

100-211



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Age King Industries, Inc.
File: B-225445.2
Date: June 17, 1987 /

DIGEST

Where the contracting officer refers a nonresponsibility determination to the Small Business Administration (SBA) under the certificate of competency (COC) procedures, and SBA does not notify the agency of its intended issuance of a COC within the prescribed time period, but the contracting officer nevertheless receives such advice from the SBA prior to taking any contract action, the agency is bound by the COC determination and must make award to the low, responsive, responsible bidder as certified by the SBA.

DECISION

Age King Industries, Inc. protests the award of a contract to F&H Manufacturing Corporation under invitation for bids (IFB) No. DLA500-86-B-2090, issued as a small business set-aside by the Defense Industrial Supply Center, Defense Logistics Agency (DLA), Philadelphia, Pennsylvania for 6,000 crank handles. Age King contends that DLA illegally directed F&H, the second low bidder, to resume work under its suspended contract (contract performance had ceased as a result of a prior protest), despite notice from the Small Business Administration (SBA) that the SBA was going to issue a certificate of competency (COC) to Age King, the low, responsive bidder which was therefore entitled to the award.

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

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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) (1986). 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 was issued on June 10, 1986 and established a bid opening date of July 10, 1986. Six bids were received. Age King submitted the low bid of \$15.95 each (approximately \$95,000 total), while F&H was second low with a bid of \$16.95 each (approximately \$101,000 total). In its bid, Age King represented itself as a small business concern and as a regular dealer in the supplies offered. Age King did not check the box in the solicitation to indicate that it was a manufacturer of the supplies or that the supplies would be manufactured by a small business concern. However, elsewhere in the solicitation, Age King did list its own plant in Chicago, Illinois as the location of the manufacturing facility where the supplies would be produced. On August 19, 1986, Age King sent a letter to the contracting officer stating that Age King was a manufacturer and that its failure to check the appropriate box in the solicitation was a clerical error.

Subsequently, a pre-award survey was performed and the survey officials, in a report dated September 5, 1986, found Age King to be satisfactory in technical capability, quality assurance capability, financial capability and packaging capability but recommended that no award be made to the firm because of unsatisfactory production capability (the survey team found that Age King could not meet the 180-day delivery schedule due to the lead time required for castings). Shortly thereafter, on September 30, 1986, the contracting officer rejected the F&H bid as nonresponsive "due to ambiguities [about its manufacturing status] which cannot be resolved from the face of the bid." The contracting officer then awarded the contract to F&H on October 10, 1986.

Age King was informed of the rejection of its bid and the award to F&H in late October 1986, and protested to our Office on October 31, 1986. In its protest, Age King argued that the erroneous representation in its bid that it was

only a regular dealer and not a manufacturer was a minor informality which should be waived and which did not affect the responsiveness of its bid. Age King also requested that DLA suspend performance by F&H and refer the matter of its responsibility to SBA for possible issuance of a COC. On November 12, 1986, DLA suspended performance under the F&H contract because the "protest was received within ten (10) days of [Age King's] learning of the contract award." As a result of the protest, the contracting officer reconsidered his position and decided that Age King's bid was responsive. DLA and the protester then entered into a "settlement agreement" under which DLA would treat the firm's bid as responsive and would refer the matter of Age King's responsibility to SBA for possible issuance of a COC in return for Age King withdrawing its protest which it did on November 26, 1986.

On December 8, 1986, the contracting officer referred the question of Age King's responsibility ("capacity") to the SBA and included in his referral the negative pre-award survey and other information relating to Age King's responsibility that had been generated by DLA. SBA subsequently established, by letter of December 19, 1986, a closing date of January 14, 1987 for a decision by SBA as to the issuance of a COC. This deadline was then mutually extended to January 23, 1987, when, on January 7, SBA also agreed to consider Age King's financial responsibility in its COC determination.

On January 16, 1987, one week before the deadline, an official of the SBA Chicago District Office called the contracting officer and relayed the following information:

"This is to alert you that we are recommending a COC You will receive an official call from SBA Regional Office next week. . . . We have visited the contractor's plant and were able to refute all negative factors. . . . [D]ocumentation to back up a COC . . . will be submitted to the Regional Office for approval of a COC."

There is a factual dispute as to the events that followed. According to DLA, no telephone call or any other form of communication was received by anyone at DLA by January 23, 1987, the closing date. DLA has submitted several affidavits in support of its position from officials who were present at DLA during this period. According to the industrial specialist at the SBA Regional Office, he called the contracting officer on Friday, January 23, 1987 and talked to an unidentified "individual who stated that he was the only one in the office due to a snow storm." The SBA

official allegedly informed this individual of the SBA's intentions and left a message for the contracting officer to call him; this call was never returned. DLA denies that any individual at its office received this message and has submitted the time and attendance records of the contracting officer which show that the contracting officer was present at work on Friday, January 23, 1987 despite the snowstorm.

On January 26, 1987, the following business day, the SBA Regional Office sent the contracting officer a letter stating that the SBA Regional Office intended to issue a COC to Age King. The SBA further stated that Age King had a positive cash flow and established credit and that the firm had assured the SBA that delinquency problems had been resolved. On February 2, 1987, prior to receiving SBA's letter of January 26, DLA was informed by an SBA official by telephone that the letter had been issued by SBA, which intended to issue the COC. In this same telephone conversation, the DLA representative told the SBA official that since SBA had not provided notice of the intended COC prior to the closing date of January 23, DLA would proceed with "award procedures" to another offeror despite the intended issuance of the COC. On the following day, February 3, knowing that SBA had determined Age King to be entitled to a COC, and not previously having taking any contract action in reliance on the missed deadline, DLA directed F&H to resume work under the suspended contract. On this same day, February 3, DLA received the official letter from SBA dated January 26.

ANALYSIS

DLA's sole basis for not awarding the contract to Age King is its contention that SBA missed its deadline of January 23, 1987 for giving notice of its intent to issue a COC to Age King.^{1/} DLA's argument is simple. The SBA was required to inform DLA of its decision by the deadline but did not do so. According to DLA, it was therefore free to direct F&H to resume performance of its contract (the equivalent of an award to another offeror), notwithstanding the fact that, on February 2, 1987, it received notice of the issuance of the COC before it notified F&H to resume performance.

^{1/}While the contract had been initially awarded to F&H prior to DLA's referral of Age King's responsibility to SBA, all parties have treated SBA's consideration of Age King's responsibility as the equivalent of a pre-award COC proceeding, especially in view of the stop-work order that was issued to F&H. We adopt this view.

Generally, after the 15-day or other agreed upon period has expired, the agency can properly make an award to another bidder when the SBA has not acted on the COC. Kan-Du Tool & Instrument Corp., B-210819, June 21, 1983, 83-2 CPD ¶ 12. We agree that SBA did not properly notify DLA before the deadline date. At best, the SBA left a message with an unidentified DLA official and the agency denies ever having received the message. We do not think that this is proper notification. In this regard, the prior SBA district office notification of January 26, that a COC was being recommended to the Regional Office also did not prevent DLA from proceeding with the resumption of F&H's contract where final approval was still required from the Regional Office. See Ken Com, Inc., 59 Comp. Gen. 417 (1980), 80-1 CPD ¶ 294.

However, we do not think that the regulation (FAR, 48 C.F.R. § 19.602-4(c)), permitting the contracting officer to proceed with award if the SBA fails to issue a COC within the agreed timeframe, can be construed to authorize award where the agency has actual notice of the issuance of the COC prior to taking any contract action. Such an interpretation would conflict with the basic responsibility of the contracting officer to make award to the low, responsive, responsible bidder. As stated above, the SBA is authorized by statute to certify conclusively as to all elements of a small business concern's responsibility. Thus, a determination by the SBA to issue a COC is a statutorily authorized finding that a low, responsive small business bidder is responsible and therefore entitled to award. Under sealed bidding procedures, agencies, absent circumstances not present here, are required to make an award, after the bids have been opened, to the responsible bidder that submits the lowest, responsive bid. FAR, 48 C.F.R. §§ 14.404-1(a)(1) and 14.407-1(a). In this regard, information bearing on a bidder's responsibility may be received and considered at any time prior to award. Guardian Security Agency, Inc., B-207309, May 17, 1982, 82-1 CPD ¶ 471. Further, where an agency determines a bidder to be nonresponsive and new material information bearing on the bidder's responsibility becomes available prior to award to another bidder, the agency is required to re-examine its initial nonresponsibility determination in light of the new information received prior to award. Mercury Consolidated, Inc. B-212077.2, Aug. 17, 1984, 84-2 CPD ¶ 186, aff'd upon reconsideration, B-212077.3 et al., Oct. 24, 1984, 84-2 CPD ¶ 459.

We think these principles are applicable here. If the agency, after the SBA misses its deadline, has no notice of the issuance of a COC, it can proceed with award action to the responsible bidder that is eligible for award. However, where, prior to making an award, the agency is informed of

the issuance of a COC albeit after the deadline established, we think that the agency cannot thereafter knowingly award a contract to other than what it knows to be the low, responsive, responsible bidder as certified by the SBA. In short, we do not think that an agency can disregard notice of the issuance of a COC if no award has yet been made and the government is not otherwise materially prejudiced by honoring the COC determination, despite the missed deadline.

Consequently, DLA's resumption of performance under F&H's contract in the face of the advice from the SBA that Age King would be issued the COC was improper. The protest is sustained. We therefore recommend that the contract with F&H be terminated for the convenience of the government, and that a contract be awarded to Age King, absent any appeal by DLA of the Regional Office's COC determination. See J.R. Youngdale Construction Co., Inc., B-219439, Oct. 28, 1985, 85-2 CPD ¶ 473.

for Milton J. Auster
Comptroller General
of the United States