



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Container Systems Corporation
File: B-232266
Date: December 13, 1988

DIGEST

Protest that the Small Business Administration (SBA) improperly refused to issue a certificate of competency is denied where protester has not shown that the SBA, which has the statutory authority to determine conclusively a small business concern's responsibility, acted fraudulently or in bad faith or disregarded material information.

DECISION

Container Systems Corporation (CONSYSCO) (formerly Yanke Container Corporation) protests the decision of the Small Business Administration (SBA) not to issue the firm a certificate of competency (COC) in connection with invitation for bids (IFB) No. N00197-88-B-0004, a 100-percent small business set-aside, issued by the Naval Ordnance Station, Department of the Navy, Louisville, Kentucky. CONSYSCO alleges that after the Navy found CONSYSCO nonresponsible and referred the matter to SBA for COC consideration the SBA acted in bad faith and in violation of procurement regulations, inasmuch as it improperly relied on allegedly inaccurate negative information furnished by the Defense Contract Administration Service Management Area (DCASMA), Seattle. CONSYSCO also alleges that DCASMA acted in bad faith in the administration of quality assurance at the CONSYSCO facility under other Navy contracts for similar containers and improperly imposed a "Method C"^{1/} corrective action against the firm which directly resulted in SBA's denial of the COC.

We deny the protest.

^{1/} A Method C corrective action is imposed by DCASMA when it is determined that serious quality problems exist in a contractor's inspection and quality assurance system.

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The IFB, for the production of Mark 631 Harpoon Missile Shipping and Storage Containers, was issued on October 15, 1987. The solicitation and CONSYSCO's prior contracts contained, among other things, military specification MIL-I-45208A which required the successful contractor to establish and maintain an inspection system in accordance with that quality standard.

Six firms submitted bids by the February 10, 1988, bid opening date. When the apparent low bidder was determined nonresponsive and the SBA refused to issue it a COC, CONSYSCO, the second low bidder, became next in line for award. The contracting officer therefore requested DCASMA Seattle to conduct a preaward survey on CONSYSCO.

DCASMA Seattle and the Navy conducted an on-site preaward survey of CONSYSCO's facilities on April 19. The preaward survey team found that CONSYSCO, which had previously produced the same type container in September 1987, was currently producing similar containers under two Navy contracts. The survey team found CONSYSCO satisfactory in four areas (technical capability, financial capability, transportation and packaging), but unsatisfactory in three areas (production capability, quality assurance and ability to meet schedule). The unsatisfactory ratings in production capability and ability to meet schedule resulted from an unacceptable delinquency rate of 33 percent on 6 open contracts, and findings that the firm was at or above maximum capacity and that any additional contracts would overload its production capability. With regard to CONSYSCO's quality assurance, the survey found that at the time the preaward survey was conducted, there were 16 Quality Deficiency Reports on prior contracts issued in the preceding 12 months. This resulted in a Method C correction action initiated by DCASMA.

Based on these findings on May 2 a Preaward Survey Review Board recommended that no award be made to CONSYSCO. The Navy adopted the Preaward Survey Review Board's recommendation in concluding that CONSYSCO was nonresponsive, noting that:

" . . . key deficiencies of the [firm's] capability are the lack of quality assurance capability, and the lack of production capability and ability to meet schedule, both of which result from the contractor's past delinquency record and a current full capacity workload in-house."

On June 7, the contracting officer referred his determination to the Seattle Regional Office of the SBA under the COC

procedures and notified CONSYSCO of this referral. By letter dated June 13, SBA asked the protester to provide information relevant to the COC review. The protester filed an application for a COC on June 21.

By letter dated June 22, the protester wrote the contracting officer requesting that he reconsider his nonresponsibility determination based on new information and withdraw his referral to the SBA. The contracting officer indicates that he reviewed all information furnished by CONSYSCO and decided that the information was insufficient to reverse the prior nonresponsibility finding or withdraw his referral to the SBA. The contracting officer states that he forwarded a copy of the protester's June 22 letter to the SBA and notified CONSYSCO of his decision and referral.

On June 14-16, DCASMA again reviewed CONSYSCO's facilities and inspection system and found eight specific deficiencies in welding practices on CONSYSCO's ongoing contracts. Consequently, on June 24, DCASMA issued a second Method C corrective action to CONSYSCO. This second Method C precluded the acceptance of production hardware until there was sufficient corrective action.

On July 25, the SBA declined to issue a COC to CONSYSCO primarily because CONSYSCO's quality system was currently unacceptable to DCASMA and because CONSYSCO's corrective action had been rejected by DCASMA.

CONSYSCO alleges that the SBA acted in bad faith in refusing to issue a COC, since, in its view, the sole reason for the SBA's decision was the erroneous information DCASMA provided to the SBA concerning the second Method C. CONSYSCO argues that the second Method C and related government actions resulted from the unreasonable and improper inspection by a Navy representative, "aggravated by [DCASMA] officials, who in the process violated numerous regulatory provisions" in issuing the second Method C without verification of the Navy representative's findings. CONSYSCO states that at the time of the preemptory inspection leading to the second Method C, DCASMA and the Navy had already performed three inspections of its quality assurance system and all identified deficiencies resulting therefrom had been corrected to the satisfaction of both agencies. CONSYSCO argues that the inspection and resulting Method C action during the COC evaluation were arbitrary and capricious and improperly "tainted" SBA's decision.

Our Office generally does not review SBA decisions to issue or refuse to issue a COC, since the SBA, not this Office, has the statutory authority to review a contracting

officer's finding of nonresponsibility and then to determine conclusively a small business concern's responsibility. We therefore limit our review of the COC process to instances in which the protester makes a showing of either possible fraud or bad faith on the part of procurement officials or where SBA failed to consider material information pertinent to the firm's responsibility. David Boland, Inc., B-221845, May 23, 1986, 86-1 CPD ¶ 484. In order to establish bad faith, a protester must present virtually irrefutable proof that government officials had a specific and malicious intent to harm the protester. Id., see also, E. J. Karnavas Corp., B-230617 et al., June 7, 1988, 88-1 CPD ¶ 540. CONSYSCO has made no such showing here.

The record establishes that the SBA reviewed all available, pertinent information submitted by CONSYSCO, DCASMA and the Navy, as well as the results of its own independent survey of CONSYSCO's facilities and concluded that, in fact, CONSYSCO cannot meet the quality system and production schedule requirements of the solicitation. Since CONSYSCO considered the second Method C to be based on erroneous information, it was incumbent on the firm to submit all relevant information to the SBA and prove through its COC application to the SBA that it was responsible. See AquaSciences International, Inc.--Request for Reconsideration, B-225452.2, Feb. 5, 1987, 87-1 CPD ¶ 127. CONSYSCO had this opportunity in making its application for a COC and, after due consideration of the material submitted by CONSYSCO, the SBA refused to issue a COC.

The record indicates that on June 27-28, a COC industrial specialist performed an on-site survey of CONSYSCO's facilities in connection with the COC determination. The essential findings of that survey were that CONSYSCO's quality assurance system was currently unacceptable because of the second Method C; that the firm's proposed corrective actions had been rejected by DCASMA; and, that, until CONSYSCO's quality assurance system was approved, accurate production planning could not be made. The COC specialist also found deficiencies in the protester's materials management systems and materials handling procedures. The record further indicates that a COC Review Committee considered all information pertinent to CONSYSCO's application, drew reasonable conclusions about the firm's ability to perform, and voted unanimously to decline a COC.

On the basis of the record before us, we have no reason to question SBA's conclusion that CONSYSCO was a nonresponsible bidder or its subsequent refusal to issue a COC. While CONSYSCO has presented extensive arguments to support its allegation that DCASMA furnished erroneous and inaccurate

information concerning its quality assurance system, it has failed to demonstrate that either SBA, DCASMA, or Navy officials had a specific and malicious intent to injure CONSYSCO, nor has it furnished any probative evidence that the SBA overlooked or ignored material information.

Accordingly, the protest is denied.

for *Seymour Epstein*
James F. Hinchman
General Counsel