



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Ferrite Engineering Labs

File: B-222972

Date: July 28, 1986

DIGEST

1. The General Accounting Office will not review an allegation concerning a contracting officer's negative responsibility determination of a small business concern where the small business fails to file an acceptable application for a certificate of competency with the Small Business Administration.
2. Bad faith on the part of contracting officials and the Small Business Administration (SBA) is not demonstrated where record shows that contracting and preaward survey agencies had a reasonable basis for finding protester nonresponsible and that the SBA, after giving protester additional time to file for a certificate of competency (COC), closed its file because the COC application ultimately filed was inadequate.

DECISION

Ferrite Engineering Labs protests the rejection of its bid under invitation for bids (IFB) No. DAAB07-85-B-B234, issued by the U.S. Army Communications-Electronics Command (CECOM), Fort Monmouth, New Jersey, on the basis that Ferrite is a nonresponsible bidder.

We deny the protest.

The solicitation, issued as a total small business set-aside, sought bids for 54 coaxial circulators for use with a "tropo-scatter" radio that can circumvent atmospheric disturbances. Four firms submitted bids by the August 27, 1985 opening date. Ferrite, at \$13,392, was the apparent low bidder. In connection with an in-house responsibility determination, CECOM personnel contacted the Defense Contract Administration Services Management Area (DCASMA), Pittsburgh, Pennsylvania. DCASMA forwarded to CECOM information concerning a May 1985 review of Ferrite conducted in connection with another acquisition which stated that Ferrite had a 100-percent delinquency rate for current and past performance and that it did not have the ability to meet the required delivery schedule. The contracting officer, relying on this information, concluded that Ferrite did not have a present capability to perform the contract. CECOM referred this negative responsibility determination to the New York regional office of the Small Business Administration (SBA) on January 21 under the certificate of competency (COC) procedures. The SBA on January 30 requested a formal preaward survey of Ferrite.

The survey, conducted by the DCASMA, Buffalo, New York, and completed on March 7, found Ferrite's production capability, quality assurance, and prior performance history to be unsatisfactory. Specifically, the survey team, in confirming that Ferrite would be unable to produce or deliver the items in accord with the required delivery schedule, cited the poor and antiquated condition of Ferrite's equipment, a failure to provide plans for testing, an inadequate purchasing system, a lack of managerial capability, and a record of failing to complete contracts on time. The contracting officer, in view of this report, again concluded that Ferrite was nonresponsible and, on March 17, referred this determination to the SBA for final resolution. Although the SBA granted Ferrite a 3-day extension to file for a COC, Ferrite submitted an unacceptable application, and the SBA consequently closed its file on the matter on April 14.

In its protest, Ferrite contends that the negative responsibility determination is part of a pattern of continuous discriminatory and prejudicial treatment, citing CECOM's actions in procurements for which Ferrite has competed since 1980. In the present case, Ferrite states, this prejudicial treatment is shown by CECOM's insistence on a preaward survey, which normally would be conducted only for contracts exceeding \$25,000. Here, the proposed contract value was less than \$14,000 and, according to Ferrite, covered an item that Ferrite had produced for CECOM in 1983. Considering these two factors, Ferrite contends that the sole purpose of the survey was to provide a basis for disqualifying it.

Ferrite further alleges that the DCASMA, Buffalo acted in collusion with CECOM. In this regard, Ferrite states that the justification for the nonresponsibility determination is without foundation. For example, Ferrite points out that while the survey team concluded it was not capable of producing the 54 circulators in the prescribed period, in actuality, it had produced more than 600 microwave components during the past 13 months. Finally, Ferrite questions the SBA's refusal to grant it a COC, arguing that it did not receive the application until the day before it was due, but that it prepared the required financial statements in accord with acceptable accounting procedures.

A small business firm contesting a negative responsibility determination is responsible for filing a complete and acceptable COC application in order to avail itself of the possible protection provided by statute against unreasonable or bad faith determinations of responsibility. See L.A. Spievak Corp., B-216535, Nov. 26, 1984, 84-2 CPD ¶ 556. The SBA has conclusive authority to determine the responsibility of small business concerns by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7) (1982). Where, as here, a firm files an unacceptable application, we do not review the agency's determination of nonresponsibility, since such action would be substituting our Office for the agency specifically authorized by statute to perform such a review. See Kos Kam, Inc., B-221806, May 14, 1986, 86-1 CPD ¶ 460, aff'd on reconsideration, June 11, 1986, 86-1 CPD ¶ ____; Darian Industries, Inc., B-221128, et al., Apr. 24, 1986, 86-1 CPD ¶ 401.

As to the implication of Ferrite's allegations that government officials have acted in bad faith, there simply is no basis for us to conclude that such is the case.

First, the record does not show that the contracting officer acted improperly. The contracting officer was required by regulation to consider Ferrite's responsibility, Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.407-2 (1985), and he acted properly in not originally requesting a preaward survey, as the cost of the contract was estimated to be less than \$25,000. See FAR, 48 C.F.R. § 9.106-1(a). Further, once an initial determination of nonresponsibility had been made, the referral to the SBA and its request for a formal preaward survey were both mandated by regulation. FAR, 48 C.F.R. §§ 19.602-1, 9.106-1.

Second, the record does not support Ferrite's view that the DCASMA personnel assigned to this case acted in bad faith. The preaward survey indicates that DCASMA reviewed all available, pertinent information and drew reasonable conclusions about Ferrite's ability to perform. Finally, with regard to the SBA's refusal to issue a COC, Ferrite has provided no evidence of any improprieties. While it is unfortunate that the COC application form did not arrive earlier, there is no allegation here that the SBA intentionally delayed mailing the forms to Ferrite, and, assuming therefore that the form was mailed when it should have been, the late delivery does not in any way establish bad faith. (We note that the government is not an insurer of their prompt delivery. Cf. Simco, Inc., B-222294, Apr. 16, 1986, 86-1 CPD ¶ 376 [risk of nonreceipt of a solicitation amendment rest with the bidder].) Moreover, since the record indicates that the SBA allowed 3 additional days for the firm to provide information concerning its current financial capability, the SBA appears to have made an effort to alleviate the late delivery. Ferrite certainly has not shown that the SBA acted in collusion with CECOM to deny it a COC.

As for Ferrite's allegations concerning earlier procurements, we cannot consider them, since our Bid Protest Regulations are reserved for considering the propriety of particular awards. Each procurement action is a separate transaction, and the action taken under one is not relevant to the propriety of the action taken under another for purposes of a bid protest. See Clousing Machine Tools, B-216113, May 13, 1985, 85-1 CPD ¶ 533.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel