



Comptroller General  
of the United States

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Washington, D.C. 20548

## Decision

**Matter of:** Joa Quin Manufacturing Corporation

**File:** B-255298

**Date:** February 23, 1994

Sam Zalman Gdanski, Esq., for the protester,  
Laurie B. Hurley, Esq., and William A. Longwell, Esq.,  
United States Marine Corps, for the agency.  
Tania L. Calhoun, Esq., and Ralph O. White, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

### DIGEST

1. Protest that contracting agency improperly rejected section 8(a) firm as nonresponsible despite determination of competency made by Small Business Administration's (SBA) Regional Office is denied where the contracting officer reasonably concluded that the Regional Office's determination did not adequately address contracting agency concerns regarding the technical capability of the firm to perform the contract, and subsequently appealed the Regional Office's decision to the SBA's Central Office, which declined to confirm the Regional Office's assessment that the protester was competent, and instead advised the contracting agency to make award to another 8(a) firm.

2. Protest that contracting agency failed to provide Small Business Administration with vital information bearing on protester's responsibility and acted in bad faith is denied where the record does not support these allegations.

### DECISION

Joa Quin Manufacturing Corporation protests the award of a contract to A.C. Incorporated under invitation for bids (IFB) No. M67854-93-B-1025, issued by the Marine Corps for 735 air conditioning skid mounting assemblies.<sup>1</sup> Joa Quin

<sup>1</sup>The skid mounting assembly is used to provide a mounting platform, protection, cables, ducting and plenums for use with standard Marine Corps air conditioners. The assemblies, when paired with air conditioners, will be deployed in support of various tactical shelters and vans.

argues that the agency improperly found it to be nonresponsible.

We deny the protest.

#### BACKGROUND

The solicitation was issued as a competitive section 8(a) set-aside<sup>2</sup> on April 20, 1993. On June 7, Joa Quin submitted the apparent low bid of \$2,794,500, and A.C. submitted the second-low bid of \$2,828,767. In response to the contracting officer's request for a preaward survey of Joa Quin's capability, a preaward survey team visited Joa Quin's Colorado facilities on July 30. The preaward survey team recommended against award to Joa Quin because it found the company deficient under four of the eight factors checked. Specifically, the survey team concluded that Joa Quin lacked production capability for a contract of this magnitude; lacked adequate quality assurance procedures; lacked adequate financial resources to perform the contract; and lacked an acceptable accounting system to accrue costs related to the contract.

Based upon the negative preaward survey, the contracting officer determined that Joa Quin was not a responsible offeror. On August 17, in accordance with Federal Acquisition Regulation (FAR) § 19.809, the contracting officer referred the matter to SBA's Denver Regional Office to decide whether Joa Quin was competent and responsible to perform the contract. The Regional Office dispatched an industrial specialist, a commercial marketing representative, and a consultant to Joa Quin's facilities to review the critical elements listed in the preaward survey, and to determine the firm's ability to successfully complete the contract. By letter dated September 7, the Regional Office advised the contracting officer that while it had not conducted a formal certificate of competency proceeding, its review led it to conclude that Joa Quin could perform the contract, and that the deficiencies listed in the preaward survey report appeared to be minor. The letter included, as attachments, the various reports filed by the three SBA representatives concerning their findings.

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<sup>2</sup>Section 8(a) of the Small Business Act authorizes the Small Business Administration (SBA) to enter into contracts with government agencies and to provide for the performance through subcontracts designed to assist "developing" small business concerns which are owned and controlled by designated disadvantaged individuals. See 13 C.F.R. Part 124 (1993); New Life Group, Inc., B-247080.2, May 22, 1992, 92-1 CPD ¶ 463.

Upon receipt of the SBA Regional Office's report, the contracting officer asked two of the three members of the preaward survey team to review SBA's response. Each of these individuals submitted memoranda to the contracting officer restating their concerns regarding Joa Quin's technical capability to perform the contract, and concluding that their earlier concerns were not allayed by SBA's report. While the members of the agency survey team concluded that the SBA response adequately addressed their concerns about Joa Quin's accounting system and financial capability, they were not convinced by the SBA Regional Office's assurances regarding Joa Quin's production capability and quality assurance capability. The agency survey team concluded that on these two issues the Regional Office provided only general assertions that deficiencies had been or would be corrected.<sup>1</sup>

Based on these concerns, the contracting officer determined that Joa Quin remained nonresponsive, and decided to appeal the decision of the SBA Regional Office to SBA's Central Office. By letter dated September 16, the contracting officer sent copies of the preaward survey report, the SBA Regional Office's report, and the preaward survey team's memoranda to SBA's Central Office, asking that SBA review the Regional Office's response and provide further information to support SBA's decision to recommend award to Joa Quin.

By letter dated September 24, SBA's Central Office notified the contracting officer that SBA was unable to assure the agency that Joa Quin could overcome the concerns raised in the preaward survey. The letter further advised that, rather than award to Joa Quin, the agency should make award to the next eligible bidder. On September 29, award was made to A.C., which had been determined responsible after a preaward survey. This protest followed.

#### DISCUSSION

Joa Quin argues that the Marine Corps acted improperly in referring this matter to SBA's Central Office, and contends that the agency instead should have relied on the Regional Office's recommendation that Joa Quin could perform the contract. The protester also contends that the agency provided SBA with erroneous information bearing on the firm's responsibility, and acted in bad faith because it "cut short" the preaward survey.

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<sup>1</sup>The Regional Office essentially echoed the survey team's concern that the firm's quality assurance program was incomplete, but concluded that the deficiency was minor and being corrected.

The authority to administer the 8(a) program is vested in the SBA by statute, 15 U.S.C. § 637(a) (1988), and SBA has promulgated regulations to implement the statute at 13 C.F.R. Part 124. A section 8(a) contract is awarded by the contracting agency to SBA, based on terms and conditions mutually agreed to by the contracting agency and SBA. See FAR § 19.800(c). The socially and economically disadvantaged small business concern is the subcontractor to SBA. Consequently, while the selection of program participants for award under the 8(a) competitive procedures is primarily the responsibility of procuring agencies, see 13 C.F.R. § 124.311(f)(1), (3), (7), and (8), SBA alone is authorized to certify itself as competent to perform the requirement based on its determination that the particular concern with which it intends to subcontract is responsible to perform the requirement. 13 C.F.R. § 124.313. If a contracting officer has "substantial doubts" as to a particular 8(a) firm's ability to perform, the question is referred to SBA, which decides whether to certify itself as competent to perform using the 8(a) concern in question. FAR § 19.809. Thus, the contracting agency has no authority to independently make an affirmative or negative determination of responsibility of an 8(a) firm or to withhold award from such a firm for reasons of responsibility. S and F Indus.--Recon., B-255134.2, Dec. 13, 1993, 93-2 CPD ¶ 314; Aviation Sys. and Mfg., Inc., B-250625.3, Feb. 18, 1993, 93-1 CPD ¶ 155.

Contracting officers are required to find a contractor to be nonresponsible where the contracting officer lacks necessary information that clearly indicates that the contractor is responsible. FAR § 9.103(b). As a result, we think that the contracting officer's concerns about the technical capability of Joa Quin to perform the contract were reasonable, based upon issues raised in the preaward survey report which were not fully addressed by the SBA Regional Office. Moreover, SBA's Central Office did not dispute the contracting agency's determination that Joa Quin was nonresponsible; rather, it ultimately advised the agency to award the contract to another 8(a) firm. While the protester disagrees with SBA's conclusion, SBA is the sole arbiter in determining section 8(a) eligibility, and its determination cannot be challenged by a program participant or any other party. S and F Indus.--Recon., supra. Since the contracting agency here relied upon SBA's guidance in withholding the award to Joa Quin, we cannot conclude that the agency acted improperly.

With regard to Joa Quin's allegation that the contracting agency provided SBA with erroneous information, as stated above, we generally do not review SBA's decision to certify, or not to certify, its competency since SBA has the statutory authority to conclusively determine the

responsibility of a small business concern. See 15 U.S.C. § 637(b); Bullard-Lindsay Contracting Co., Inc., B-252027, May 18, 1993, 93-1 CPD ¶ 392; Joanell Laboratories, Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207. We will do so, however, where the protester alleges that the procuring agency has acted in bad faith or has failed to provide SBA with vital information bearing on the firm's responsibility. See RBE, Inc., B-252635, July 16, 1993, 93-2 CPD ¶ 27; COSTAR, B-240980, Dec. 20, 1990, 90-2 CPD ¶ 509.

While the protester has provided its explanations for various deficiencies pointed out by both the contracting agency and the SBA Regional Office, it has not shown that the contracting agency failed to provide SBA with vital information bearing on the firm's responsibility. For example, under the production capability factor, Joa Quin cites as erroneous the contracting agency's statements that the firm had not performed a contract "of this complexity or magnitude." However, the protester does not argue that SBA was not provided with information concerning the firm's prior contract history, but instead asserts that two of its prior contracts, in combination, contained more stringent requirements than the one at issue here. Similarly, Joa Quin cites as erroneous the preaward survey report's statement that the firm's delinquency on one government contract was caused by the contractor. While Joa Quin acknowledges the delinquency, it contends that the delay was caused by the government.

Under the quality assurance capability factor, Joa Quin contends that an agency memorandum erroneously states that a member of the preaward survey team was told that the quality assurance program would not be fully implemented for 2 to 3 months. While it is not clear whether this statement was made to a member of the preaward survey team, we cannot conclude that it was erroneous or misleading, as the SBA Regional Office's report, unchallenged by the protester, indicates that Joa Quin made the same statement to the SBA officials. While Joa Quin disagrees with SBA's decision to accept the contracting officer's determination that the firm was nonresponsible--and thus disagrees with SBA's advice to the agency to make award to another 8(a) firm--this disagreement does not mean SBA failed to consider vital information bearing on the firm's responsibility. See Bullard-Lindsay Contracting Co., Inc., supra.

Finally, Joa Quin argues that the contracting agency acted in bad faith because it "cut short" the preaward survey.<sup>4</sup>

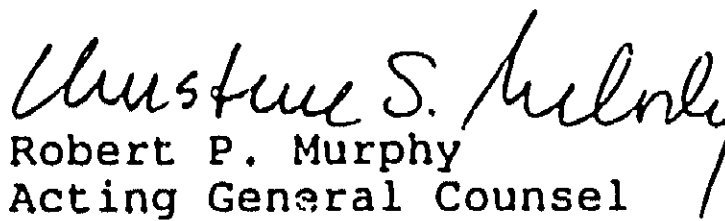
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<sup>4</sup>Joa Quin also alleges that the agency acted in bad faith by not discussing the SBA regional office's report with the  
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To establish bad faith, the protester must present convincing evidence that the officials involved had a specific and malicious intent to harm the firm. See Kinross Mfg. Corp., B-234465, June 15, 1989, 89-1 CPD ¶ 564. The protester has not done so here. Nor is there any other basis on which to object to the duration of the preaward survey.

Members of the preaward survey team arrived at Joa Quin's facilities at 9 a.m. and left at 1 p.m. on July 30; during that time they discussed relevant issues under each of seven factors with various Joa Quin employees. In addition, Joa Quin was given advance notice of the visit, and, thus could have prepared any documentation it thought relevant to the survey. Finally, throughout its own submissions in this matter, the protester refers to discussions and question and answer sessions involving the principal topics in issue. While it is clear that Joa Quin is displeased with the duration of the survey, we see no basis to conclude that it denied the protester an opportunity to demonstrate its responsibility. A preaward survey team is not under an obligation to tailor the duration of its facilities visit to suit an offeror's particular sense of what is required under the circumstances. See Oertzen & Co. GmbH, B-226537, Feb. 17, 1988, 88-1 CPD ¶ 158. Absent a showing that the analysis is flawed, the duration of a preaward survey does not provide a basis to challenge the reasonableness of the survey. See American Sys. Corp., 68 Comp. Gen. 475 (1989), 89-1 CPD ¶ 537.

The protest is denied.

  
 for Robert P. Murphy  
 Acting General Counsel

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4 (...continued)

third member of the preaward survey team prior to referring the matter to the SBA Central Office since, the protester asserts, that individual disagreed with the survey team's conclusions. This allegation has no basis in fact, as the individual in question, who recommended no award based on the quality assurance capability factor, has submitted an affidavit indicating that he agrees with the team's conclusions.