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**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: E. F. Felt Company, Inc.

File: B-289295

Date: February 6, 2002

Walter J. Malyszek, Esq., Malyszek & Malyszek, for the protester.

Warren D. Leishman, Esq., and Kenneth C. Kitzmiller, Esq., Department of the Air Force, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not review challenges to the Small Business Administration's (SBA) decision not to issue a certificate of competency unless there is a showing that the certificate of competency denial resulted from possible bad faith on the part of a government official, or from a failure to consider vital information because of how information was presented to, or withheld from, the SBA by the procuring agency.

DECISION

E. F. Felt Company, Inc. protests the refusal of the Small Business Administration (SBA) to issue a certificate of competency (COC) to Felt with regard to its offer under request for proposals (RFP) No. F34601-01-R-40213, issued by the Department of the Air Force for the overhaul of 840 aircraft components. The protest also alleges an organizational conflict of interest exists for a competing offeror.

We dismiss the protest.

The Air Force issued the emergency RFP on July 17, 2001, with award to be made to the acceptable, responsible offeror who proposed the lowest price. The contracting officer requested a preaward survey on Felt from the Defense Contract Management Agency-San Francisco (DCMA). DCMA found the firm's financial resources to be satisfactory, although it otherwise recommended that award not be made to Felt based on the following deficiencies: lack of sufficient personnel or subcontracts to perform the contract work, lack of evidence that material quotes had been received,

lack of adequate testing facilities, non-compliance with the RFP's safety requirements, and no certified quality program in place. On October 1, based on the DCMA's preaward survey, the contracting officer determined that Felt was not a responsible prospective contractor for the solicited requirement and referred the matter to the SBA pursuant to the COC procedures. The contracting officer also informed Felt of the reasons for the non-responsibility determination and the referral to the SBA.

Felt timely applied for a COC with the SBA. By letters of October 24 to Felt and the Air Force, the SBA Area Director for Government Contracting declined to issue a COC, finding that Felt would not have adequate working capital available throughout the proposed term of the contract to successfully perform. The area director based his decision on a letter from a potential creditor to Felt that, though indicating an intent to enter into an agreement to provide the firm a significant line of credit, explicitly stated that the letter did not commit the creditor to do so; the creditor would not approve the credit line prior to a review and documentation process. See SBA Report, exh. E, Creditor's Letter of Intent to Felt. The area director stated in his letter to Felt that assets pledged as collateral for the proposed line of credit were already committed by the firm as security for two other loans, one of which was an SBA loan. The area director stated that he thus was not confident that the proposed line of credit would be approved and, consequently, the SBA could not be assured that Felt would satisfy the Air Force's contract requirements in a timely manner. The letter stated that the decision was final and offered the firm an opportunity to discuss with the SBA the reasons for the decision.

On October 25, Felt met with the area director, at which time it asserted that the area director's finding was based on incorrect facts. Felt states that it advised the area director that other, uncommitted assets had been pledged for the credit line in question, and that Felt had provided information to DCMA and other SBA officials demonstrating this fact, which the area director had not considered. Protest at 8. Felt and the SBA's Area Director disagree as to the substance and result of that meeting. Felt states the following:

The SBA did not realize it had utilized incorrect information in making a negative determination denying E. F. Felt a COC. However, when they did learn such, an attempt was made the next day to request that the Contracting Officer re-open the COC.

Protest at 10. SBA's Area Director states the following:

At no time either before or after my decision to deny a COC did I advise [the contracting officer] or any representative from E. F. Felt Company that we had made a "mistake" and that it needed to be corrected. In fact, I clearly explained to the representatives from E. F. Felt Company during a 3 hour meeting on October 25, 2001 that even if the contracting officer would reopen the COC case to allow E. F. Felt

Company to submit new additional information, there was no guarantee that SBA would issue a COC.

SBA Report, exh. B, Declaration of the Area Director, at 1. On October 26, the area director contacted the contracting officer, stated that he was firm in his belief that his decision to deny the COC was correct, and requested that the contracting officer consider allowing Felt to provide her with new information that could possibly demonstrate the necessary financial resources to perform. *Id.* Soon thereafter, the contracting officer notified Felt that the Air Force intended to award the contract to another offeror. This protest followed.

The protester challenges the SBA's decision denying a COC for the firm, alleging that the SBA acted in bad faith by willfully disregarding significant facts, failed to follow the SBA's standard operating procedures, and failed to consider vital information bearing on Felt's responsibility.¹ The protester also alleges that the only other offeror in the competitive range has an organizational conflict of interest that should preclude that offeror from performing the contract requirements.

The Small Business Act, 15 U.S.C. § 637(b)(7) (2000), gives the SBA, not our Office, the conclusive authority to review a contracting officer's determination that a small business is not responsible. We therefore do not review challenges to the SBA's decision not to issue a COC unless there is a showing that the COC denial resulted from possible bad faith on the part of a government official, or from a failure to consider vital information because of how information was presented to, or withheld from, the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2) (2001); Joanell Labs., Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207 at 4-6.

To establish bad faith, a protester must present convincing evidence that the officials involved had a specific and malicious intent to harm the firm. Joa Quin Mfg. Corp., B-255298, Feb. 23, 1994, 94-1 CPD ¶ 140 at 6. The burden of establishing bad faith is a heavy one. Evidence establishing a possible defect in an agency's actions generally is not sufficient in itself to establish that the agency acted in bad faith; the protester must also present facts reasonably indicating, beyond mere inference and suspicion, that the actions complained of were motivated by a specific and malicious intent to

¹ The protester initially alleged that the Air Force improperly failed to re-open the COC process. The Air Force submitted a report responding fully to this protest issue, stating that the protester has not identified any new information for the agency to consider concerning the agency's responsibility determination or the SBA's denial of the firm's COC application, and thus there was nothing improper about the Air Force's decision not to reconsider the matter. The protester did not substantively reply to the Air Force's explanation and we consider this protest allegation to be abandoned.

harm the protester. See Vanguard Indus., Inc., B-233490.2, Dec. 21, 1988, 88-2 CPD ¶ 615 at 2; David Boland, Inc., B-221845, May 23, 1986, 86-1 CPD ¶ 484 at 3.

Although it generally alleges “bad faith,” Felt has not alleged or otherwise presented facts showing that the SBA acted with intent to harm the firm. Even assuming for the sake of argument that the area director did not consider all the information presented to the SBA, or incorrectly interpreted that information, Felt states that the area director was not aware of this problem at the time he denied the protester’s application for a COC. The protester thus essentially concedes that the SBA acted without intent to harm the firm. Also, since the protest does not provide a basis for concluding that the SBA failed to consider vital information with the intention of harming the firm, it fails to show that the SBA acted in bad faith. See Marine Instrument Co., B-241287.2, May 6, 1991, 91-1 CPD ¶ 436 at 3. Thus, Felt has not made the requisite showing of possible bad faith on the part of the SBA that would allow us to consider its protest.

Absent bad faith, Felt’s allegation that the SBA did not consider vital information does not otherwise provide a basis for reviewing a protest of the SBA’s decision not to issue a COC. To do so, the protester must show that the SBA’s failure to consider vital information is due to the contracting agency’s failure to adequately inform the SBA of the information, not the SBA’s alleged failure to consider vital information presented to it. Joanell Labs., Inc., *supra* at 5. Here, since the protester states that the Air Force properly provided all vital information to the SBA, Protester’s Comments at 5, the “vital information” exception does not apply.

Felt also contends that the SBA did not follow applicable regulations in considering and declining the COC. See Skillens Enters., B-202508.2, Dec. 15, 1981, 81-2 CPD ¶ 472 at 3. This contention is based on the alleged failure of the SBA to follow its standard operating procedures (SOP) regarding the processing of COCs. These procedures represent internal SBA policies and guidelines that do not have the force and effect of law, and we generally do not review the SBA’s compliance with them. A.R.E. Mfg. Co., Inc., B-218116, May 17, 1985, 85-1 CPD ¶ 564 at 3. Moreover, evidence that the SBA failed to follow its standard procedures does not establish that the SBA acted with intent to harm a firm. Prospect Assocs., Ltd., B-218602, June 17, 1985, 85-1 CPD ¶ 693 at 2.

In sum, the protester has not established the elements necessary for our Office to consider a protest of SBA’s decision not to issue a COC. We thus have no basis to disturb the finding of nonresponsibility.

Since the protester was determined to be nonresponsible and not eligible for award here, it is not an interested party eligible to maintain a protest of an organizational conflict of interest of another offeror. 4 C.F.R. § 21.0(a); see WesternWorld Servs., Inc., d/b/a The Video Tape Co., B-243808.3, Aug. 12, 1991, 91-2 CPD ¶ 182 at 3; Stemaco Prods., Inc., B-243206, Mar. 27, 1991, 91-1 CPD ¶ 333 at 3.

The protest is dismissed.

Anthony H. Gamboa
General Counsel