant evidence, information, or analyses for our initial consideration do so at their own peril. Id.

The SBA and Control argue that our Office made errors of both fact and law in finding that the SBA was untimely in issuing the COC. The SBA and Control contend that we made a legal error because the 15-day rule of FAR § 19.602-4(c) only applies where the contract has not yet been awarded. The parties contend that our decision was factually erroneous because the Navy, through its actions, essentially agreed to extend the 15-day period for action by the SBA. Thus, the requesters assert, the Navy was bound by the SBA's issuing of the COC and should have terminated CDS' contract and awarded Control a contract for the remainder of the second option period when the COC was issued.

The applicability of FAR § 19.602-4(c), and whether the SBA issued the COC in a timely manner under it, was raised by both the Navy and the awardee during the initial protest. In its report on the protest, the Navy quoted the 15-day rule in FAR § 19.602-4(c) and argued that the SBA's issuance of the COC under it was untimely. The Navy stated that:

"In the case at hand, the actual COC was issued by the SBA on 2 June 1994, approximately one year after the Navy's 25 May 1993 referral. The FAR, of course, contemplates the issuance of a COC prior to any contract award and allows the agency to proceed with award if the SBA does not act in an expeditious manner. The logical extension to this is that the FAR would allow a contract to be kept in place if the SBA did not act within the 15 days."

The Navy also pointed out that, in dismissing CDS' lawsuit filed in the United States Court of Federal Claims on jurisdictional grounds, the court specifically noted that "[Control] did not request, and the Navy did not agree to (and may not have had the authority to agree to), an enlargement of the fifteen-day prohibition on the award of the contract to another bidder pending the SBA's COC determination."

In addition, in its comments on the SBA's report on Control's protest, CDS pointed out that neither the SBA nor Control had provided any evidence that the SBA and the Navy had agreed to any extension of the 15-day period for SBA to issue a COC on behalf of Control. Thus, CDS argued, "[b]ecause SBA neglected to secure an

agreement extending the due date for issuance of a COC, as required by the FAR, the COC can no longer affect contract award."

Though they participated fully in the initial protest and submitted several lengthy briefs to support their views that Control should be awarded the contract, Control and the SBA did not rebut or comment in any manner on the Navy's and CDS' arguments that the COC determination was untimely issued. Rather, Control and the SBA first raised in their requests for reconsideration the argument that FAR § 19.602-4(c) is inapplicable and that the Navy implicitly agreed to waive the 15-day rule. These arguments thus do not provide a basis for reconsidering our decision. WN Hunter & Assocs.--Recon., B-237168.2, Mar. 27, 1990, 90-1 CPD ¶ 334.

In any event, even if the Navy's actions following the COC referral could be construed as an agreement to waive the 15-day requirement, the Navy effectively disavowed any such implicit agreement when: (1) in February 1995, the Navy agreed not to terminate CDS' contract as part of the settlement of CDS' lawsuit in the United States District Court for the District of Minnesota; and (2) the Navy argued in its report on the initial protest that the SBA was untimely because it had taken about 1 year to issue the COC. Moreover, in the absence of the contracting agency's agreeing to extend the period, the FAR requires the SBA to issue its COC determination within 15 days and allows the contracting officer to proceed with the acquisition and award the contract if a COC is not issued within the prescribed period. See FAR §§ 19.602-2(a) and 19.602-4. In our opinion, it would be illogical and inconsistent with these FAR provisions to require the contracting officer to terminate the original contract and make award to the firm receiving an untimely COC simply because the original award was made before the matter was referred to the SBA. This is especially true where, as here, the contract was awarded more than 1 year before the SBA issued the COC to another firm.

The requests for reconsideration are denied.

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