



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: High Point Security, Inc.--Reconsideration
and Protest

File: B-255747.2; B-255747.3

Date: February 22, 1994

Sam R. Rovetuso, UnLimited Services of America, Inc., for the protester.
Catherine E. Pollack, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Dismissal of protest as academic upon receipt of agency report indicating that appropriate corrective action had been taken, without waiting for protester's comments on report, was proper since regulations permit dismissal at time the propriety of such action becomes clear.
2. The General Accounting Office will not consider protest challenging agency's referral of protester's negative responsibility determination to Small Business Administration (SBA) under Certificate of Competency program where there is no showing that the agency acted in bad faith to deny protester opportunity to obtain SBA review.

DECISION

High Point Security, Inc. requests reconsideration of our January 4, 1994, dismissal of its protest challenging the rejection of its bid as nonresponsive, and also protests the agency's subsequent determination that the firm is nonresponsible, under Department of Veterans Affairs (VA) invitation for bids (IFB) No. 550-5-94 for security guard services at the VA Outpatient Clinic, Peoria, Illinois.

We deny the request and dismiss the protest.

On November 12, 1993, High Point filed a protest challenging VA's determination that its bid was nonresponsive because the firm did not have the required state security contractor's license; High Point argued that the licensing requirement is a matter of the firm's responsibility, not bid responsiveness. In reviewing the protest, the contracting officer agreed with High Point and determined that the firm's bid--as well as the low bid, which had been

rejected for the same reason as High Point's bid--was in fact responsive. The contracting officer then found both High Point and the low bidder nonresponsive for failure to have a current license; High Point was also found nonresponsive for other reasons. As both High Point and the low bidder are small business concerns, the contracting officer referred the matter of the firms' responsibility to the Small Business Administration (SBA) under that agency's Certificate of Competency (COC) program. The contracting officer reported the corrective action to us in the agency report.

Upon reviewing the agency report, we concluded that there was no basis to entertain High Point's protest further, since the agency had resolved High Point's dispute regarding the responsiveness of its bid. As we had no basis to consider the possibility that High Point would object to the agency's nonresponsibility determination, since it was not an issue in the protest, we dismissed the protest as academic. Before learning of our dismissal, High Point submitted its comments on the agency report. In the comments, High Point challenged the contracting officer's nonresponsibility determination and subsequent referral to SBA. Although we had already dismissed High Point's protest, since these comments raised the new challenge to the nonresponsibility determination and SBA referral, we opened another protest file and notified the agency of the new protest. Upon receiving our dismissal of its initial protest, High Point filed this reconsideration request, arguing that it was improper for us to dismiss its protest without having reviewed its comments on the agency report.

High Point's reconsideration argument is without merit. Our Bid Protest Regulations provide that we may dismiss a protest at the time the propriety of a dismissal becomes clear based upon information provided by the contracting agency. 4 C.F.R. § 21.3(m) (1993). Since the information provided by VA in its agency report rendered academic High Point's protest against the nonresponsiveness determination, our dismissal upon receipt of the report was proper. See AOI Sys., Inc.--Recon., B-240768.2, Oct. 16, 1990, 90-2 CPD ¶ 300.

As for High Point's new protest against the agency's nonresponsibility determination and referral of the matter to SBA, we explained in our earlier dismissal that our Office does not review such issues except under very limited circumstances. The Small Business Act vests SBA with the exclusive authority to review a contracting officer's finding of nonresponsibility and to conclusively determine a small business concern's responsibility through the COC process. 15 U.S.C. § 637(b)(7)(C) (1988). Accordingly, our review of these matters is limited to determining, after

SBA has declined to issue a COC to the protester, whether bad faith or fraudulent actions on the part of government officials resulted in a denial of the protester's opportunity to seek SBA review of a nonresponsibility determination or whether SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing on the firm's responsibility. Pittman Mech. Contractors, Inc., B-241046.2, Feb. 1, 1991, 91-1 CPD ¶ 103. Since SBA has not yet acted, it would be premature for us to consider whether the agency acted in bad faith to deny the firm the opportunity for a proper SBA review of its responsibility.

In any case, before we will review a protest of a COC matter, the protester must first make a showing that one of the above elements--bad faith actions on the part of the government or a failure to consider vital information bearing on responsibility--was present. See 4 C.F.R. § 21.3(m)(3). Under this standard, High Point's protest must make a showing that the contracting officer acted in bad faith to deny the firm the opportunity for COC review by SBA. High Point's protest does not meet this requirement. While High Point asserts that the contracting officer acted in bad faith by intentionally giving SBA misinformation concerning various elements of the firm's responsibility, the record indicates otherwise. For example, High Point alleges that the contracting officer informed SBA that the firm does not possess a current security contractor license when in fact the firm has renewed its license. Our review of the contracting officer's written referral to SBA, however, shows that the contracting officer did not report to SBA that High Point does not possess a current license. She did report to SBA that High Point's bid originally was rejected because the firm did not have the "proper licensing." The record indicates that the contracting officer was motivated, not by bad faith, but by her belief that High Point lacked the required licenses at the time of the rejection since High Point did not furnish a copy of its renewed security contractor license until after its bid was rejected, and the individual security guard license of High Point's principal was in probationary status.¹

Furthermore, the contracting officer reported other negative information about High Point to SBA that High Point does not challenge. For example, the contracting officer questioned High Point's representation that it has been in business as a security guard contractor for 8 years, as the firm

¹High Point argues that the probationary status of its principal's license has been lifted; however, it was still in effect at the time of award and at the time the contracting officer made the referral to SBA.

provided no financial statements for the past 3 years; High Point does not take issue with the contracting officer's concern. In addition, the contracting officer was concerned about licensing violations on the part of High Point's principal that led to the above-referenced probation of his license; High Point does not respond except to note that the probationary period has now expired. The record thus is without support for High Point's allegation that the contracting officer made intentional false statements to SBA, or otherwise proceeded in bad faith. While High Point disagrees with some of the statements, this does not establish that they were improperly motivated; indeed, as discussed above, the record suggests that they were reasonably based. See Pittman Mech. Contractors, Inc., supra. It is now SBA's responsibility, under its exclusive statutory authority, to evaluate the disputed elements of High Point's responsibility to determine whether the contracting officer's conclusion was reasonable. See id.

The request for reconsideration is denied and the protest is dismissed.



Ronald Berger
Associate General Counsel