



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: WesternWorld Services, Inc., d/b/a The Video Tape Company

File: B-243808.3

Date: August 12, 1991

Patricia H. Wittie, Esq., Kirkpatrick & Lockhart, for the protester.

Catherine M. Evans, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not consider protest of Small Business Administration's (SBA) refusal to grant certificate of competency (COC) absent a showing of possible fraud or bad faith on the part of government officials. Protester's allegation that agency and SBA failed to inform it that they were considering protester's financial ability to continue performance if agency ordered less than estimated quantity of services does not amount to the required showing of possible bad faith.

DECISION

WesternWorld Services, Inc., d/b/a The Video Tape Company (VTC) protests the agency's nonresponsibility determination and the subsequent refusal of the Small Business Administration (SBA) to grant VTC a certificate of competency (COC) to perform a contract under invitation for bids (IFB) No. MDA902-91-B-0007, issued by the Armed Forces Radio and Television Service for videotape duplication services.

We dismiss the protest.

The agency determined VTC nonresponsive based on its financial condition, and referred the matter to SBA for consideration under SBA's COC procedures. According to VTC, the SBA loan specialist who evaluated VTC's financial condition found that the agency had failed to understand the nature of certain subordinated debt resulting from a leveraged buyout of VTC in 1987, and recommended in favor of a COC. SBA nevertheless denied the COC based on VTC's "unbalanced" financial position. In a discussion with a member of the SBA committee that considered its COC application, VTC learned that SBA was concerned that VTC would not be able to cover

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its startup costs, and therefore would not be able to continue performance, if the agency ordered less than the estimated quantities of videotapes. VTC then filed this protest.

Our Office generally will not review a contracting officer's nonresponsibility determination where a small business is concerned since by law SBA, not our Office, has conclusive statutory authority to determine the responsibility of a small business by issuing or refusing to issue a COC. Inter-Continental Equip., Inc., B-230266, Mar. 4, 1988, 88-1 CPD ¶ 237. In a case where SBA denies a COC, our review is limited to determining whether the denial was made as a result of bad faith on the part of government officials or a failure to consider vital information bearing upon the firm's responsibility. Id. To establish bad faith, our Office requires the presentation of virtually irrefutable proof that government officials had a specific and malicious intent to injure the protester. Marine Indus. Northwest Inc., Marine Power and Equip. Co., 62 Comp. Gen. 205 (1983); 83-1 CPD ¶ 159. VTC has not met this standard.

VTC asserts that neither SBA nor the agency notified it of the basis upon which its financial responsibility was being evaluated--i.e., whether VTC could afford to perform the contract if the government ultimately ordered less than the IFB estimated quantities--so that it could address the agencies' concerns. VTC alleges that the agencies' failure to so notify it "constitutes action so arbitrary and capricious that it amounts to bad faith." However, we do not agree that an agency's failure to inform a bidder that it will consider, in the course of determining the bidder's responsibility, the possibility that the agency will order less than the estimated quantities evidences bad faith; there is nothing in VTC's assertion to suggest, let alone irrefutably establish, the specific, malicious intent required. Moreover, as such a possibility always exists under an indefinite quantity contract, it would appear to be a proper factor for the agency to consider. For the same reasons, VTC's further argument that the agency's communication to SBA of its concerns in the event of reduced quantities evidences bad faith also is meritless; the Federal Acquisition Regulation encourages a complete exchange of information between the agency and SBA to resolve any disagreement about a bidder's ability to perform. See Cal Pacific Fabricating, Inc., B-214946, May 22, 1984, 84-1 CPD ¶ 552.


In addition, VTC's assertion that it was not afforded an opportunity to address SBA's real concerns is not supported by its protest submission. In this regard, VTC states that it addressed in detail SBA's stated concerns--VTC's "high debt, negative working capital, and lack of profits"--in response to SBA's request; these apparently were the areas of SBA's

concern in the event reduced quantities were ordered. Although the SBA loan specialist who performed the financial evaluation apparently was satisfied that VTC could perform the contract based on the information it submitted, the SBA ultimately determined otherwise. VTC's disagreement with the final SBA decision simply does not establish that the SBA's action was improperly motivated, or that review by our Office otherwise is warranted. See Action Bldg. Sys., Inc., B-237067, Oct. 4, 1989, 89-2 CPD ¶ 311.

VTC also alleges that the agency improperly applied an unannounced evaluation criterion in considering whether VTC could perform the contract if the agency ordered less than the estimated quantities. This argument is without merit, as VTC's financial capacity to perform under various circumstances clearly is a matter of VTC's responsibility and thus was within the scope of the contracting officer's subjective responsibility determination. See generally Zero Mfg. Co.--Recon., B-224923.2, Oct. 28, 1986, 86-2 CPD ¶ 485. We similarly reject VTC's contention that the agency's requirements regarding a bidder's financial position were definitive responsibility criteria that the agency was required to disclose, since the Army's nonresponsibility determination was not based on VTC's failure to meet any specific, objective financial standard. Id.

Finally, VTC alleges that the basis for the nonresponsibility determination and COC denial--that VTC will not be able to perform if the government orders less than the estimated quantities--suggests that the agency in fact expects to order less than the estimated quantities and thus establishes that the IFB estimates are defective. As VTC has not offered a valid basis for us to question its rejection, VTC is no longer in line for award under the IFB and therefore does not have the direct economic interest required to protest the IFB estimates. 31 U.S.C. § 3553 (1988); 4 C.F.R. § 21.1(a) (1991); RRRS Enters., Inc., B-241512; B-241512.2, Feb. 6, 1991, 91-1 CPD ¶ 152. In any case, we do not view an agency's mere consideration of contingencies as to estimated quantities in a responsibility determination an indication that the estimates are flawed; such uncertainties are inherent in estimates.

The protest is dismissed.



John M. Melody
Assistant General Counsel