

Matter of: Government Contract Advisory Services, Inc.

File: B-255989; B-255990

Date: January 18, 1994

D. Lee Roberts, Jr., Smith, Currie & Hancock, for the protester.

DIGEST

1. The Small Business Administration's consideration of a small business's intention not to perform a significant portion of a contract with its own forces in determining whether to issue a certificate of competency (COC) is not inconsistent with that agency's COC regulations.

2. The General Accounting Office (GAO) will consider a protest of a contracting officer's decision that a small business is not responsible where the Small Business Administration (SBA) declines to issue certificate of competency (COC) for eligibility rather than responsibility reasons. However, where SBA declination is based on a determination that the small business will not perform a significant portion of the contract with its own forces, it is viewed as based on responsibility reasons, precluding GAO review of the contracting officer's decision.

DECISION

Government Contract Advisory Services, Inc. protests the determination by the Small Business Administration (SBA) that it is not eligible for a certificate of competency (COC) under solicitation Nos. GS-04P-93-EWD-0307 and GS-04P-93-EWD-0328 issued by the General Services Administration.

We dismiss the protests.

The contracting officer determined under both solicitations that Government Contract was nonresponsible and referred the matter to the SBA. The SBA determined that Government Contract did not intend to perform a significant portion of the work with its own resources and that therefore the company was ineligible for a COC under 13 C.F.R. § 125.5(b) (1993), which provides that a "concern shall not be eligible for a Certificate unless it performs a significant portion of the contract with its own facilities and personnel."

Government Contract argues that it provided SBA with information to establish that it intended to perform at least 20 percent of the work with its own personnel and that SBA's determination that it would not perform a significant portion of the work therefore was unreasonable. Government Contract also argues that SBA violated its own regulations by determining that the firm does not intend to perform a significant portion of the work; the protester states that the regulation permits SBA to view a company as ineligible for a COC only where the company indicates that it will not so perform.

The Small Business Act, 15 U.S.C. § 637(b)(6) (1988), gives the Small Business Administration (SBA), not our Office, the conclusive authority to review a contracting officer's nonresponsibility determinations with respect to small businesses and to determine whether to certify the capability of those small businesses to perform specific government contracts through the issuance of a COC. We do not consider challenges to SBA decisions to issue a COC or to affirm the contracting officer's nonresponsibility determination by not issuing a COC unless there is a showing of possible fraud or bad faith on the part of government officials. See 4 C.F.R. § 21.3(m)(4) (1993); Tamsco, Inc., B-199017, Sept. 3, 1980, 80-2 CPD ¶ 172. Since we view an SBA decision that a bidder is ineligible for a COC because it will not itself perform a substantial portion of the work to be tantamount to an affirmation of the procuring agency's determination of nonresponsibility, Howell Constr. Co., Inc.--Recon., B-237231.2, Nov. 3, 1989, 89-2 CPD ¶ 425, and since the protester has made no showing of possible fraud or bad faith, this is not a matter for our review.

The protester nevertheless argues that we should consider this matter because SBA, allegedly contrary to 13 C.F.R. § 125.5(b), based its determination on what it perceived to be the protester's intent. The short answer to that argument is that the regulation, quoted above, does not preclude SBA from considering a bidder's intent, and there is nothing novel about SBA's doing so. See generally PHE/Maser, Inc., 70 Comp. Gen. 689 (1991), 91-2 CPD ¶ 210.

The protester argues that the contracting officer's initial nonresponsibility determination has no rational basis, and asserts that this itself is a proper matter for our review because the SBA did not rule on the merits of the COC application. Although we do not normally review challenges to a contracting officer's determination that a small business is not responsible because that would involve us in a matter statutorily designated for SBA, we do, as the protester points out, consider such challenges when the SBA does not issue a COC for eligibility rather than

responsibility reasons and does not therefore affirm the contracting officer's determination. Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc.--Recon., B-209589.2; B-209860.2, July 29, 1983, 83-2 CPD ¶ 142. As stated above, however, we view SBA decisions under 13 C.F.R. § 125.5(b) that a small business is not eligible for a COC as based on responsibility considerations and therefore as affirmations of the contracting officer's decisions.

The protests are dismissed.

Ronald Berger
Associate General Counsel

¹On the other hand, as in Wallace & Wallace, we view SBA's refusal to issue a COC because a small business intends to furnish a foreign rather than a domestic product (see 13 C.F.R. § 125.5(c)) as not involving such an affirmation.