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Joseph M. Moulton
Proc. II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-187574

DATE: January 31, 1977

MATTER OF: JBS Construction Company

DIGEST:

1. Protest against Small Business Administration's (SBA) denial of Certificate of Competency (COC) is dismissed since GAO has no authority to review SBA determinations and record does not establish either presence of fraud or failure to consider information vital to decision regarding issuance of COC which can be attributed to Government.
2. Where bidder knows that its prior performance has been questioned and it is given opportunity to support application for Certificate of Competency (COC), burden is on bidder to establish its responsibility and it cannot, upon denial of COC, complain that Small Business Administration did not consider information which bidder could have provided.

The subject protest has been filed by counsel for JBS Construction Company, the low bidder under invitation for bids (IFB) Nos. F04609-76-09054 (calling for the repair of a water pumping supply system) and F04609-76-09058 (calling for the installation of a water softener and a booster pump) issued by George Air Force Base, California, against the contracting agency's determination that JBS is not a responsible bidder and the subsequent denial by the Small Business Administration (SBA) of a Certificate of Competency (COC). Counsel contends that the contracting officer, the Defense Contract Administration Services District (DCASD), and the SBA have acted either on the bases of misrepresentations of fact amounting to fraud or in willful disregard of the true facts.

The record shows that JBS was declared nonresponsible under the two solicitations, issued as total small business set-asides, because its past performance in meeting delivery schedules and its production schedules for the contracts on which it bid raised doubt as to whether JBS could meet the required 90-day schedules.

It is reported that after JBS was determined to be the low bidder, inquiries concerning JBS' past performance were made of several instrumentalities identified by JBS as those for which

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it had performed previous services, including the City of Los Angeles; the Metropolitan Water District, Los Angeles; the General Services Administration, San Francisco; Los Angeles Community College. Two bank references were also checked. Because the contracting officer was informed that JBS had failed to complete performance according to the original delivery date at all locations, pre-award surveys were requested and performed by the DCASD, Pasadena, California. DCASD recommended that no award be made based on JBS' performance record and its apparent inability to meet the instant required performance schedule. It was specifically reported in pertinent part by DCASD that:

"A random review of work the offeror has completed in the past year reveals that he has performed the work required in a satisfactory manner, but has been late to the basic delivery schedule on virtually every job. In most instances, he requested and was granted an extension of time in order to complete the job. He is considered unsatisfactory on this factor because his reasons for late completion of work were not considered satisfactory reasons by the Industrial Specialist. In most instances, his delays were caused by poor planning and scheduling of work
* * *."

DCASD was also concerned, after considering JBS' production plans, that the 90-day delivery schedules under the instant solicitation would not be met, since they showed contract completion time in excess of 100 days. Accordingly, it issued a recommendation of no award.

Pursuant to Armed Services Procurement Regulation (ASPR) § 1-705.4 (1975 ed.), the contracting officer then forwarded the complete files, including the DCASD reports, to SBA for possible issuance of a COC. By identical letters of September 30, 1976, the SBA declined to issue a COC for either procurement, stating that its decision was based upon a comprehensive analysis of all available information.

In support of its protest allegations, JBS refers to the pre-award survey and contends that DCASD neither reviewed documents in JBS' possession relating to its prior work nor

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discussed with JBS the matter of its prior performance. Apparently the protester's position is that had DCASD done so, it would have been aware that JBS had completed the prior contracts at issue in accordance with modified completion dates agreed to by the parties; that the delays involved primarily were excusable or justifiable; and that, with the exception of one instance in which delays were purportedly occasioned by a supplier's financial difficulties, JBS was never assessed liquidated damages.

Under 15 U.S.C. 637(b)(7) (1970), the SBA has the authority to issue or deny a COC. Our Office has no authority to review SBA determinations or to require the SBA to issue a COC or to reopen a case when a COC has been denied. Z.A.N. Company, B-185740, March 4, 1976, 76-1 CPD 157; Unitron Engineering Company, B-181350, August 20, 1974, 74-2 CPD 112. Consequently, the contracting agency's determination must be regarded as having been affirmed by the SBA, and that determination generally must be accepted by our Office. Environmental Tectonics Corporation, B-185258, February 13, 1976, 76-1 CPD 101; Zinger Construction Company, Inc., B-185390, December 16, 1975, 75-2 CPD 397. It is only where the protester has made a prima facie showing of fraud, see Dyneteria, Inc., 55 Comp. Gen. 97 (1975) 75-2 CPD 36, or where the record discloses that information vital to a responsibility determination has not been considered, see Shiffer Industrial Equipment, Incorporated, B-184477, October 28, 1976, 76-2 CPD 366; Gallery Industries, Inc. - Request for Reconsideration, B-185911, June 16, 1976, 76-1 CPD 383, that this Office will review the matter or take other appropriate action.

Here, despite protester's assertions, the record does not establish that the Government's actions were the result of either fraud or any willful disregard of facts. The record shows that (1) the contracting agency, upon checking with references provided by the protester, was informed that the protester had difficulty in meeting original performance and delivery dates; (2) DCASD, in making pre-award surveys, was similarly advised, and also found that JBS supplier quotes indicated a 14-week (98 days) lead time for certain items which along with other performance requirements, would preclude JBS from meeting the 90-day contract completion schedule; and (3) SBA denied COCs only after evaluating both what was submitted by the Air Force and

what was submitted directly by JBS in support of its COC applications. Although the main thrust of the protester's contentions is that the pre-award survey report statement, to the effect that JBS had not completed performance of prior contracts according to original delivery dates, "is utterly misleading and is so incomplete as to amount to a falsehood" because the contracts were completed in accordance with modified delivery dates, the record further shows that DCASD reports, rather than implying that there had been defaults, pointed out that time extensions had been granted to JBS (at the firm's request) for contract completion. While the protester's affidavit suggests that the extensions were due, for the most part, to change orders or other actions by the entities with which it had contracted, this indicates only that JBS and those entities may not agree on the reasons for the modified completion dates, and not that the information provided to SBA by the Air Force was inaccurate or misleading.

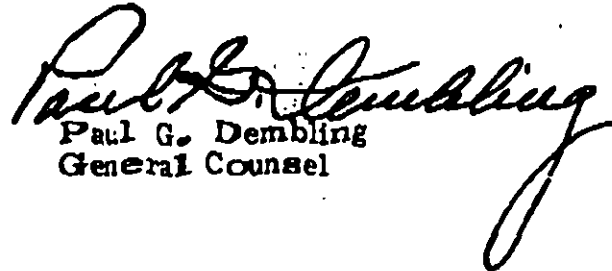
Furthermore, the protester's own affidavit indicates that (1) protester had been informed, shortly after bid opening on IFB -09058, that the contracting officer had been told that JBS had not completed its previous contracts in accordance with the original contract schedules, and (2) that it knew the COC procedure had been invoked with respect to its responsibility. Although protester states that SBA representatives never questioned its prior performance or reviewed JBS records pertaining to prior contracts, the burden is on the would-be contractor and not the Government to establish its responsibility. The protester cannot now be heard to complain about the basis for the COC denials when it was given an opportunity to show its responsibility notwithstanding the fact that its prior performance (as it knew or should have known) had been called into question.

We note that the protester has filed suit under the Freedom of Information Act "in order to obtain information relating to the determination of nonresponsibility," and that, in the protester's view, it may be "several months" before that matter is resolved. In view of the above, however, it appears that no useful purpose would be served by our holding this protest in abeyance, particularly since we would anticipate that much of what the protester seeks in the way of documentation is contained in the files furnished us by the Air Force and thus has been subject to our review. Cf., Riggins & Williamson Machine Company, Inc.

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54 Comp. Gen. 783 (1975), 75-1 CPD 168; Management Services, Incorporated, 55 Comp. Gen. 715 (1976), 76-1 CPD 74.

For the foregoing reasons, the protest is dismissed.


Paul G. Dembling
General Counsel