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DECISION

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

FILE: B-219439.2 **DATE:** February 20, 1986

MATTER OF: J.R. Youngdale Construction Co., Inc--Request for Reconsideration

DIGEST:

1. Parties to a bid protest, including contracting agencies, that withhold or fail to submit all relevant evidence to GAO in the expectation that GAO will draw conclusions beneficial to them, do so at their peril, since it is not GAO's function or province to prepare defenses to allegations raised in a protest record.

2. Decision is affirmed on reconsideration where it is not shown to be factually or legally wrong.

The United States Army Corps of Engineers (Corps) requests reconsideration of our decision in J.R. Youngdale Construction Co., Inc., B-219439, Oct. 28, 1985, 85-2 C.P.D. ¶ 473. We held in the decision that the Corps improperly awarded a contract to Inland Contractors, the second low bidder, under invitation for bids (IFB) No. DACA05-85-B-0045 after receiving notice from the Small Business Administration (SBA) that the SBA was going to issue the certificate of competency (COC) to J.R. Youngdale Construction Company, Inc. (Youngdale), the low bidder. We affirm our decision.

Previous Decision

Our decision was based on the conclusion that on June 18, 1985, 8 days before the June 26 award to Inland, the SBA notified the Corps by telephone that it would issue a COC; we considered this telephone advice the preliminary telephone notice of the SBA Central Office's decision contemplated by the Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.602-3(b) (1984). Our conclusion was based, in large part, on a handwritten memorandum in the evidentiary exhibits submitted by the Corps with the agency report. The memorandum was titled "Significant Events Regarding the Non-Responsible Determination Found on J.R.

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Youngdale," and included the June 18 entry: "L.A.D. C.H. P&S informed Central Office does not have time to review package and that they will issue COC."

We also discussed a letter of June 20 from the Acting Director of the SBA's Office of Industrial Assistance to the Director, Office of Small and Disadvantaged Business Utilization, Department of the Army, which the Corps received before the award to Inland. In this letter, the SBA advised the Army that the Los Angeles District of the Corps had informed the SBA's San Francisco Regional Office that it wished to appeal the SBA's proposed affirmative action on the COC, and that the COC proceeding was being put in "suspense" pending possible appeal within the required 10-day period. We stated that although the letter did not expressly state that a COC was issued, it would be elevating form over substance to suggest that, in view of the June 18 notice and the letter's contents, the contracting officer thought the SBA Central Office really had not decided the matter or that the lack of an actual COC document justified award to Inland under applicable regulations.

We stated that it was apparent from the record that the contracting officer's decision to award to Inland really was based on his concern with the depth of the SBA's deliberations on the Youngdale matter and his disagreement with what he knew the Central Office's decision to be, not on the lack of a Central Office decision. We pointed out that neither law nor regulations afford an agency the option to disregard a COC decision for those reasons.

Reconsideration Request

The Corps contends that our conclusions of fact are in error. The agency argues that the SBA had not reached a decision and had not notified the Corps of a decision in accordance with the FAR, but that SBA staff members merely had made informal statements to the Corps predicting what SBA would do in the future. In support of its position, the Corps has submitted two affidavits dated November 8, 1985, one from the attorney who handled the bid protest for the Corps, and the other from the employee who prepared the handwritten chronicle of significant events. The attorney states that on August 22--the day before the Corps submitted to our Office its report on Youngdale's protest--she spoke with SBA officials who told her that the Central Office COC committee had not met to review the Youngdale

matter; had closed the file without action because of the award to the next low bidder; and would reopen the Youngdale case if the Corps so desired. The other affiant is responsible for conducting preaward surveys and coordinating contract awards, and prepared the documentation on which the Corps' nonresponsibility determination with respect to Youngdale was based. He states regarding the memorandum entry for June 18:

> "I intended these words to convey my understanding based on conversations with others in the [Corps'] Los Angeles District. My understanding was that someone in the Corps HQ [Headquarters] had indicated to the CH [Chief], Procurement and Supply Division that the [SBA] Central Office would decide to concur with the Regional Office recommendation and issue a COC to Youngdale.
>
> "I did not intend to indicate that the 'Ch., P&S' was actually contacted by the SBA Central Office. I also did not intend to indicate that the SBA Central Office had already made the decision to issue a COC."

The Corps also has submitted a June 18 memorandum prepared by the person at Corps Headquarters who actually spoke with the SBA on that date. He states that the SBA Central Office advised that the SBA was reviewing the matter and in all probability would concur with the Regional Office's recommendation to issue a COC. The Headquarters employee also states in the memorandum that it appeared as if the SBA had problems with the material the Corps sent and needed more time to review the situation.

The Corps argues that these submissions show that we were wrong in concluding that the SBA Central Office had reached a decision on the COC and had so advised the Corps.

Decision

Parties to a protest, including contracting agencies, that withhold or fail to submit all relevant evidence to our Office in the expectation that we will draw conclusions beneficial to them do so at their peril, since it is not our function or province to prepare, for parties involved

in a protest, defenses to allegations raised in the record. Interscience Systems, Inc.; Cencom Systems, Inc.--Reconsideration, 59 Comp. Gen. 658 (1980), 80-2 C.P.D. ¶ 106. Our Office therefore will not reconsider a decision on the basis of an argument previously presented but supported for the first time in a request for reconsideration by evidence that could have been furnished at the time of our original consideration. Evans Inc.--Request for Reconsideration, B-218963.2, June 26, 1985, 85-1 C.P.D. ¶ 730; Global Crane Institute--Request for Reconsideration, B-218120.2, May 28, 1985, 85-1 C.P.D. ¶ 606.

The only justification suggested by the Corps now for its failure to explain the June 18 entry in the chronicle of events at the time of our initial consideration of Youngdale's protest is that it had not occurred to the Corps that anyone would conclude from that entry that the SBA had notified the Corps of a decision. Youngdale, however, had made specific reference to that entry in its protest comments, to support the firm's view that the Corps knew the SBA Central Office's position when it made award to Inland; certainly, it was incumbent on the Corps to do more than remain silent on the matter, since the Corps' assertion that the SBA Central Office had not notified the Corps of a decision as required by the FAR was in conflict with the clear import of the handwritten memorandum. It simply is too late in the protest process for our Office now to consider the information the Corps has furnished in connection with its reconsideration request.

Moreover, we note that Youngdale, in commenting on the Corps' reconsideration request, has furnished our Office a document the firm recently received from the Corps in response to a Freedom of Information Act request Youngdale filed during the pendency of the original protest, which appears to support our view as to the apparent basis for the award to Inland. The document is a June 14 memorandum for the record prepared by the contracting officer, in which he states:

> "It is assumed that prior to or on 20 Jun 85, the SBA Central Office will telephonically contact the contracting officer or his representative. Per advice of legal counsel, the following outlines our strategy for action.

> "a. If SBA advises the contracting officer that their preliminary decision is to issue a COC but that a COC has not actually been signed by the appropriate SBA official, then the Corps should immediately award the contract to the second low bidder . . .
>
> "b. If SBA has issued the COC, then the Corps must award to J.R. Youngdale . . . ."

The Corps, in a December 2 letter to Youngdale that accompanied the document, asserts that the memorandum is misleading in that paragraph (a) "does not reflect the position adopted by the Corps and was not the basis for making award to the second low bidder." Notwithstanding that explanation, however, we cannot ignore the fact that the quoted statement in the memorandum--released to Youngdale a full 5 months after the protest was filed, and furnished to our Office by Youngdale, not the Corps, in connection with the reconsideration request--is consistent with our view that, considering all the circumstances of the Army's actions with respect to Youngdale, the award to Inland was made not due to the lack of knowledge of the SBA Central Office's position, but because of disagreement with it.

Finally, as we stated in our initial decision, the SBA supported Youngdale's protest. Nevertheless, to insure fairness in connection with the decision on reconsideration we invited the SBA's comments on the Corps' reconsideration request. The SBA, however, having been afforded the chance to support the Corps' current position, has declined to comment on the matter.

We stated in our initial decision that absent any appeal by the Corps of the SBA's decision under applicable regulations, the contract with Inland should be terminated and a contract awarded to Youngdale. The Corps still has not chosen to appeal even though the SBA offered, at least as of August 22 (according to the affidavit of the Corps attorney), to reopen its files if the Corps so desired. Accordingly, unless the Corps appeals and the SBA decides a COC in fact is not warranted, Youngdale is entitled to the contract.

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Our decision is affirmed. 4 C.F.R. § 21.12(a) (1985).

Milton J. Socolar

Acting Comptroller General
of the United States