



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: All Seasons Construction & Roofing, Inc.

File: B-230299

Date: June 28, 1988

DIGEST

Protest that procuring agency made award of contract prior to the expiration of waiting period for Small Business Administration consideration of issuance of a Certificate of Competency is sustained. The procuring agency knew SBA was on the verge of completing its review and was likely to issue a COC and yet made the award.

DECISION

All Seasons Construction & Roofing, Inc., protests the award of a contract to Alpha Construction under invitation for bids (IFB) No. DACA63-88-B-0004, a total small business set-aside, issued by the United States Army Corps of Engineers, for construction work. All Seasons alleges that the Army improperly awarded the contract to Alpha before the regulatory 15-day time period for the Small Business Administration (SBA) to consider All Seasons' responsibility under the Certificate of Competency (COC) program had expired.

We sustain the protest.

The regulations governing COC proceedings provide that when a contracting officer determines that a small business 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) § 19.602-1(a) (FAC 84-31). 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 § 19.602-2(a) (FAC 84-12).

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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 § 19.602-4(c) (FAC 84-12).

All Seasons was the low responsive bidder. However, based on a preaward survey, the Corps determined that All Seasons was nonresponsive because of unsatisfactory past performance and lack of capacity, perseverance, tenacity, and integrity. The Corps based the integrity finding on the fact that All Seasons had been debarred from performing contracts for the City of Shreveport, Louisiana because of labor problems and falsifying payroll records. On January 27, 1988, the Corps hand-carried the nonresponsibility determination to the SBA for review under the COC program. Because the referral lacked what SBA considered pertinent information for the integrity finding, the SBA requested the Corps to furnish a copy of the document regarding the City's debarment action, which was provided on February 1, 1988. In a letter dated February 4, 1988, the SBA informed the Corps that February 18, 1988, was the expiration date for the 15-day COC review period.

The SBA, which has filed comments in support of the protest, and the Corps differ on what occurred during the COC process. The Corps reports that on February 18, when contacted, the SBA advised that the expiration date for the COC review period had been changed to February 23, 1988, because the supporting information for the integrity finding was not received by SBA until February 1. The record reflects that a letter to this effect, dated February 18, 1988, was also sent to the Corps reflecting the change in the review period. The Corps advises that at no time did it agree to an extension of the review period. Further, the Corps reports that on February 18 the SBA requested that it provide additional information on All Seasons' integrity, which was provided on February 19. The Corps states that the SBA never advised that it would issue All Seasons a COC but only that it was "leaning" toward such action and since it did not agree to an extension, award was made to Alpha on February 22. The Corps states that on February 23 the SBA notified it of the issuance of a COC to All Seasons.

On the other hand, the SBA reports that a plant survey of All Seasons was performed on February 12 and, on February 18, the Corps was advised of the intent to issue a COC to All Seasons. Further, the SBA states that during this February 18 telephone conversation, the SBA asked whether there was any additional information which might bear on All Seasons' responsibility and whether the Corps intended to appeal the determination. The Corps responded

that there was additional information which it would provide to the SBA. The SBA reports that the Corps again contacted the SBA on February 18 to inquire about the status of the COC application, and the SBA informed the Corps that February 23 was the expiration date for the COC review period because the integrity information had not been received by SBA until February 1. The SBA states that at no time did the Corps raise any objection to the new date. The SBA further reports that after review of the additional information submitted by the Corps on February 19, it advised the Corps that such information did not change the decision to issue a COC. The SBA states that All Seasons was issued a COC on February 23, but when the Corps was contacted SBA learned that the contract had been awarded to Alpha.

In addition, SBA argues that its decision to begin the 15-day review period on February 1 instead of January 27 was consistent with the regulations. FAR § 19.602-1(a) states that upon determining and documenting that a responsive small business lacks certain elements of responsibility the contracting officer shall refer the matter to the SBA. Moreover, FAR § 19.602-1(c)(1) and (2) provides that the "referral shall consist of a notice that a small business concern has been determined to be nonresponsive and . . . any other pertinent information that supports the contracting officer's determination." The regulations contemplate that the notice provided to SBA of a small business' nonresponsibility must include any pertinent information before the 15-day period begins to run. This regulation balances the need for a prompt SBA resolution of a COC proceeding so as to not unduly delay an agency's procurement action and the need for SBA to have a complete file with all pertinent documents before it renders its decision on this issuance of a COC. Here, the Corps' information on the debarment was based on telephone calls and no written documents were submitted to the SBA.

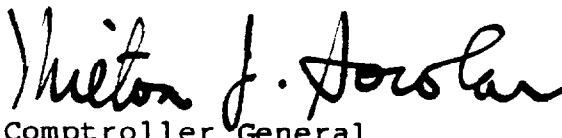
Both the Corps and the SBA have submitted affidavits from numerous employees in support of their positions as detailed above. FAR § 19.602-2(a)(3) (FAC 84-12) states that if the SBA intends to issue a COC, it shall provide advance notice to the contracting officer. During the February 18 conversation, SBA personnel contend that they advised the Corps that a recommendation was being made to issue All Seasons' a COC and asked if the Corps had any further information to

submit for consideration. On February 19 the Corps submitted additional information to SBA. The contracting officer states that she was not advised of the proposed issuance of the COC. However, a contract specialist in the office states that SBA did say they were leaning toward a COC. We believe this led to the February 19 submittal.

Based on the facts here, we find the Corps should have waited until after February 23, to allow SBA to complete its COC review before making the award. In this case, the Corps knew on February 22 that SBA was about to complete its review of All Seasons' COC application and that, at the very least, SBA was giving serious consideration to issuing a COC to All Seasons. Further, there is no indication that the Corps had to make an award on February 22 in order to meet its needs. We have held that an agency cannot make an award, even after the expiration of the deadline, if it knows SBA is going to issue a COC. Age King Industries, Inc., B-225445.2, June 17, 1987, 87-1 CPD ¶ 602. While here it is true that the Corps did not know definitely that SBA was going to issue a COC to All Seasons, the Corps did know that SBA was on the verge of completing its COC review, and that SBA was likely to issue a COC. Under these circumstances, we believe that the rationale of Age King Industries, Inc. should apply. To hold otherwise would permit an undermining of the SBA's statutory authority to conclusively consider a small business's responsibility.

Therefore, the protest is sustained. Since the SBA issued All Seasons a COC and there is no evidence of any appeal by the Corps, we recommend that the contract with Alpha be terminated for the convenience of the government and award be made to All Seasons.

The protest is sustained.

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