

DECISION

Konovitz 24-17

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

FILE: B-208796

DATE: January 19, 1983

MATTER OF: Martin Tool and Die, Incorporated

DIGEST:

1. When small business concern is found to be nonresponsible and the Small Business Administration refuses to issue a certificate of competency, GAO will not review this refusal unless the protester makes a prima facie showing of bad faith or demonstrates that information vital to the nonresponsibility determination was not considered. Alleged confusion of two firms does not constitute bad faith when record shows that separate pre-award surveys were conducted and separate certificates were requested.
2. Protest that agency improperly awarded contract after receiving notice of protest is denied because deficiency is a procedural one that does not affect the validity of the award.

Martin Tool and Die, Incorporated, the second low bidder under a solicitation for practice bombs issued by the Naval Surface Weapons Center, protests the award of a contract to Makco Manufacturing Co., Inc. Martin Tool and Die argues that it was improperly confused with Martin Machine Works, the low bidder for the same contract. Both companies were found nonresponsible, and the Small Business Administration (SBA) subsequently declined to issue a certificate of competency to the protester. We dismiss the protest.

After opening of bids in response to invitation No. N60921-82-B-A024 on May 25, 1982, the Navy requested pre-award surveys on both companies because Martin Machine Works had failed to make timely deliveries under an ongoing contract and it appeared that Martin Tool and Die shared the same labor and facilities. As a result of these surveys, the Defense Contract Administration Services Management Area recommended that no award be made to either

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company, noting that each had deficiencies in production capability, purchasing, subcontracting, labor resources, and ability to meet required schedules. Martin Machine Works was advised of additional deficiencies in its financial capability and performance record.

Since both companies were small businesses, the contracting officer's nonresponsibility findings were referred to the SBA for possible issuance of certificates of competency; however, Martin Machine Works notified the agency that it would not request such a certificate. On August 20, 1982, the SBA advised the contracting officer that it declined to issue a certificate of competency to Martin Tool and Die.

Martin Tool and Die alleges that the contracting officer did not evaluate its own capabilities, but rather found it nonresponsible on the basis of Martin Machine Works' delinquent performance record and inadequate production capabilities and labor resources. Martin Tool and Die maintains SBA was misled by this evaluation.

The Navy, however, maintains that each company was evaluated as a separate legal entity, individual pre-award surveys were conducted, and each company was separately determined to be nonresponsible. However, the contracting officer notes that their sharing of labor and facilities-- or the "physical reality" of the situation--necessarily was considered.

Under 15 U.S.C. § 637(b)(7) (Supp. IV. 1980), the SBA has authority to conclusively determine the responsibility of small businesses by issuing or refusing to issue a certificate of competency. Unless a protester makes a prima facie showing of bad faith or fraud, or demonstrates that information vital to a nonresponsibility determination was not considered, our Office is not empowered to review SBA determinations, to require the SBA to issue a certificate of competency, or to reopen a case when a certificate of competency has been denied. Whitey's Welding and Container Repair, dba Richmond Drydock and Marine Repair, B-202517.2, June 1, 1981, 81-1 CPD 431.

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We do not believe any of the above exceptions applies in this case. Although Martin Tool and Die alleges that the contracting officer and the SBA committed such an error in confusing the two companies as to imply bad faith, the record simply does not support such a finding. Further, we find no evidence that vital information was disregarded in the course of the responsibility determination. We therefore will not consider Martin Tool and Die's protest on this basis.

Additionally, Martin Tool and Die has objected to the fact that the Navy awarded the contract after notice that the protest had been filed. The Navy, however, states that it was not advised of the protest until 4 p.m. on the day of award. In any event, a deficiency of this type is a procedural one that does not affect the validity of the award. Policy Research Incorporated, B-200386, March 5, 1981, 81-1 CPD 172.

The protest is dismissed.

Harry R. Van Cleve
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Acting General Counsel