

DECISION



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

FILE: B-219439 **DATE:** October 28, 1985
MATTER OF: J.R. Youngdale Construction Co., Inc.

DIGEST:

Where a contracting officer refers a nonresponsibility determination to the Small Business Administration (SBA) under the certificate of competency (COC) procedures, and agrees to withhold award until the matter is resolved, award to another firm after receiving advice from the SBA within the agreed-upon time that a COC would be issued was improper. The fact that the contracting officer did not believe the SBA's review was thorough enough is irrelevant, since the SBA's decision on a small business' responsibility is conclusive.

J.R. Youngdale Construction Co., Inc. (Youngdale), protests award to Inland Contractors (Inland) of a contract under invitation for bids (IFB) No. DACA05-85-B-0045, issued as a small business set-aside by the United States Army Corps of Engineers (Corps) to build a dental clinic at Fort Irwin, California. Youngdale contends that the Corps illegally awarded the contract in the face of a decision by the Small Business Administration (SBA) to issue a certificate of competency (COC) to Youngdale. We sustain the protest.

Regulatory Framework

The regulations that govern COC proceedings provide that when a contracting officer determines that a small business concern is not a responsible, prospective contractor, the contracting officer must withhold award and refer the matter to the SBA, the agency authorized by statute (15 U.S.C. § 637(b)(7) (1982)) to certify conclusively as to all elements of a small business concern's responsibility. Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.602-1(a) (1984). The SBA must take specific actions in response to a COC referral within 15 business days, unless the SBA and the contracting agency agree to a longer period. FAR, 48 C.F.R. § 19.602-2(a). If the SBA has not issued a COC

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within 15 business days or such longer time as may have been agreed upon by the agency and the SBA, the contracting officer is authorized to proceed with the acquisition and award the contract to another offeror. FAR, 48 C.F.R. § 19.602-4(c).

Further, where the amount of the contract exceeds a specified amount,^{1/} the SBA Regional Office must refer a recommendation to issue a COC to the SBA Central Office, FAR, 48 C.F.R. § 19.602-2(b) and 13 C.F.R. § 125.2(f) (1985), and so notify the contracting officer. FAR, 48 C.F.R. § 19.602-2(a)(3). The regulations provide that if the Central Office concurs with the Regional Office's recommendation, the Central Office is to notify the contracting officer of its decision by telephone, followed by written confirmation. FAR, 48 C.F.R. § 19.602-3(b). If the agency intends to appeal the decision of the Central Office, the agency must notify the Central Office within 10 business days after receipt of the written confirmation. FAR, 48 C.F.R. § 19.602-3(c).

Facts

Youngdale submitted the lowest responsive bid, as disclosed at the March 6, 1985, bid opening, in the amount of \$2,373,379. Because the preaward survey indicated that Youngdale's performance had been deficient on 7 of the last 11 government contracts exceeding \$1,000,000 listed by the firm, the contracting officer found Youngdale lacking in perseverance and tenacity and, therefore, nonresponsible. On April 22, the contracting officer referred the unfavorable determination to the SBA for a COC determination, and agreed to withhold award until May 24, so that the SBA could complete its review.

After consideration of the application for a COC the SBA Regional Office, by letter of May 22, notified the contracting officer that the Regional Office intended to recommend to the Central Office that the COC be issued, and enclosed a copy of the minutes of the COC Committee meeting setting forth the reasons for the favorable recommendation. In a telephone conversation on May 24, the last day of the

^{1/} The amount stated in the FAR is \$500,000, whereas the SBA's regulations in 13 C.F.R. set the amount at \$2,000,000.

agreed-upon period for the SBA to complete its review, the contracting officer advised the SBA Regional Office that he did not agree with the proposed recommendation and that factual errors existed in the minutes of the Committee meeting. On May 30, the contracting officer sent a letter to the SBA Regional Office setting forth in detail his disagreement with that office's recommendation, and requested the Regional Office to suspend action and refer the case to the Central Office. The contracting officer also stated that Inland had extended its bid acceptance period until June 20 (so had Youngdale), and "in order not to further tie up their bonding capability, and thus prevent them from competing for other opportunities, I request an expeditious decision."

By letter of June 11, the Regional Office advised the contracting officer that the matter had been forwarded to the Central Office for final disposition. The letter further advised that the time limit for processing the COC "is held in abeyance" pending a final decision.

The record shows that on June 18, the SBA Central Office notified the contracting officer that it did not have time to review the evidence and would issue the COC. In a letter of June 20, the SBA Central Office advised the contracting officer that the SBA Regional Office had been informed by the Los Angeles District Office of the Corps that the Corps wanted to appeal the SBA's action, and stated that the case was placed in "suspense" pending possible appeal within the required 10-day period. The contracting officer did not reply to this letter, but awarded the contract to Inland on June 26.

Protest

Youngdale and the SBA, which supports Youngdale's protest, argue that by his actions on and after May 24 the contracting officer effectively agreed to withhold award until the SBA Central Office reached its decision, and that the award to Inland thus violated the COC regulations since the regulations contemplate that the contracting officer will adhere to such agreements. The Army, however, contends that the contracting officer only agreed to withhold contract award for the issuance of a COC until May 24, and was not required by the FAR to withhold award after that date. The Army asserts that the notice required by FAR, 48 C.F.R. § 19.602-3(b), of an intent to issue the COC was

not received from SBA, and states: "Having concluded that no one from SBA had or would undertake even to check on Youngdale's current performance record, the Contracting Officer awarded a contract to the next low bidder"

Discussion

In our view, the award to Inland despite the SBA Central Office's June 18 telephone advice to the contracting officer was improper.

We do not agree with Youngdale or the SBA that the contracting officer at any time agreed to withhold award indefinitely, to await a Central Office decision. As we have pointed out in the past, the regulations do not require the contracting officer to do so, Diesel Energy Systems Co., B-203781, July 8, 1981, 81-2 C.P.D. ¶ 24; instead, they only contemplate withholding an award for 15 days or a period mutually agreed to by the agencies. FAR, 48 C.F.R. § 19.602-2(a). It is clear from our analysis of the record that the contracting officer in this case never made the agreement the SBA seems to have inferred from his actions.

Nevertheless, and notwithstanding the Army's position as to what the contracting officer could have done--award to Inland--on May 24, when the agreed-upon time for COC issuance expired, we think it is clear that the contracting officer's actions after that date did reflect an agreement to extend the time, at least to June 20, when bids were to expire, and conceivably to June 26, the actual award date. The contracting officer's letter of May 30 requested an expedited decision because bids would expire on June 20, and the contracting officer even solicited further bid extensions, to July 20, when he became worried that the COC matter would not be resolved on time; clearly, he did contemplate withholding award at least into June.

Under these circumstances, we would be inclined to condone award to Inland if the SBA Central Office did not resolve the matter before the award was made. As stated above, however, on June 18 the SBA Central Office notified the Corps that it would issue a COC. This notice is reflected in a list prepared by the Corps on June 20 of "Significant Events Regarding the Non-Responsible Determination Found on J.R. Youngdale," which includes the June 18 entry: "L.A.D. C.H. P&S informed Central Office does not have time to review package and that they will issue COC." Further, the next entry on the list is "L.A.D.

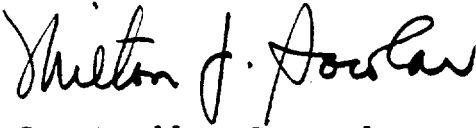
gets 30 day bid extension from low & 2nd low. Bids now expire on 20 July - L.A.D. + OCE prepare to appeal to next higher level when COC is issued."

The June 18 advice to the contracting officer clearly was, in our view, the preliminary telephone notice of the SBA Central Office's decision contemplated by FAR, 48 C.F.R. § 19.602-3(b). It thus is clear from the record that by June 18 the contracting officer knew precisely what the Central Office's position was, in the form of this initial telephone notification: to issue Youngdale a COC. Indeed, while it is not clear on the record, the contracting officer may well have had in hand the SBA's June 20 confirming letter when he made the award on June 26. In this regard, we recognize that the letter did not state expressly that a COC was issued, but instead mentioned "proposed issuance" and the Corps' appeal rights. Nevertheless, we think it is elevating form over substance to suggest, in view of the June 18 notice and the letter's content, that the contracting officer thought the Central Office really had not yet decided the matter, or that the fact that he did not actually have a written COC in hand was sufficient, under the regulations, to justify award to Inland.

Thus, whether the time period for SBA review ended on June 20 or June 26, by June 18 the contracting officer knew the Central Office's position. We think it apparent that his decision to award to Inland was based not on the lack of the Central Office decision contemplated by the procurement regulations, but on his disagreement with it. As the Corps reports (as quoted once above): "Having concluded that no one from SBA had or would undertake even to check on Youngdale's current performance record, the Contracting Officer awarded a contract to the next low bidder" While the governing regulations afford a contracting agency the option to appeal an SBA decision, neither the law nor the regulations give the agency the option to disregard a COC decision because the agency is concerned about the thoroughness or depth of the SBA's deliberations. The law is clear that the SBA has the conclusive authority in this area. 15 U.S.C. § 637(b)(7); FAR, 48 C.F.R. § 19.602-4.

Consequently, award to Inland in the face of the advice from the Central Office that Youngdale would be issued a COC was improper. The protest is sustained.

In view of the SBA's decision, and absent any appeal by the Corps under FAR, 48 C.F.R. § 19.602-3(c), we recommend that the contract with Inland be terminated for the convenience of the government, and that a contract be awarded to Youngdale.

for 
Comptroller General
of the United States