



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: The Pepperdine Corporation

File: B-225490

Date: December 24, 1986

DIGEST

1. General Accounting Office generally will not review the Small Business Administration's denial of a certificate of competency (COC) unless the protester's submission indicates that the action may have been the result of fraud, bad faith, or failure to consider information vital to the decision regarding issuance of the COC.
2. Where a small business concern is found nonresponsible, the contracting officer must refer the matter to the Small Business Administration (SBA); however, there is no regulation requiring the contracting officer to notify the bidder of the referral. Rather, this is the SBA's responsibility.
3. Responsibility determinations are administrative in nature, and they do not require the procedural due process--notice and an opportunity for a hearing--that is necessary in judicial proceedings. Thus, the Small Business Administration's failure to provide protester with a specific opportunity to challenge complaints regarding poor prior performance is not a denial of due process.
4. Although the Federal Acquisition Regulation requires the contracting officer to notify unsuccessful bidders "promptly" of award, it does not specify a particular time. When a protester learns of award and protests within 10 calendar days, so that it can take advantage of the statutory "stay" provision, the agency's alleged failure to notify the protester of award is not prejudicial.

DECISION

The Pepperdine Corporation protests the award of a contract to Virtexco Corporation under invitation for bids (IFB) No. N62470-83-B-6979, issued by the Naval Facilities Engineering Command for additions to a building at the Naval Air Station, Norfolk, Virginia. Pepperdine, a small business, states that it was the apparent low bidder, but that the Navy found it nonresponsible and the Small Business

037673

Administration (SBA) declined to issue a certificate of competency (COC). The protester alleges that these actions constituted a denial of due process, as well as bad faith on the part of government officials. We dismiss the protest.

The record indicates that the Navy referred the question of Pepperdine's responsibility to the SBA by letter dated September 9, 1986. The letter advised SBA that the Navy recommended against issuance of a COC based on Pepperdine's prior unsatisfactory performance in the areas of timeliness, management, compliance with labor standards, and quality. The Navy included in the referral to the SBA copies of the IFB, an abstract of offers, and numerous Construction Contractor Performance Evaluation Reports for past Pepperdine contracts.

By letter of October 3, the SBA's Philadelphia Regional Office notified Pepperdine that the Navy had found it nonresponsible. The SBA offered the firm an opportunity to apply for a COC and explained the application procedure. The SBA also alerted Pepperdine that the firm had the responsibility to demonstrate its competency in order to obtain affirmative certification by the SBA. By letter dated November 4 to the agency, the SBA declined to issue a COC, stating that its decision was based upon a comprehensive analysis of all available information. On November 4, the agency awarded the contract to Virtexco.

In its protest, Pepperdine primarily complains that its due process rights were violated by the referral of the responsibility question to the SBA, and by the agency's and SBA's failure to give Pepperdine adequate notice of the basis for the nonresponsibility determination and an opportunity to respond. The protester contends that the SBA's notification to it referred only to the firm's financial capacity and credit, and not to past performance.

Pepperdine also alleges that the agency and SBA failed to notify it of the COC denial. Pepperdine states it learned of the award to Virtexco on November 13 during an unrelated telephone conversation with agency personnel. Additionally, the protester questions the agency's award of the contract on November 4, 3 days before the date the protester alleges was agreed upon by the Navy and SBA for the SBA to complete its review. According to Pepperdine, under these circumstances the "hurried" award constituted bad faith by contracting officials. Finally, the protester maintains that the agency did not properly document the contract file.

Our Office does not generally review SBA decisions to issue or not to issue a COC, since by statute SBA has conclusive authority to rule on the responsibility of small business concerns. 15 U.S.C. § 637(b)(7)(A) (1982). Accordingly, our Office will review COC determinations only when a protester's submission indicates that the action may have been taken fraudulently or in bad faith or that the SBA disregarded information vital to a responsibility determination. Cal Pacific Fabricating, Inc., B-214946, May 22, 1984, 84-1 CPD ¶ 552; JBS Construction Co., B-187574, Jan. 31, 1977, 77-1 CPD ¶ 79. Here, we do not believe that the protester has made the requisite showing.

First, under the Federal Acquisition Regulation (FAR), upon determining and documenting that a small business lacks certain elements of responsibility, the contracting officer must (1) withhold award and (2) refer the matter to the cognizant SBA regional office. 48 C.F.R. § 19.602-1(a) (1985). Second, once a nonresponsibility determination is made, the FAR imposes no duty on the contracting officer with respect to notification of the bidder. Rather, it is the SBA's responsibility to notify the bidder and provide it with an opportunity to apply for a COC. 48 C.F.R. § 19.602-2(a)(1).

Although the protester alleges that SBA did not inform it that its prior performance record was in question, we believe Pepperdine should have known that this was likely. As indicated above, the Navy's letter of referral to the SBA under the COC procedures included Construction Contractor Performance Evaluation Reports for 11 different Pepperdine contracts. The Navy advised the SBA that these enclosures indicated that the contractor had "consistently performed unsatisfactorily" in the areas of timeliness, management, compliance with labor standards, and quality of work. While Pepperdine may not have been aware at the time of the referral that it included these evaluation reports, and while it may disagree with the Navy's conclusions, it certainly must have been aware from the reports themselves, which should have been provided to it during performance of the earlier contracts, that the Navy found its work unsatisfactory. Since the SBA's statutory authority extends to all elements of responsibility, not merely financial capacity and credit, Pepperdine could not reasonably believe that its prior performance would not be a consideration. Moreover, the burden is on the would-be contractor, and not the government, to establish its responsibility. JBS Construction Co., supra.

As for the alleged lack of due process, the record here indicates that the protester knew that the COC procedure had been invoked and was given an opportunity to demonstrate its responsibility in its application. Due process does not guarantee any particular form of procedure, S.A.F.E. Export Corp.--Request for Reconsideration, B-222308.2, et al., July 8, 1986, 86-2 CPD ¶ 44, and in the context of a COC denial, we have held that the protester is not entitled to anything more in the way of due process than Pepperdine was accorded. See Tri Rivers Ambulance, et al., B-190326, Apr. 18, 1978, 78-1 CPD ¶ 299.


As for the alleged lack of notice from the SBA of the COC denial, the FAR states that upon a negative determination of competency, the SBA's regional administrator is to notify both the contracting officer and the bidder. 48 C.F.R. § 19.606-2(3)(b). Here, the record indicates that the SBA informed the contracting agency of the COC denial by letter dated November 4. While there is no indication as to whether SBA notified the protester, the purpose of notice to the bidder is to inform it of the reasons for the denial and to give it an opportunity to request a meeting with the SBA to discuss them. See 13 C.F.R. § 125.5(g) (1986). Such a meeting is intended to provide the applicant with an opportunity to improve or correct deficiencies for future procurements, and it does not provide a basis for reopening the case. Id. Accordingly, to the extent the SBA failed to notify the unsuccessful bidder here of the COC denial, that is a mere procedural deficiency.

Additionally, the protester alleges that the contracting officer's actions in awarding the contract without notice to Pepperdine demonstrated bad faith. To establish bad faith, the courts and our Office require the presentation of virtually irrefutable proof that government officials had a "specific and malicious intent" to injure the protester. Cal Pacific Fabricating, Inc., supra. Under the Competition in Contracting Act of 1984, an agency is required to suspend contract performance pending resolution of a protest when it receives notice of the protest within 10 calendar days of the date of contract award. 31 U.S.C. § 3553(d)(1) (Supp. III 1985). Although the FAR requires the contracting officer to notify unsuccessful bidders "promptly," it does not specify a particular time. 48 C.F.R. § 14.408-1(a)(1); Delphi Mechanical, Inc., B-220879, Nov. 15, 1985, 85-2 CPD ¶ 561. We therefore do not find that the alleged delay in notification constituted bad faith. Moreover, a lack of notice did not prejudice the protester, who filed with our Office on the 10th calendar day after award, and therefore invoked the statutory "stay" provision.

As for award before the alleged agreed-upon time, the FAR provides that if the SBA has not issued a COC within 15 days (or longer, if agreed to), the contracting officer is free to award the contract to another firm. 48 C.F.R. § 19.602-4(c). While the contracting agency may grant an extension for processing a COC, whether to do so is within the agency's discretion. General Painting Co., Inc., B-219449, Nov. 8, 1985, 85-2 CPD ¶ 530. Here, the period between referral and award was 21 business days. Moreover, the protester has submitted no evidence concerning the alleged agreement to extend the time period for the SBA to issue a COC.

Concerning contract file documentation, the FAR requires that documentation supporting a determination of nonresponsibility, including any preaward survey reports, be included in the contract file. 48 C.F.R. § 9.105-2. Here, the contract file includes both the contracting officer's initial responsibility determination and the SBA's denial of the COC.

In summary, we find Pepperdine has not made the requisite showing of possible fraud or bad faith, or of a failure to consider relevant information that would warrant our review of the COC denial. Consequently, we dismiss the protest under section 21.3(f) of our Bid Protest Regulations without convening the conference requested by the protester, since it is clear that one would serve no useful purpose. Connie Hall Co., B-223440, July 9, 1986, 86-2 CPD ¶ 52.


Ronald Berger
Deputy Associate
General Counsel