



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cosmodyne, Inc.
File: B-224009
Date: November 18, 1986

DIGEST

1. Allegation that agency's preaward survey and determination of nonresponsibility is in error will not be reviewed by the General Accounting Office since Small Business Administration (SBA) is empowered by statute to conclusively determine whether a small business is responsible, and after consideration of the matter under the SBA's certificate of competency (COC) procedures, the SBA declined to issue a COC.
2. Protest that contracting officer did not give adequate consideration to changed circumstances affecting the protester's responsibility after the Small Business Administration had declined to issue a certificate of competency (COC), is denied where record shows that contracting officer was aware of the new information and determined the offeror still was nonresponsible, and the protester has not shown that the determination was made in bad faith.

DECISION

Cosmodyne, Inc. protests the Air Force's nonresponsibility determination under request for proposals (RFP) No. F41608-85-R-4392 for an estimated quantity of 78 liquid oxygen storage tanks. Cosmodyne argues that the contracting officer ignored current information which shows that Cosmodyne was a responsible offeror at the time of contract award.

We deny the protest.

The RFP was issued on October 22, 1985 as a total small business set-aside. Thirty-two potential sources were solicited and the Air Force received eight offers by the January 3, 1986 closing date. Cosmodyne was the low offeror but because of a prior high delinquency rate, the contracting officer requested the Defense Contract Administration

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Services Management Area (DCASMA) to perform a preaward survey. The preaward survey report was completed on February 25, 1986 and recommended that no award be made because timely performance could not be assured due to deficiencies in Cosmodyne's production control system. The contracting officer then referred the matter to the Small Business Administration (SBA) for its certificate of competency (COC) determination. On April 28, the SBA declined to issue a COC.

Thereafter, the next low offeror was surveyed and although award was recommended, the contracting officer was notified on July 18 by the SBA that this offeror was not a small business and was therefore ineligible for award. A preaward survey was then conducted for Gibson Cryogenics, the third low offeror, and after a positive finding, award was made to that firm on August 14.

Cosmodyne alleges that there were several errors in the Air Force's preaward survey which cast considerable doubt on the Air Force's initial nonresponsibility determination. In addition, Cosmodyne notes that the preaward survey was over 6 months old at the time of contract award and that the contracting officer was aware that the problems which had formed the basis for the negative recommendation had been cured. Cosmodyne indicates that after being advised of its alleged delivery schedule problems, it submitted a corrective action plan to the Administrative Contracting Officer (ACO) under its outstanding contracts on May 23. Cosmodyne states that the contracting officer for this procurement was provided a copy of the plan and was further advised by the ACO, by letters dated July 16 and 21, that Cosmodyne had been removed from the Contractor Improvement Program (CIP) and that the delinquency problems had been eliminated. Cosmodyne argues that the contracting officer clearly had information prior to award which indicated a fundamental change in circumstances and that based on this information, the prior nonresponsibility determination should have been reconsidered. At the very least, Cosmodyne contends that the matter should have been further investigated to resolve the apparent inconsistencies regarding Cosmodyne's responsibility.

The contracting officer indicates that he reviewed all information, including the ACO's July 16 and 21 letters, and decided that the information was insufficient to reverse the prior nonresponsibility finding or request another preaward survey. The contracting officer states that the ACO's two letters only indicated that Cosmodyne had been removed from the CIP program, not that all the deficiencies identified in

the earlier preaward survey had been corrected. Also, the contracting officer contends that he contacted the preaward survey monitor on July 30 to discuss the effects of the ACO's July 21 letter, and was advised that the letter was not intended to reverse the prior negative recommendation nor were there any assurances that the action taken by Cosmodyne had corrected the deficiencies. The Air Force also notes that award had already been delayed twice before because of referrals to the SBA and that a further delay based on the additional information submitted by Cosmodyne was not warranted. The Air Force argues that the very latest information was thoroughly reviewed and that the contracting officer's nonresponsibility determination was reasonable.

We note that we find no basis to consider Cosmodyne's challenge to the Air Force's initial nonresponsibility determination. Although Cosmodyne argues that there were several errors in the Air Force's preaward survey, the SBA, not our Office, has the statutory authority to review a contracting officer's finding of nonresponsibility and the SBA's determination to issue or refuse to issue a COC is conclusive with respect to all aspects of a small business concern's responsibility. 15 U.S.C. § 637(b) (1982); Federal Acquisition Regulation, 48 C.F.R. subpart 19.6 (1985); Bldg. Maintenance Specialists, B-220966, Jan. 14, 1986, 86-1 CPD ¶ 39. Moreover, to the extent Cosmodyne considered the Air Force's determination incorrect, it was incumbent on Cosmodyne to submit all relevant information and prove through its COC application to the SBA that it is responsible. Sealtech, Inc., B-221584.3, Apr. 16, 1986, 86-1 CPD ¶ 373. Cosmodyne had this opportunity in making its application for a COC and after due consideration, the SBA refused to issue a COC.

With respect to the Air Force's consideration of the additional evidence submitted by Cosmodyne, we have stated that a contracting officer should reconsider an initial negative determination when two conditions are present: 1) there is ample time for the review; and 2) there occurred a material change in a principal factor on which the initial determination was based. Camel Mfg. Co.--Request for Reconsideration, B-218473.4, Sept. 24, 1985, 85-2 CPD ¶ 327. Furthermore, we have encouraged contracting officers to reconsider a finding of nonresponsibility even after the SBA's refusal to issue a COC, where before award, new information becomes available which affects the offeror's responsibility. Inflated Products Co., B-189115, Oct. 31, 1977, 77-2 CPD ¶ 334. However, we will not substitute our judgment for that of the cognizant procuring official, and absent a showing of possible fraud or bad faith, we will not review a contracting officer's determination that a second preaward survey is not warranted or that the prior nonresponsibility determination remains valid. Id.

Cosmodyne questions whether the contracting officer contacted the preaward survey monitor about the new information. Cosmodyne argues that it had been in close contact with both the contracting officer and the preaward survey monitor, and that if the alleged July 30th conversation took place, it would have been relayed to Cosmodyne. Furthermore, Cosmodyne states that it tried to telephone the preaward survey monitor on July 29 or 31 but was told that he would be unavailable until the following week.

The record contains a "Memo to File" dated July 30 and signed by the contracting officer detailing the conversation with the preaward survey monitor. Since contracting officials are presumed to act in good faith, a protester questioning the veracity of a contracting officials' statements to our Office must provide "hard facts" to support its charge. Scipar, Inc., 220645, Feb. 11, 1986, 86-1 CPD ¶ 153. In our view, the circumstantial evidence presented by Cosmodyne to support its position does not provide a sufficient basis for our Office to question the contracting officer's statement on this matter.

Cosmodyne also argues that the preaward survey monitor was in no position to discuss the intent of the ACO's letters, and that if the contracting officer questioned the significance of the letters, he had a duty to obtain reliable updated information, presumably from the ACO himself. Our review is limited to determining whether the contracting officer had evidence from which he reasonably could conclude that Cosmodyne still had not demonstrated its responsibility; the quality of the evidence, and the weighing of that evidence, was a matter for the judgment of the contracting officer, not our Office. See Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Since there is no showing of possible fraud or bad faith, we will not question the contracting officer's judgment.

Finally, Cosmodyne alleges that Gibson Cryogenics has filed for bankruptcy. The mere fact that a contractor is undergoing bankruptcy does not require a finding of nonresponsibility, and whether Gibson Cryogenics ultimately performs in accordance with contract requirements is a matter of contract administrative which is not for review under our bid protest function. See James S. Scroggins & Co., B-213363, Apr. 17, 1984, 84-1 CPD ¶ 429.

The protest is denied.


Harry R. Van Cleve
General Counsel