



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Airports Unlimited, Inc.
File: B-222324.2
Date: July 25, 1986

DIGEST

1. Dismissal of protest for failure to furnish a copy to the contracting officer within 1 day of filing with the General Accounting Office (GAO) is not warranted where, as here, the protester pursued its protest with the agency so the contracting officer had actual knowledge of the grounds which formed the basis of the protest and the protester, whose agency level protest was never addressed by the agency, could have timely refiled the protest with GAO when its agency level protest was later denied.
2. Where a contracting officer refers a nonresponsibility determination to the Small Business Administration under the certificate of competency procedure, the contracting officer is required to withhold award for 15 business days.
3. Certificate of competency referral is received by the Small Business Administration (SBA) for purposes of calculating the 15-day period for withholding award when the referral letter is received in the cognizant SBA Regional Office. Post Office receipt of delivery is better proof of receipt than date stamp on referral letter or office log of correspondence received.
4. The Small Business Administration (SBA) has conclusive authority to review a contracting officer's nonresponsibility determination by issuing or refusing to issue a certificate of competency (COC). The General Accounting Office (GAO) generally will not review a contracting officer's nonresponsibility determination since such a review would be tantamount to a substitution of its judgment for that of the SBA. While GAO has reviewed nonresponsibility determinations relating to small business bidders where the SBA refused to review the determination or where the nonresponsibility determination was not referred to the SBA, it will not review a nonresponsibility determination where SBA reviewed the matter but simply failed to issue a timely COC.

DECISION

Airports Unlimited, Inc., protests the award of a contract to We Try Harder, Inc., under invitation for bids (IFB) No. FAPM-V5-67812-S, issued by the General Services Administration (GSA) for leasing an indefinite quantity of five different types of automobiles. Airports contends that

GSA illegally awarded the contract before time had expired for the Small Business Administration (SBA) to issue a certificate of competency (COC) to Airports. We deny 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) (1985). Unless the SBA and the contracting agency agree to a longer period, the SBA must take specific action in response to a COC referral within 15 business days. FAR, 48 C.F.R. § 19.602-2(a). The contracting officer is authorized to proceed with the acquisition and award a contract to another offeror, if the SBA fails to issue a COC within 15 business days or within such longer time as may have been agreed upon by the agency and the SBA. FAR, 48 C.F.R. § 19.602-4(c).

Facts

The solicitation, issued on November 4, 1985, contained five line items. When bids were opened on December 5, Airports was the apparent low bidder on line items 1, 3, 4 and 5. Based on this a preaward survey was requested to determine that firm's responsibility to perform the contract at an estimated award amount of approximately \$3.9 million. Subsequently, Airports was allowed to withdraw its bid on items 4 and 5. Consequently, on January 22, the contracting officer informed the GSA Credit and Finance Office that the estimated award amount for the preaward survey should be adjusted downward to \$1.3 million since Airports was only eligible for award of items 1 and 3.

On January 27, the contracting officer received the GSA Credit and Finance Office's recommendation that no award be made to Airports because that firm lacked financial responsibility. Since Airports is a small business, on February 13 the contracting officer forwarded by certified mail the nonresponsibility determination to SBA's New York Regional Office for consideration under the COC procedures. On February 21, the contracting officer received the return receipt for the referral letter, signed and dated as having been received by SBA on February 18.

During a series of phone calls between GSA and officials in SBA's New York Regional Office, a dispute arose as to the date that SBA received the COC referral. The contracting officer, based on the return receipt, believed that the referral was received by SBA on February 18, and thus argued that the 15 days for SBA consideration of the referral

was to expire on March 11. SBA officials, however, advised GSA that they did not receive the referral until February 19, so the 15-day period was to expire on March 12. GSA officials also denied an SBA request for an extension of the 15 days, arguing that it was imperative that award be made as soon as possible because the manufacturers' cut-off dates for current model year vehicle orders under the contract were only 2 weeks away and orders had to be placed by customer agencies before those dates. Finally, on March 11, GSA officials informed SBA that GSA would proceed with award to the next low bidder if a written notice of SBA's intention to issue a COC was not received by GSA by the close of business that day. During the conversation the record shows that SBA indicated to GSA that it had not decided whether it would issue Airports a COC.

According to GSA, on March 11, at approximately 4:45 p.m. (after the contracting office closed at 4:30 p.m.), since no notice of a COC was received from the SBA, the contracting officer awarded a contract to We Try Harder for items 1, 2 and 3. On March 12, at approximately 4:00 p.m., the Regional Coordinator of the SBA's New York Regional Office called and informed the contracting officer that SBA was going to issue Airports a COC. The contracting officer responded that award had already been made to the next low bidder since notice was not received from SBA within the 15-day timeframe prescribed by the regulations. GSA also states that it received a wire from SBA on March 13, at 9:58 a.m., indicating that a COC had been issued to Airports.

Protest

Airports' argues that GSA illegally awarded the contract on March 11 before the expiration of the required 15 days for SBA consideration of the COC and that the SBA's March 12 phone call to the contracting officer notified GSA of the issuance of a COC within the required 15-day referral period.

Airports maintains that GSA's February 13 referral letter was not received by SBA until February 19, so that the 15-day period for SBA consideration of the COC lasted through March 12. In support of its position, Airports has submitted affidavits of two officials responsible for COC referrals in SBA's New York Regional Office. Both affidavits state that the contracting officer's referral letter "was received by the New York Regional Office on February 19, 1986." The SBA officials refer to a copy of a mail log and a copy of GSA's February 13 referral letter with a dated receipt stamp. The mail log contains a handwritten entry for Airports' COC referral which indicates that the referral was received on February 19. The copy of the February 13 referral letter submitted by the protester has a receipt stamp but the date is illegible; only the digit "9" is visible, although the affidavit from one SBA official states that "the original clearly shows February 19 as the stamped date." From this evidence, Airports concludes that the 15 days for SBA's decision on the COC began with the receipt of GSA's letter on February 19 and that GSA was prohibited from making the award until after March 12. Airports

further maintains that the phone call from SBA to the contracting office on March 12 notified GSA that a COC had been issued within 15 days after the referral from SBA, as required by FAR, 48 C.F.R. § 19.602-2(a).

Alternatively, Airports requests that we reverse GSA's nonresponsibility determination, since according to the protester, that initial determination was erroneously based on an incorrect contract value.

Procedural Issue

As a preliminary matter, GSA urges us to dismiss the protest because Airports failed to comply with section 21.1(d) of our Bid Protest Regulations which requires that a copy of the protest be furnished to the contracting officer within 1-day after the protest is filed with our Office 4 C.F.R. § 21.1(d) (1986). Although the protester says that it sent a copy of its protest to the contracting officer, GSA did not receive a copy of the protest until March 27, 6 working days after the protest was filed in our Office on March 19.

We initially dismissed the protest on March 25 because GSA informed us that it had not received a copy of the protest as required by 4 C.F.R. § 21.1(d). We subsequently reopened the protest because we found out that Airports had also pursued its protest with the contracting officer. Although the contracting officer may not have timely received a copy of the submission filed with our Office, he had received a timely agency level protest on substantially the same grounds 2 days after the protest was filed with our Office. The contracting officer had not responded to Airports' agency level protest. Since Airports' protest to GSA was still pending, the protester could have timely refiled its protest with this Office and complied with the 1-day rule if its agency level protest was later denied. Thus, a dismissal in these circumstances would have constituted a technicality which would not have served a useful purpose. See Dixie Box & Crating, B-221866, May 21, 1986, 86-1 CPD ¶ 475. We think that we correctly reopened the protest and therefore will consider its merits.

Discussion

We first consider Airport's contention that the COC referral from GSA was not received until February 19. There is nothing in the FAR defining when receipt of the notice of a COC referral occurs. FAR, 48 C.F.R. § 19.602. In the absence of a specific definition, we conclude that a COC referral is received for the purpose of establishing the 15-day period when the agency letter is actually received in the cognizant SBA Regional Office. See, for example, Bid Protest Regulations, 4 C.F.R. § 21.2(b).

The certified return receipt, which was attached to GSA's February 13 referral letter, indicates that the letter was received by the SBA on February 18. The return receipt, which shows that the addressee was the "Asst. Reg. Adm. for Regional Programs, Small Business Admin. 26 Federal Plaza, Room 29-118, New York, N. Y. 10007," has on it a February 18, 1986, delivery date. In the receipt's signature blank is a signature that is not entirely clear, although not completely illegible. The first initial is clearly an "R" while the last name begins with an "L" and has 3 or 4 letters.

While the protester speculates that the return receipt card must have been signed, dated and returned on February 18, by someone in a central mailroom for federal agencies at the Federal Plaza Building, the evidence submitted by Airports--affidavits of SBA officials, the SBA mail log and the date stamped copy of GSA's referral letter--does not refute the February 18 date on the return receipt. This evidence, in fact, is not inconsistent with the routing of GSA's referral letter to the responsible SBA officials after receipt in the Regional Office on February 18. For instance, the mail log submitted by the protester, which indicates receipt of the referral on February 19, lists only COC referrals and no other mail, so it actually appears to be a log for COC referrals in the particular SBA section responsible for COC processing in the SBA's New York Regional Office. If that is the case, the log merely indicates receipt of the Airports referral by the responsible SBA section on February 19, and does not preclude receipt by the SBA Regional Office on the previous day.

Similarly, the stamp on the letter does not show that the letter was not received by the SBA mailroom. In fact, we are informally advised by our New York Regional Office, which is located in the same building as the SBA Regional Office, that there is no central mailroom serving the entire building but that each agency's mail is delivered to its own office.

We conclude then, that GSA's referral was received by the SBA Regional Office on February 18. Since GSA did not agree to an extension for COC processing^{1/}, the SBA had 15 days to issue a COC after receipt of the referral. FAR, 48 C.F.R. § 19.602-4(c). Since the SBA's time for processing the referral expired on March 11 the contracting officer was free to award the contract to the next low bidder when the COC was not issued on or before that date.

Finally, Airports states that since it was effectively deprived of its right to have SBA consider the matter, our Office should review GSA's

^{1/} The decision whether to grant an extension for processing a COC is within the contracting agency's discretion. General Painting Co., Inc., B-219449, Nov. 8, 1985, 85-2 CPD ¶ 530.

initial nonresponsibility determination. The SBA, however, has conclusive authority to review a contracting officer's nonresponsibility determination by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7). We will not generally review a contracting officer's nonresponsibility determination relating to a small business bidder, since such a review would be tantamount to a substitution of our judgment for that of the SBA. Aero Engineering Corp., B-219745, Sept. 24, 1985, 85-2 CPD ¶ 331. Our Office generally limits its review of the COC process to cases in which the protester shows either possible fraud or bad faith on the part of the contracting officer or where SBA failed to consider vital information bearing on the bidder's responsibility. Id. As the protester notes, we have, however, reviewed agency determinations of nonresponsibility because the SBA refused to review the COC referral, General Painting Company, Inc., B-219449, supra, or because the nonresponsibility determination was not referred to the SBA. See C.W. Girard, C.M., 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704. Here, however, the SBA reviewed GSA's nonresponsibility determination regarding the protester but simply failed to issue a COC within the required time. Under these circumstances, we will not review the nonresponsibility determination. Security Unlimited Enterprises, Inc., B-199860, B-199907, Dec. 10, 1980, 80-2 CPD ¶ 421.

The protest is denied.

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