



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Gem Construction Co., Inc. and Enclave One, Inc.
File: B-232420, B-232420.2
Date: October 31, 1988

DIGEST

1. The General Accounting Office does not review a Small Business Administration's denial of a certificate of competency except in limited circumstances.
2. Where a firm fails to apply for a certificate of competency after the contracting officer refers a nonresponsibility determination to the Small Business Administration (SBA), General Accounting Office (GAO) will not review the contracting officer's determination since such a review would in effect substitute GAO for SBA.
3. A protester may not reasonably delay submitting a certificate of competency application while waiting for an agency to respond to a Freedom of Information Act request.

DECISION

Gem Construction Company, Inc. and Enclave One, Inc. protest the rejection of their offers under request for proposals No. F49642-88-R-0077, issued by the Department of the Air Force for the renovation of 150 military family housing units at Andrews Air Force Base, Maryland.

The solicitation was set aside for small disadvantaged businesses. Of the twelve offers received, Gem was the apparent low offeror and Enclave was the apparent second low offeror. Gem protests its rejection, suggesting that questions about its bonds resulted in the rejection. Similarly, Enclave protests its rejection stating that its bonds were acceptable. Enclave also states that it is capable of performing and that it has not had adequate time to respond to the Small Business Administration (SBA) regarding the Air Force's request for a Certificate of Competency (COC).

The agency states that for both Gem and Enclave, the offers were rejected because the SBA refused to issue COCs for

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either firm and that in neither case were the protesters' bonds a factor in the rejection of their offers. The contracting officer determined that Gem, the apparent low offeror, was nonresponsible and referred the matter to the SBA for a COC determination. On August 19, 1988, the SBA declined to issue a COC to Gem. In response to the agency's report on its protest, Gem challenged the Air Force's determination that Gem was nonresponsible.

Because the SBA has the statutory authority to review a contracting officer's finding of nonresponsibility and then to determine conclusively a small business concern's responsibility, our Office limits its review of the denial of a COC to instances in which the protester makes a showing of either possible fraud or bad faith on the part of the contracting officials or that SBA failed to consider vital information bearing on the firm's responsibility. Coliseum Construction, Inc., B-229691, B-229728, Mar. 1, 1988, 88-1 CPD ¶ 213. Gem did not allege any of these circumstances, and therefore we will not consider its protest.

Upon receipt of the SBA's denial of a COC for Gem, the contracting officer then examined the responsibility of Enclave, the apparent next low offeror. Enclave was also found to be nonresponsible and the contracting officer referred the matter to SBA. On September 7, 1988, the SBA closed its file on Enclave because Enclave did not provide the required information for a COC within the specified timeframe. The Air Force notes that Enclave had submitted an untimely request for an extension.

Enclave disagrees with the Air Force's nonresponsibility determination, because it believes the information supporting it is false. Enclave sought to support its position by requesting information from the Air Force under the Freedom of Information Act (FOIA). Enclave alleges that it did not have enough time to respond to the SBA because the Air Force delayed sending documents requested by Enclave under FOIA.

As noted above, the SBA has conclusive authority to review nonresponsibility determinations made with respect to small businesses by issuing or failing to issue a COC. When a contracting officer finds a small business to be nonresponsible, and refers the matter to the SBA, the burden is on the firm to apply for a COC from the SBA in order to avail itself of the protection afforded against unreasonable determinations by the contracting officer. Ferrite Engineering Labs, B-225997, Feb. 27, 1987, 87-1 CPD ¶ 231. Where, as here, the firm fails to apply for a COC, we will not review the contracting officer's underlying determination of nonresponsibility since such a review would in

effect substitute our Office for the SBA, the agency authorized by statute to review nonresponsibility determinations. Ferrite Engineering Labs, supra.

In appropriate cases we will review a protest to determine whether bad faith or fraudulent actions on the part of procurement officials resulted in a denial of the protester's opportunity to seek SBA review of a nonresponsibility determination or whether the SBA's denial of a COC was made in bad faith. Zan Machine Co., Inc.--Request for Reconsideration, B-229705.2, Jan. 19, 1988, 88-1 CPD ¶ 50. To establish bad faith, the law requires the protester to provide virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. Spheres Co., B-225755, June 5, 1987, 87-1 CPD ¶ 573.

Enclave alleges that the contracting officer's bad faith actions prevented Enclave from responding to the SBA's request for information regarding the COC. The protester alleges that the contracting officer acted in bad faith by misleading it about the source of the documents Enclave sought under FOIA, an action which allegedly delayed Enclave's receipt of the documents by a number of days.

Notwithstanding these allegations, Enclave still had the burden to either apply for a COC or request an extension within the time period specified. While Enclave promptly filed its FOIA request after learning that the Air Force had asked SBA for a COC, it was still on notice that its COC application was due within 5 working days from receipt of SBA's letter requesting the application. We do not believe it was reasonable for Enclave to expect the Air Force to respond to its FOIA request in time for Enclave to file a timely COC application. Accordingly, we find the contracting officer's actions with respect to Enclave's FOIA request to be irrelevant to the COC application.

The protests are dismissed.



Ronald Berger
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