

DOCUMENT RESUME

02384 - [A1532505]

[Protest re Bidder Responsibility and Agency's Failure to Consider Timely Relevant Information]. B-188319. May 25, 1977. 3 pp.

Decision re: Inflated Products Co., Inc.; by Robert F. Keller, Deputy Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law II.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: Department of the Army: Army Troop Support Command.

Authority: 15 U.S.C. 637 (b) (7). A.S.P.R. 1-705.4. 13 C.F.R. 124.8-16. 53 Comp. Gen. 344. 53 Comp. Gen. 496. B-186751 (1976). B-188110 (1977). B-179738 (1) (1974). B-185963 (1976).

Company protested finding that it was nonresponsible. Finding by procuring agency that concern was nonresponsible and subsequent denial by Small Business Administration of Certificate of Competency were not subject to GAO review. However, GAO will consider agency's failure to consider timely information bearing on bidder's responsibility, and recommended that agency review all pertinent information and then expeditiously make award to low responsible bidder. (DJM)

DECISION



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

FILE: B-188319

DATE: May 25, 1977

MATTER OF: Inflated Products Company, Incorporated

DIGEST:

1. Where small business concern is found to be nonresponsible bidder by procuring activity, subsequent denial of Certificate of Competency (COC) by SBA must be viewed as affirmation of nonresponsibility determination, and GAO has no authority to review COC determination, or to require SBA to issue COC where COC has been denied.
2. Although GAO does not review allegations that an agency's finding of nonresponsibility was arbitrary and capricious where the bidder has subsequently been denied a Certificate of Competency by the SBA, nevertheless GAO will consider the agency's failure or refusal to consider information probative of the bidder's responsibility where such information is presented to the contracting officer within a reasonable time before contract award.
3. Although contracting officer's determination of bidder's responsibility should be made on basis of information made available as closely as practicable to contract award, agency need not withhold award interminably while bidder attempts to cure possible causes of nonresponsibility. In instant case, GAO recommends that contracting officer review all information bearing on protester's responsibility which is available as of date of this decision and then expeditiously make award to that firm determined to be low, responsive and responsible bidder.

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Inflated Products Company, Incorporated, (IPI) protests award to any other offeror under Request for Proposals (RFP) DAAK01-76-R-5598. The RFP, a small business set-aside, was issued by the Army Troop Support Command (TROSCOM), St. Louis, Missouri. The Army has agreed that no award will be made until a decision is reached by this Office. Additionally this matter is currently before the U.S. District Court for the District of Massachusetts on a complaint which specifically requests the court to stay the award pending our decision.

Essentially IPI protests TROSCOM's initial determination of February 8, 1977 that it lacks the financial capability to perform the contract. The contracting officer forwarded the matter to the Small Business Administration (SBA) on February 9, 1977, under Armed Services Procurement Regulation (ASPR) § 1-705.4 (1976) in order to give IPI the opportunity to apply for a Certificate of Competency (COC) under 15 U.S.C. § 637(b)(7) (1970) and 13 C.F.R. § 124.8-16 (1976). The SBA denied IPI's request for a COC on March 2, 1977, "[b]ased on a comprehensive analysis of all available information." During our consideration of IPI's protest following the SBA's denial of a COC, the protester has provided us with additional information concerning its financial condition. IPI asserts that this information shows that it is in fact a financially responsible concern.

In the recent cases of Precision Electronics Labs, B-186751, October 29, 1976, 76-2 CPD 369, and Crawford Development and Manufacturing, B-188110, March 15, 1977, 77-1 CPD 193, we stated our willingness to recommend reassessment of the responsibility of a prospective contract where it appears that either SBA or the agency failed to consider all relevant information. Although we do not review the agency's initial determination that a small business is nonresponsible when the question has been referred to SBA and the agency's determination is affirmed, see Marine Resources, Inc., B-179738(1), February 20, 1974, 74-1 CPD 82, we do not treat the denial of a COC as dispositive where, during the period between the COC denial and contract award, information probative as to the bidder's responsibility, comes to light for the first time. Precision Electronics Labs and Crawford Development and Manufacturing, *supra*, and 53 Comp. Gen. 344 (1973). Even in those cases, however, we have limited our review to recommending that the agency reassess the bidder's responsibility where such newly available information has not been considered. See, Harper Enterprises, 53 Comp. Gen. 496 (1974), 74-1 CPD 31; Gallery Industries, Inc., B-185263, April 16, 1976, 76-1 CPD 262.

Therefore, IPI's protest is denied insofar as it seeks a review of the contracting officer's initial determination of responsibility.

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We would agree that the contracting officer should make his final determination of responsibility not on the basis of "stale" information, but on the basis of information made available as closely as practicable to the contract award. See 53 Comp. Gen. 344 (1973). At the same time, we do not believe a bidder can reasonably expect the Government to withhold award indefinitely while the bidder attempts to cure the causes for its being found nonresponsive. We believe this is especially true where, as here, the contracting officer's negative determination is affirmed by the SBA's denial of the COC.

Here we have a solicitation which was issued on July 22, 1976 and which closed September 30, 1976. It appears that the contracting officer would have proceeded with an award in early March 1977 had not IPI protested. In view of the time which has elapsed, there is much to be said in favor of permitting the contracting officer to proceed in an orderly fashion with the award of the contract.

We believe that the contracting officer should review all information bearing on IPI's responsibility which has been made available to him as of the date of this decision. This review should be expeditious but thorough, and should be followed closely in time by award to that firm who he determines to be the low, responsive and responsible bidder.

R. J. K. 11/11/77
Deputy Comptroller General
of the United States