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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Marine Instrument Company

File: B-241287.2

Date: May 6, 1991

Steve J. Nadel for the protester, Audrey H. Liebross, Esq., and David R. Kohler, Esq., Small Business Administration, for the agency. Charles J. McManus, Esq., Jonathan H. Kosarin, Esq., and Gary Van Osten, Esq., Department of the Navy, for the agency. Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against denial of a certificate of competency by the Small Business Administration (SBA) is denied where the record does not support the protester's contention that SBA failed to consider vital information.

DECISION

Marine Instrument Company protests the decision by the Small Business Administration (SBA) to deny it a certificate of competency (COC) in connection with request for proposals (RFP) No. N00104-90-R-T138, issued by the Department of the Navy, Navy Ships Parts Control Center, for the acquisition of telescopic alidades.^{1/} Marine contends that SBA acted in bad faith and disregarded vital information in denying the COC.

We deny the protest.

Marine submitted the lowest-priced offer in response to the RFP by the October 10, 1990 closing date. On October 12, the contracting officer requested a preaward survey and, in conjunction with that survey, an on-site visit was conducted on October 23. The preaward survey indicated that Marine was delinquent on three of its four current government contracts over the past 6 months, and that Marine had been terminated for default on two recent contracts for similar items.

^{1/} A telescopic alidade is a navigational instrument used on large ships.

Based on the survey report, the contracting officer found Marine nonresponsible for purposes of this RFP. By letter dated November 20, the contracting officer referred his nonresponsibility determination to SBA in connection with Marine's COC consideration. On December 10, SBA conducted its own on-site visit, during which, among other things, Marine's problems with delivery delays and terminations for default were discussed. An SBA report was prepared using Marine's own records in which SBA listed four current contracts, which were all delinquent, and four closed contracts, of which two were delinquent and two had been terminated for default.

Based on this performance record, the SBA report states that SBA had "no assurance that the firm will deliver the required item on schedule." The report also notes that: (1) Marine explains that performance was delinquent on two of the current contracts because the government agent responsible for first article testing did not inspect as originally scheduled, and (2) the terminations for default are still under appeal. Marine contends that these terminations were unfair because it could not perform the work on either contract due to faulty technical data packages supplied by the government. The SBA report states that even if it assumed that these explanations justified the performance problems, Marine is still delinquent on 50 percent of its open contracts and had been delinquent on 50 percent of its closed contracts, and that this poor performance level warranted denial of the COC.

On December 18, the COC Review Committee recommended denying a COC to Marine, again on the basis of Marine's performance, even accepting Marine's justifications. By letter dated December 18, SBA notified Marine that it would not reverse the nonresponsibility decision of the contracting officer because "... your firm's less than satisfactory performance on both past and current [g]overnment contracts does not assure us the requirements of the proposed contract would be satisfied in a timely manner."

Marine alleges that SBA acted in bad faith by failing to consider vital information in denying the COC. Specifically, Marine asserts that SBA distorted its record of performance under its recent contracts with the government. While Marine concedes that SBA "gave us the benefit of the doubt and disregarded the two contracts that were [terminated] for [default] and the two contracts that were delinquent namely, N00104-89-C-N119 and DLA400-90-C-0861," Marine alleges that it was not delinquent on two other current contracts at the time of the SBA survey. Marine submits Material Inspection and Receiving Reports (Form DD250) for these two contracts to support its position. Marine also argues that the agency delinquency record for a third contract is "incorrect" and

again submits a Form DD250 to support its position, Marine argues, therefore, that SBA has miscalculated Marine's delinquency rate, which, according to Marine is 25 percent rather than the adjusted 50 percent calculated by SBA.

SBA, not our Office, has the statutory authority to review a contracting officer's negative finding of responsibility and SBA's determination to issue or to refuse to issue a COC is conclusive with respect to all aspects of a small business concern's responsibility. 15 U.S.C. § 637(b) (1988); Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112. Our Office will not review such matters unless the protester makes a showing that government officials may have acted fraudulently or in bad faith or failed to consider vital information bearing on the firm's responsibility. Ceredo Mortuary, Inc.--Recon., B-241791.2, Nov. 27, 1990, 90-2 CPD ¶ 433. An allegation that SBA failed to consider vital information must be supported not only by a showing that the information was essential to a COC decision, but by evidence sufficient to make a prima facie showing that SBA willfully disregarded it, thus implying bad faith. Id.

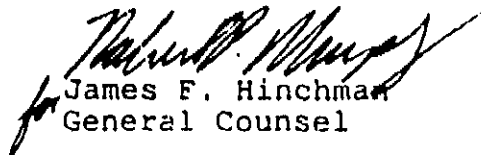
Here, the protester, in our view, has not submitted any probative evidence for its allegation that SBA failed to consider vital information concerning its current and closed contracts. Marine points to no other current or closed contracts in the relevant 6 months time period which SBA failed to consider. Rather, Marine simply argues that SBA is incorrect in considering that Marine was delinquent under three contracts; however, the record does not support Marine's position.

With respect to the two contracts that Marine alleges were not delinquent on December 10, 1990, the time of the SBA survey, SBA had before it information that Marine was more than 1 year delinquent under one contract, and was 23 days delinquent under the other contract. The protester's Form DD250, submitted to support its position, indicates that items under one contract were accepted and shipped on November 14, 1990, notwithstanding an August 1989 delivery date. Similarly, the Form DD250 which Marine submitted with respect to the other contract only confirms what SBA states with respect to the late delivery date.

With regard to the third contract, while Marine states that the SBA's record of 124 days delinquent is incorrect, the protester's submissions show only that delivery was delinquent by 66 days rather than by 124 days, which does not alter the material fact that delivery was late.

in sum, Marine has not identified any specific vital information that SBA willfully disregarded, and Marine's submissions actually confirm the SBA survey report concerning delinquencies on three of Marine's contracts. As noted above, the SBA report also shows that SBA considered Marine's explanations concerning two delinquencies and two terminations and, in calculating an adjusted delinquency rate, did not count performance problems on these four contracts against Marine. Consequently, while Marine disagrees with SBA's conclusion, it has not shown that SBA failed to consider vital information. The fact that the protester may disagree with SBA's conclusion does not constitute a showing that SBA failed to consider information vital to Marine's responsibility. Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132.

The protest is denied.


for James F. Hinchman
General Counsel