

DECISION

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

FILE: B-208559

DATE: February 14, 1983

MATTER OF: Food & Drug Research Laboratories, Inc.

DIGEST:

Question of small business' responsibility (financial capacity) must be referred to Small Business Administration (SBA) for consideration of issuing certificate of competency. Since this was not done, we recommend referral to SBA.

Food & Drug Research Laboratories, Inc. (FDRL), a small business, protests the Department of Health and Human Services, National Institutes of Health (NIH), award of a contract, No. NIH-NIAMDD-81-2, to International Research and Development Corporation (International). The contract is for experimental research entailing the toxicologic evaluation, in animals, of iron chelating compounds. NIH anticipates that the work involved will encompass a 3-year incrementally funded period. In addition, NIH believes that two or three compounds per year will be evaluated by the contractor. The contract was awarded on May 17, 1982, with an effective date of June 1, 1982.

FDRL alleges that its proposal was the lowest cost proposal in the competitive range; but, it did not receive an award because NIH made a determination that FDRL was non-responsible. However, FDRL argues that NIH failed to submit this determination to the Small Business Administration (SBA) for a certificate of competency (COC) determination. FDRL requests that since it was denied its right to demonstrate to the SBA that FDRL was competent to perform, the contract should be terminated and a new contract awarded to FDRL.

Based on the following, we sustain the protest.

NIH admits that it did make a procedural error in that it did not submit this matter to the SBA for a COC at the time FDRL was determined to be nonresponsible. However, it

024618

is NIH's position that it remedied this error because on June 15, 1982, as a result of FDRL's May 27, 1982, protest to NIH, it wrote to the SBA advising the SBA of the procedural error and the events leading up to its recognition of the error. Furthermore, in its letter, NIH summarized the basis for finding FDRL nonresponsible and argued that the issuance of a COC would not be in the best interest of the Government. The only attachment to the letter was a chronology of events. NIH also contends that the SBA is only allowed 15 days to make a COC determination.

It is the SBA's position that NIH's June 15, 1982, letter did not rectify NIH's failure to initially refer this matter to the SBA since it did not constitute an adequate COC referral. SBA argues that a COC referral must "provide the SBA with sufficient copies of all pertinent technical and financial information with respect to the small business concern." 41 C.F.R. § 1-1.708-2(b) (1982). The SBA also submits, and we agree, that the 15-day period referred to by NIH pertains to a preaward situation and is not applicable to the FDRL postaward situation. The SBA, in its submission to our Office, advises that, in this circumstance, it is willing to conduct a COC survey upon proper and adequate notification.

The question of FDRL's responsibility was not referred to the SBA for the possible issuance of a COC due to an oversight by the contracting agency. The Small Business Act, as amended, provides that a small business may not be precluded from an award on the basis of nonresponsibility without referral of the matter to the SBA for final disposition under COC procedures. See the Small Business Act, 15 U.S.C. § 637(b)(7) (1976), as amended by section 501 of Pub. L. No. 95-89, 81 Stat. 557, effective August 4, 1977, and implementing regulations, 13 C.F.R. § 125.5 (1982). The language and legislative history of the act, SBA's implementing regulations, and the Federal Procurement Regulations (FPR) provide no exceptions to this referral procedure. See International Business Investments, B-206474, May 27, 1982, 82-1 CPD 500; Environmental Growth Chambers, B-201333, October 8, 1981, 81-2 CPD 286.

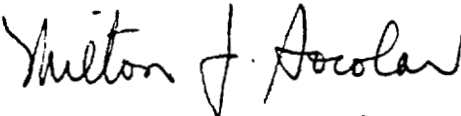
The fact that NIH sent a letter to the SBA does not alter this result since we do not view NIH's letter as a COC

referral. The letter did not include any mention of requesting a COC survey. Rather, the letter was merely a chronology of events and an argument, based on the chronology, why a COC would not be in the best interest of the Government. A more accurate interpretation of the letter is NIH's apology for not following SBA's COC procedures accompanied by an argument why NIH believed no further action should be taken in this circumstance.

By letter of today to the Secretary of Health and Human Services, we are recommending that the contracting officer refer this matter to the SBA. If the SBA issues a COC, then the current contract should be terminated for the convenience of the Government and award made to FDRL at its proposed prices for the remaining portion of the terminated contract. See Hub Testing Laboratories, B-199368, September 18, 1980, 80-2 CPD 204; Hub Testing Laboratories-- Claim for Costs, B-199368.3, June 18, 1982, 82-1 CPD 602. If a COC is not issued, no further action is required. See Angelo Warehouses Co., B-196780, March 28, 1980, 80-1 CPD 228.

Since our decision contains a recommendation for corrective action, we have furnished copies to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720 (formerly 31 U.S.C. § 1176 (1976)), which requires the submission of written statements by the agency to those committees concerning the action taken with respect to our recommendation.

The protest is sustained.

for 
Comptroller General
of the United States