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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

81-1 CPB 278

FILE: B-201225

DATE: April 10, 1981

MATTER OF: Delta Lighting Corp.

DIGEST:

1. GAO does not review Small Business Administration refusal to issue certificate of competency unless protester makes prima facie showing of fraud or demonstrates that information vital to responsibility determination was not considered.
2. Where small business firm is low bidder on both unrestricted and set-aside portions of IFB, and is found nonresponsible to perform former after preaward survey, agency need not complete preaward survey regarding set-aside portion before referring matter to Small Business Administration for certificate of competency consideration. Rather, regulations require only that referral note entire quantity of acquisition to which firm may be entitled.

Delta Lighting Corp. (Delta) protests the rejection of the firm's low bid and the award of a contract by the Department of the Army to another firm under invitation for bids (IFB) No. DAAK10-80-B-0107 for aiming post lights.

One-half of the Army's requirement was set aside for award to a small business concern. Delta was the low bidder on both the restricted and unrestricted portions. However, a preaward survey of Delta's ability to meet the Army's needs with respect to the unrestricted portion of the IFB resulted in a finding that the firm was nonresponsible. Upon review, the Small Business Administration (SBA) declined to issue a certificate of competency (COC).

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Delta argues that the contracting agency improperly failed to conduct a preaward survey of Delta with respect to the set-aside portion of the requirement; as indicated above, the Army's preaward survey was limited to the unrestricted part. Delta further argues that the contracting agency improperly failed to indicate in the referral to the SBA that Delta also was being considered for the set-aside portion of the requirement.

The protest is denied.

The SBA has authority under its COC procedures to issue final determinations on whether small business concerns are responsible to receive and perform specific Government contracts. 15 U.S.C. § 637(b)(7) (Supp. I 1977); see Hub Testing Laboratories, B-199368, September 18, 1980, 80-2 CPD 204. As a result, our Office has consistently declined to review a contracting officer's determination of nonresponsibility where the determination has been affirmed by the SBA's denial of a COC unless the protester makes a prima facie showing of fraud or the record indicates that vital information relevant to the protester's responsibility has not been considered. Wilson and Hayes, B-199144, July 24, 1980, 80-2 CPD 66; SMI/ New York; Sweepster, Inc., B-194009, July 24, 1979, 79-2 CPD 55.

Delta essentially argues that because of the Army's actions, vital information bearing on Delta's responsibility was not revealed to the SBA for COC consideration.

There is no requirement, when an invitation includes equal unrestricted and set-aside requirements and a single small business is in line for award on both, that the contracting agency complete preaward surveys for both requirements prior to referring the matter to the SBA for COC consideration. Rather, Defense Acquisition Regulation (DAR) § 1-705.4(c) (1976 ed.) provides:

"* * * If a partial set-aside is involved and the bid of a small business concern on the unreserved portion is to be rejected for nonresponsibility and the same small business concern is entitled to consideration on the reserved portion of the set-aside if a COC is issued by the SBA, the entire quantity of

the acquisition (reserved and unreserved) for which that small business concern may be entitled, if competent, shall be referred to SBA and the referral papers so noted. The contracting officer may request SBA to certify the small business concern for the maximum quantity of the acquisition for which it has been determined responsible. * * *

Thus, where the firm is found nonresponsible for the unrestricted part of the requirement, the regulation merely requires that the referral to the SBA identify the entire quantity being procured. The SBA can then issue a COC with respect to whatever portion of the entire requirement that it deems appropriate if the contracting officer so requests. The Army thus did not act improperly in limiting the pre-award survey to Delta's ability to meet its needs under the unrestricted part of the IFB.

Regarding Delta's assertion that the referral to the SBA was incomplete, the Army's report on the protest indicates that the SBA was furnished (1) a listing of various factors concerning the procurement (the items involved, the low and second low bidders and their bids, procuring activity, etc.); (2) a formal nonresponsibility determination; (3) the preaward survey report; (4) an abstract of bids; and (5) copies of the IFB as issued without any amendments. The quantities and prices referenced in copies of the first three items furnished to our Office reflect only one-half of the Army's total requirement, i.e., either the unrestricted or the restricted portion of the procurement. Although the copy of the bid abstract which we have been provided indicates the Army's total requirement, we have been informally advised by the SBA that the abstract furnished to that agency shows bids on what amounts to only one-half of the requirement, although the copy of the IFB sent to the SBA indicates the total number of lights being procured, since the IFB as initially issued was not restricted at all; the requirement was split into equal restricted and unrestricted parts by amendment No. 1.

The SBA informally advises, however, that from the information provided to it by the Army, it considered the protester's ability to perform with respect to only one-half of the Army's total needs; it was not aware that Delta would be considered for award of the restricted portion of the IFB if a COC were issued.

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Under the circumstances, we cannot see how Delta could have been prejudiced by the contents of the documentation which the Army sent to the SBA. It would be unreasonable to conclude that Delta could have obtained a COC from the SBA for the Army's entire requirement when the firm could not secure a COC to perform the half of the contract actually noted in the referral to the SBA. Accordingly, we cannot agree that information vital to the SBA's COC deliberations was not considered.

Delta's protest is denied.

Milton J. Fowler

Acting Comptroller General
of the United States