



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Department of the Army--Reconsideration

File: B-270860.5

Date: July 18, 1996

James H. Roberts III, Esq., Manatt, Phelps & Phillips, for Holiday Inn-Laurel.
J. William Bennett, Esq., for Convention Marketing Services, Inc.
Col. Nicholas P. Retson and Capt. Bryant S. Banes, Department of the Army, for the agency.
Tania L. Calhoun, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Request for reconsideration is denied where the requesting party has not shown that our prior decision contained legal or factual errors which would warrant a reversal or modification of our decision.

DECISION

The Department of the Army requests that we reconsider our decision in Holiday Inn-Laurel-Protest and Request for Costs, B-270860.3; B-270860.4, May 30, 1996, 96-1 CPD ¶ 259, concerning the Army's procurement of meals, lodging, and transportation to support the Baltimore Military Entrance and Processing Station in Baltimore, Maryland under request for proposals (RFP) No. DAHC36-95-R-0012. In that decision, we granted Holiday Inn-Laurel's request that it be reimbursed the reasonable costs of filing and pursuing its protest of the evaluation of its proposal, and sustained its protest of the Army's refusal to award it the contract in light of the fact that the Small Business Administration (SBA) issued the firm a certificate of competency (COC).

We deny the request for reconsideration.

Holiday Inn-Laurel filed a protest¹ in which it asserted that the Army had improperly evaluated its proposal as marginal and, more specifically, that the Army had improperly evaluated its proposal with respect to past performance. The firm also challenged the Army's past performance evaluation to the extent that it constituted

¹The long history of this disputed procurement is set forth in detail in our May 30 decision and will not be repeated here.

a nonresponsibility determination. After the protest was filed, the contracting officer determined that the firm's poor past performance justified a finding that it was nonresponsible. Since the firm is a small business concern, the Army, pursuant to Federal Acquisition Regulation (FAR) § 19.602-1(a)(2), referred the matter to SBA for review under its COC procedures. The Army also issued a stop-work order to the awardee.

In its report, the Army summarily rebutted the protest allegations and referred to enclosed evaluation documents. Our review of those documents showed that the evaluation was flawed, and we asked the agency to respond to our concerns. The day before the protester's comments were due, the Army advised us that it had taken corrective action and reevaluated the proposals consistent with our concerns. As a result, Holiday Inn-Laurel was determined to be the lowest-priced, technically acceptable offeror, and thus in line for award. However, the Army did not make award to the firm because it had been determined nonresponsible, and SBA's decision on the COC was still pending. Under the circumstances, we dismissed the protests as academic with respect to the evaluation challenge, and as premature with respect to the nonresponsibility determination challenge.

Holiday Inn-Laurel subsequently filed a request for costs with our Office, arguing that the Army had unduly delayed taking corrective action in response to the firm's meritorious protest. On that same day, SBA declined to issue the firm a COC, but then subsequently issued the COC. Holiday Inn-Laurel then protested the Army's refusal to acknowledge the SBA's issuance of the COC and award the contract to the firm.

As to the request for costs, we determined that the Army had unduly delayed taking corrective action in the face of Holiday Inn-Laurel's clearly meritorious protest, and recommended that the firm be reimbursed the costs of filing and pursuing that protest. See Bid Protest Regulations, 4 C.F.R. § 21.8(e) (1996). The Army did not dispute that its corrective action was taken in response to our queries bearing directly upon issues implicit in those allegations, leading to our conclusion that they were clearly meritorious, and the record showed that the Army unduly delayed taking its corrective action by not promptly undertaking a reasonable factual investigation before filing its report. See Tucson Mobilephone, Inc.–Request for Entitlement, 73 Comp. Gen. 71 (1994), 94-1 CPD ¶ 12.

In its request for reconsideration, the Army complains that since its corrective action did not result in award to Holiday Inn-Laurel—because SBA had not yet acted on the COC issue—the protest was not clearly meritorious. The Army is mistaken.

A protest is "clearly meritorious," *i.e.*, not a close question, when a reasonable agency inquiry into the protester's allegations would show facts disclosing the absence of a defensible legal position. *Id.*; ManTech Field Eng'g Corp.--Recon., B-246152.5, Dec. 17, 1992, 92-2 CPD ¶ 422. Hence, the determination as to whether a protest is clearly meritorious depends upon the nature of the protest allegations, not the final result of the agency's corrective action. A protest challenging the evaluation of proposals, such as this one, may be clearly meritorious even where the protester does not receive award as a result of the agency's corrective action. *See, e.g., David Weisberg--Entitlement to Costs*, 71 Comp. Gen. 498 (1992), 92-2 CPD ¶ 91 (corrective action resulted in termination of awardee's contract and resolicitation); Carl Zeiss, Inc.--Entitlement to Costs, B-247207.2, Oct. 23, 1992, 92-2 CPD ¶ 274 (corrective action resulted in termination of awardee's contract and decision not to reinstate selection process). Since Holiday Inn-Laurel's allegations were clearly meritorious, that SBA had not yet acted on the COC referral was irrelevant to our determination.²

Turning to the protest, our decision explained that shortly after SBA declined to issue a COC, it learned that its decision might not be sound. SBA immediately requested and received additional time from the Army to review its decision, and the Army chose not to lift the stop-work order. After additional review, SBA decided to issue the COC. SBA advised the contracting officer of its intention to do so, and the contracting officer asked to submit new or additional information bearing on Holiday Inn-Laurel's use of overflow facilities and the total number of written complaints of rude or discourteous treatment of applicants. The parties agreed that further action would be suspended pending SBA review of this additional information. Several days later, the Army advised SBA that it had no additional information to provide, and that it needed a final decision. It was not until after SBA issued the COC that the Army lifted the stop-work order and informed SBA that it would not acknowledge the COC.

In our decision, we stated that the Army must consider SBA's issuance of the COC as conclusive. SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business firm's responsibility by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7)(A) (1994); R.T. Nelson Painting Serv., Inc., 69 Comp. Gen. 279 (1990), 90-1 CPD ¶ 202. We agreed with SBA that the applicable regulations did not bar SBA from further

²To the extent that the Army argues that Holiday Inn-Laurel's allegation with respect to the nonresponsibility determination was not clearly meritorious, as noted in our prior dismissal, that allegation was not before this Office.

review following the issuance of an initial decision under the circumstances here.³ We also explained that where SBA does not notify a contracting agency of its intent to issue a COC until after the time period for issuing a COC decision, but the contracting officer nevertheless receives such advice from SBA prior to taking any contract action, the agency is bound by the COC determination. Age King Indus., Inc., B-225445.2, June 17, 1987, 87-1 CPD ¶ 602. Taking these two factors together, we concluded that when the Army was advised of the decision to issue a COC, it could not disregard it, given that the stop work order had not been lifted and the government otherwise would not be materially prejudiced by honoring the COC. This result was consistent with the contracting officer's basic responsibility under the RFP to make award to the responsible offeror offering the lowest priced, technically acceptable proposal, and with the statutory scheme that vests conclusive authority for determining a small business's responsibility in SBA. Id.

In its request for reconsideration, the Army complains that we improperly failed to give it the opportunity to provide information rebutting SBA's conclusions as to Holiday Inn-Laurel's responsibility, and asks that we now consider such information as "vital information" bearing upon the firm's responsibility which SBA failed to consider.

While our bid protest authority encompasses alleged violations of law and regulation, 31 U.S.C. §§ 3552, 3554 (1994), we have been given no authority to review SBA's judgments concerning the issuance of COCs. We will only review such decisions given a showing of possible bad faith on the part of government officials or a failure to consider vital information bearing on the firm's responsibility. 4 C.F.R. § 21.5(b)(2). In adopting the "failure to consider vital information" standard, we were concerned that in certain circumstances SBA, because of how information was presented to or withheld from it by the procuring agency, could be led to issue or not issue a COC when its decision might be otherwise were it given a more accurate picture of the facts bearing on a firm's responsibility. That is, we were concerned primarily that SBA could be misled into denying a COC by incomplete, misleading, or inaccurate information presented by the procuring agency. See Joannell Labs., Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207. This concern is not present here.

Contracting agencies are afforded ample administrative recourse when disagreement arises over whether SBA should issue a COC to a firm. See FAR § 19.602-3. In accordance with these provisions, prior to issuing the COC, SBA gave the Army the opportunity to submit new or additional information in support of its position that

³While the Army complains that we did not address the effect of revised COC regulations on this case, 61 Fed. Reg. 3,310 (1996), these revised regulations were not effective until March 1, 1996, long after the COC referral was made.

Holiday Inn-Laurel was nonresponsible. Specifically, the contracting officer advised SBA that he would submit information bearing on the firm's use of overflow facilities and the total number of written complaints of rude or discourteous treatment of applicants. SBA agreed to delay issuing the COC until it had reviewed this information. For reasons known only to the Army, the contracting officer subsequently informed SBA that the Army had no new or additional information to submit. There is no evidence that the information now proffered could not have been provided to SBA prior to the issuance of the COC. Indeed, the record shows that SBA offered to give the Army additional time in which to submit additional information, but that the Army pressed for a final decision, effectively waiving its right to appeal to SBA's Central Office. The Army is now asking our Office to provide it with the administrative appeal that it declined to pursue with SBA. Given SBA's conclusive authority in this area, and the lack of evidence that the information now proffered could not have been provided to SBA prior to the issuance of the COC, we will not do so.

Under our Bid Protest Regulations, to obtain reconsideration the requesting party must show that our prior decision may contain either errors of fact or law or present information not previously considered that warrants reversal or modification of our decision. 4 C.F.R. § 21.14(a); R.E. Scherrer, Inc.--Recon., B-231101.3, Sept. 21, 1988, 88-2 CPD ¶ 274. As the Army has not met this standard, its request for reconsideration is denied. In addition, we recommend that Holiday Inn-Laurel recover the costs incurred in responding to this request for reconsideration. Banks Firefighters Catering; Dept. of Agriculture; Western Catering, Inc.--Recon., B-257547.5 et al., Mar. 6, 1995, 95-1 CPD ¶ 129; General Servs. Admin.--Recon., B-237268.3 et al., Nov. 7, 1990, 90-2 CPD ¶ 369.

The request for reconsideration is denied.

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