

10,909

PL-1

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-193773

CNG 01461

DATE: August 2, 1979

CNG 2397

MATTER OF: U.S. Eagle, Inc.; Reliable Building
Maintenance Company

DIGEST:

A&G 00002

1. Compliance with special experience requirements affected responsibility of bidder and not responsiveness of submitted bid; hence referral to Small Business Administration (SBA) of question of small business' compliance with requirements was appropriate under certificate of competency (COC) procedure.
2. Statement of representative of small business concern that concern did not meet minimum experience requirements did not excuse referral of question of bidder's compliance with requirements to SBA under COC procedure since: (a) procurement regulation mandates referral and does not contain exception for situations where bidder offers subjective opinion that it does not comply with requirements; (b) after referral to SBA bidder actively sought COC; and (c) bidder's subjective judgment on compliance with requirements is not decisive since resolution of question of compliance requires knowledge of legal precedent.
3. GAO perceives no denial of procedural fairness in protest against SBA COC decision notwithstanding SBA's refusal to disclose to protester specific rationale for decision since: (a) Bid Protest Procedures, 4 C.F.R. part 20 (1979), generally afford protester and interested parties a reasonable opportunity to present their positions; (b) protester has not specifically requested release of rationale from SBA; and (c) protester and interested parties have been furnished copies of Army's summary of SBA rationale.
4. GAO's review standard concerning protest of issuance of COC involving compliance with special experience requirements is limited to fraud on part of SBA or to failure of SBA to consider vital information. Since protesters' arguments are concerned with information which was of record before SBA

~~006027~~

[ALLEGATION THAT Awardee Is Incompetent]

and because protesters have not shown fraud on SBA's part, GAO cannot question SBA's issuance of COC or Army's concurrence in issuance.

U.S. Eagle, Inc. (Eagle), has protested the Department of the Army's referral to the Small Business Administration (SBA) of the question of the competency of Pacific Coast Utilities Servicing Inc. (Pacific), a small business, to perform the requirements of invitation for bids (IFB) DAKFO1-78-B-0302 for "hospital housekeeping services," Letterman Army Medical Center, Presidio of San Francisco, California. Eagle questions the SBA rationale (as summarized by the Army) for finding Pacific to be competent for the procurement and also complains of the Army's acquiescence in the SBA's competency decision. For the reasons set forth below, we deny Eagle's protest.

Background

The IFB, issued in August 1978, provided that the services would be furnished under the supervision and training of an "executive housekeeper" who was to have achieved certain minimum levels of education and experience including "* * * at least two years experience as the executive housekeeper or his primary assistant within the past five years in a hospital of more than 200,000 sq. ft." The IFB also set forth an "offeror's experience" requirement, as follows:

"TP 1.13 OFFEROR'S EXPERIENCE: The minimum acceptable period of experience in conducting a hospital housekeeping program is twelve (12) months of hospital service within the prior thirty-six (36) months. This service must have been obtained at a maximum of two (2) hospital sites. In order to be considered acceptable, the cited experience must have been for the entire period certified at each site for the four (4) areas of surgery, recovery, labor and delivery, and infant nursery. Additional experience in the following

areas is considered beneficial, but not mandatory, nor can it be substituted for the above-cited four (4) areas. These areas are: emergency rooms, intensive care, cardiac catheterization, and isolation."

Of the seven bids opened on October 23, 1978, two bids were rejected because of bid bond deficiencies. Of the remaining bids, Pacific's bid was the lowest; Eagle's bid was second lowest.

The contracting officer reports that on November 6 he requested a preaward survey on Pacific to determine whether the company was a responsible concern especially considering the experience requirement set forth in the IFB. While the survey was being made, Eagle protested to the Army any award to Pacific on the grounds that the company did not possess the necessary experience; by letter of December 8, Eagle also filed a protest with our Office.

After the survey was made of the company, the survey team recommended to the contracting officer that no award be made because the team found (as reported by the contracting officer) that "Pacific did not meet the experience requirement of a minimum of 12 months specialized experience within the last 36 months."

Because of this information, the contracting officer found that Pacific was not a responsible concern on December 18, 1978. Shortly after this date, Pacific mailed a December 26 protest to our Office. The letter stated the "failure of Pacific to technically satisfy the [IFB experience requirement] does not render Pacific's bid non-responsive or Pacific a non-responsible bidder."

By letter of January 9, 1979, the contracting officer referred the question of Pacific's competency to perform the contract to SBA "pursuant to [Defense Acquisition Regulation] DAR § 1-705.4" which provides:

"1-705.4 Certificates of Competency

"(a) SBA has statutory authority to certify the competency of any small business concern as to all elements of responsibility including, but not limited to, capability, competency, capacity, credit, integrity, perseverance, and tenacity except regulatory requirements under the jurisdiction of other Federal agencies. Contracting officers shall accept SBA certificates of competency as conclusive of a prospective contractor's responsibility * * *

* * * * *

"(c) If a bid or proposal of a small business concern is to be rejected because the contracting officer has determined the concern to be nonresponsible, the matter shall be referred to the appropriate SBA field office having the authority to process the referral in the geographical area involved."

The documents forwarded to the SBA clearly revealed that the only reason the contracting officer found Pacific to be not responsible was the concern's failure to meet the IFB experience requirement.

On learning of the referral, Pacific withdrew its protest before our Office.

Thereafter, in late February 1979, the SBA informed the Army that it had certified Pacific to be competent to perform the contract in question. There was no indication, however, in the SBA's letter to the Army as to the reasoning or findings which led the SBA to conclude that Pacific was "competent" with respect to the IFB's experience requirement. Thus, the Army specifically requested SBA to furnish it with "all copies of significant data developed by [the SBA concerning its decision]."

While the Army's request was pending at SBA, we received a February 15 letter of protest from Eagle that the Army had improperly referred the question of Pacific's competency to the SBA; and that SBA had no "jurisdiction to pass on the matter as Pacific * * * does not have the experience required"; and that "SBA cannot waive the specifications."

By letter of March 19, the SBA forwarded the requested documents to the Army with the restriction that "these documents are not to be disclosed to Eagle or any other person or entity outside the Government." To our knowledge, Eagle has not contested this restriction by filing a request for the documents from SBA-- the agency having primary interest in the documents.

In May of this year, the Army forwarded its report on Pacific's February 15 protest.

The Army's report noted that the "contracting officer has elected to abide by SBA's [issuance of the competency certificate to Pacific] on the basis of information [contained in the March 19 SBA letter to the Army]." The Army further observed:

"With regard to the [SBA] determination made in this case we observe that the file shows that Pacific has performed custodial services since 1961 and has had a long record of satisfactory performance. However, its last hospital housekeeping contract is said to be about five years ago (1973-1974). Although it may be available in the SBA files, the administrative report does not reflect the specific experience in months and/or years at named hospitals relied on by the SBA in reaching its determination that Pacific satisfies the specific experience criteria of operating a hospital housekeeping program for 12 of the previous 36 months (TP 1.13). The file also does not reflect how the officers of the corporation possess such experience or its equivalent. In

fact, Mr. Ellis, the President of Pacific, in a letter to the Procurement Division of 8 November 1978, stated that 'we find that our most recent corporate experience does not fall within the three (3) years limit, although we can and do meet all other requested requirements.'

"It is our view, however, that qualifications of Mr. Redfern, the Executive Housekeeper who will be hired by Pacific, are considered sufficient to satisfy the experience requirements of TP 1.13. It is observed that Mr. Redfern has had seven (7) years' experience as an Executive Housekeeper. In this connection the Executive Housekeeper is the most important person working under the contract. He acts for the contractor, supervises and trains the housekeeping employees and insures effective compliance with all the provisions in the contract. As such it is our view that in this instance, it is not improper to consider the experience of the Executive Housekeeper in examining the contractor's overall experience level. Thus we consider that Pacific satisfies the definitive experience criteria set out in TP 1.13."

Finally, the Army requested our Office "to express its opinion as to whether it will assume jurisdiction * * * to assure that the evidence used by the SBA to support its determination satisfies the definitive criteria set out in a solicitation, especially where the SBA decision overrules a contracting officer's nonresponsibility determination."

The day before the Army transmitted its report to our Office, we issued a decision which involved a similar factual situation to that of the present protest, namely: SBA issuance of a certificate of competency (COC) to a bidder who had previously been found to be nonresponsible for failure to comply with a special experience standard. That decision, J. Baranello and Sons, 58 Comp. Gen. _____, B-192221, May 9, 1979, 79-1 CPD 322, was made available to the involved parties for their comments.

Analysis

The issues Eagle raises about the propriety of the Army's referral of the question of Pacific's competency to the SBA are resolved through reference to the applicable DAR provisions, noted above, which demonstrate, in our view, the propriety of the referral.

First of all, there can be no question that the experience requirement relates to the concept of responsibility which, as commonly understood, relates to a proposed contractor's apparent ability or capacity to perform the contract's requirements. For example, DAR § 1-903.2(a)(i) (DAC #76-15, June 1978) lists "experience" as an additional standard of responsibility for appropriate procurements. In this perspective, "experience"--or any other element of responsibility--has nothing to do with a bidder's commitment to perform the Government's work requirements which involves the concept of responsiveness.

Whether Pacific met the experience requirement was, thus, a matter of responsibility which, under DAR § 1-705.4(c), noted above, had to be referred to SBA by mandate of existing regulation. Moreover, the referral provision in question does not contain an exception for those situations in which the small business concern, as here, does not initially question the adverse finding. On this point, we note, in response to argument made by Eagle, that, although Pacific initially stated it "did not satisfy the minimum [offeror's] experience requirement," the company did not object to the referral of the question of its competency to SBA; moreover, Pacific actively sought a COC from SBA after the referral had been made. Finally, it is obvious that bidders' subjective judgments as to whether they are responsible are not decisive--nor should they be--since the resolution of responsibility questions requires knowledge of legal precedent. Thus, we find the referral of the question of Pacific's competency to be appropriate under existing procedures.

Next, Eagle argues that SBA's refusal to disclose its documents which support the Pacific COC affects "due process rights" in its protest before our Office. We have refuted similar arguments in prior decisions. As we stated in Systems Research Laboratories, Inc., Reconsideration, B-186842, May 5, 1978, 78-1 CPD 341:

"SRL argues that data not releasable to the protester or another interested party for rebuttal must be rejected as evidence to support the case and that to do otherwise is to deny the procedural due process rights of the nonproponent. We do not agree with SRL's assessment of our treatment of such cases under our Bid Protest Procedures.

"The resolution of bid protests by this Office is an administrative procedure distinct from the conduct of litigation in the courts. Our bid protest authority is based upon our authority to adjust and settle accounts and to certify balances in the accounts of accountable officers under 31 U.S.C. §§ 71, 74 (1970). * * * Neither of these sections prescribes the form or procedure in which bid protests are to be resolved. We are of the view that to whatever extent due process is required under these sections, procedures affording the protester and interested parties a reasonable opportunity to present their case are a satisfactory and fair method. * * * Furthermore, we do not consider it necessary to satisfy due process requirements in administrative proceedings of this nature that a party be apprised of all of the information in the record. * * *

"Our Bid Protest Procedures are intended to provide fair and equitable procedural standards for the protection of all parties to a protest. Notice of the protest is required to be given to all bidders or proposers which appear to have a 'substantial

and reasonable prospect of receiving an award if the protest is denied.' 4 C.F.R. § 20.3(a) (1977). The agency is required to submit a report responsive to the protest to this Office with copies to the protester and interested parties. 4 C.F.R. § 20.2(c) (1977). The protester and interested parties are entitled to examine and comment on the agency report. 4 C.F.R. § 20.3(d) (1977).

"A protester or other party denied access to documents furnished to this Office by an agency may seek disclosure of those documents under the provisions of the FOIA. Where, as here, the records sought to be disclosed are agency records, we have held that this Office is without authority under the FOIA to determine what records must be released and the protester must make application to the agency for release of the documents. * * * Once a party has sought disclosure from the agency and been denied, his sole remedy is by suit in the United States District Court. * * * A protester may make and we may honor a request that our Office withhold action on the protest during the pendency of an FOIA request. * * * Where a request to withhold action is denied by our Office, the party may still seek reconsideration of our decision on the protest on the basis of new information obtained through its FOIA request. 4 C.F.R. § 20.9 (1977).

"We think that this procedure affords all parties both reasonable notice and an opportunity to be heard and we are satisfied that these procedures are fair. * * * In these circumstances, we perceive no denial of procedural fairness * * *."

In any event, Eagle and Pacific have been furnished with a copy of the Army's summary of the SBA's rationale for the COC decision. This summary reveals, to some extent, the SBA position. Thus, Eagle has some knowledge of SBA's reasoning for issuing the COC; this fact further undercuts, as a practical matter, Eagle's "lack of due process" argument. Moreover, Eagle has not, to our knowledge, requested the documents in question from the SBA.

Next, Eagle makes several arguments as to why SBA's decision as summarized by the Army is erroneous, why the Army has erroneously concurred in the SBA's decision, why the Army's concurrence departs from practice on prior procurements and why fairness to bidders demands that the decision not be given effect. All these arguments are directly or indirectly premised on the assumption that our review standard of the SBA decision would be the same as if we were reviewing the question of a bidder's compliance with a special experience requirement where the SBA was not involved. Eagle's premise is erroneous.

In the Baranello decision, supra, which also involved the question of a small business' compliance with a special experience requirement, we concluded that where "no question of fraud is involved [in SBA's issuance of a COC], [GAO's role in reviewing a protest against the COC's issuance] would be limited to suggesting that the procuring agency reconsider its decision if the record indicates that certain vital information bearing on a small business bidder's responsibility had not been considered by SBA." Although Eagle attempts to distinguish Baranello from the present case mainly through an argument which contrasts the difference in the wording of the experience clauses involved, we conclude that Baranello is applicable to the present case to the extent it announces the standard of our Office in reviewing a protest against the SBA's issuance of a COC for a procurement which required a bidder to meet certain minimum experience requirements.

Essentially, therefore, our review of the issuance of the COC is limited under Baranello to fraud on the part of SBA, which has been neither alleged nor shown here, or to failure of the SBA to consider vital information bearing on Pacific's responsibility. Eagle does not cite any information which the SBA failed to consider and does not argue that SBA was unaware of the experience requirement; instead, Eagle merely makes arguments about information which was of record before SBA. Thus, Eagle's arguments are irrelevant to our review standard and will not be further considered.

Since under our review standards we cannot question the SBA's decision, we also cannot question the Army's concurrence in that decision.

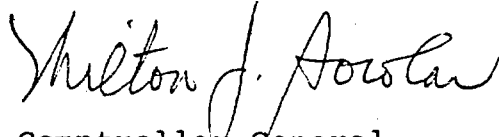
In response to Army's request for an opinion on whether we will especially review SBA COC decisions concerning bidders' compliance with special experience requirements, we note that the review standard for SBA COC decisions as announced in Baranello and in this decision will afford some review of these decisions. Given the present COC scheme, however, we are prohibited from any more intensive review.

Reliable Building Maintenance Company Protest

Reliable Building Maintenance Company (Reliable) has also protested the SBA's COC decision and the Army's concurrence in the decision. Essentially, Reliable says it felt it would not comply with the special experience requirements; consequently, the company did not bid for the contract. Further, Reliable argues that the SBA decision here effectively allows a deviation from these requirements and should not be permitted.

We view these arguments as closely related to the ones advanced by Eagle. Specifically, Reliable is contesting the reasonableness of the SBA decision but does not show that the decision was the result of fraud or that the SBA failed to take into consideration vital information bearing on Pacific's competency. As noted above, we cannot question the SBA's decision under these review standards.

Protest denied.

A handwritten signature in cursive script, reading "Milton J. Rowland". The signature is written in dark ink and is positioned above the typed name.

for the Comptroller General
of the United States