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

FILE: B-207605 **DATE:** February 1, 1983

MATTER OF: Fry Communications, Inc.

DIGEST:

1. The Government Printing Office is a legislative agency which is excluded from coverage of the Small Business Act. Therefore, its determination that a small business concern is nonresponsible need not be referred to the Small Business Administration for review under certificate of competency procedures.

2. GAO will not disturb contracting agency's determination that a firm is nonresponsible where that determination is reasonably based on fact that firm did not have security clearances necessary to perform contract and could not obtain such security clearances in time to perform in an efficient and uninterrupted manner.

Fry Communications, Inc. (Fry), protests the Government Printing Office's (GPO) determination that Fry was not responsible to perform the services required under invitation for bids No. A203-S, and the subsequent award of the contract to Braceland Brothers, Inc. Fry contends that GPO's finding of nonresponsibility was contrary to the terms of the invitation and applicable sections of the Federal Procurement Regulations (FPR). Fry further contends that, since it is a small business, GPO was required to refer the matter of its nonresponsibility to the Small Business Administration (SBA) for the possible issuance of a certificate of competency as required under the Small Business Act, 15 U.S.C. § 637(b)(7).

We find no merit to the protest.

The invitation was for printing and related services, including production of looseleaf pamphlets, reprints and changes. Under the resulting requirements contract, the contractor is to perform such operations as film processing, printing, binding, packing and distributing. The invitation stated that approximately 50 percent of the orders under the contract "will be classified up to 'Confidential' or 'NATO Confidential.'" The invitation further stated that:

"All provisions of the Security Agreement (DD Form 441) including the 'Industrial Security Manual for Safeguarding Classified Information' (DoD 5220.22-M) are hereby made a part of these specifications and will be applicable to all phases of production and shipment of classified publications ordered under these specifications."

Bids were opened on April 27, 1982, and Fry submitted the lowest bid. The contracting officer subsequently contacted the Defense Investigative Service Cognizant Security Office (DISCO) to find out if Fry had been properly cleared under the Department of Defense Industrial Security Program to handle any classified material which would be released to the firm if awarded the contract. A DISCO representative told the contracting officer that it would take at least 6 months for Fry to obtain the necessary clearance. (Subsequent to Fry's filing a protest in our Office, the contracting officer again contacted DISCO and was told Fry was not cleared and that, "Under the most ideally realistic conditions, it would normally take 60 to 90 days to clear a facility from the time of receipt of the request.") The DISCO representative further informed the contracting officer that because of the need for "NATO Confidential" clearance, an interim security clearance would not be issued. The contracting officer concluded that there was not sufficient time for Fry to obtain the proper clearance before performance had to start and, therefore, determined Fry to be nonresponsible and awarded to Braceland Brothers, Inc., on May 12.

Fry contends that, even though the contracting officer determined Fry to be nonresponsible, Fry's offer could not properly be rejected without referral of the responsibility issue to the SBA for review under its certificate of competency procedures. Fry cites FPR § 1-1.708-2 and the Small Business Act, 15 U.S.C. § 637(b)(7), as mandating such referral.

In accordance with section 501 of the Small Business Act Amendments of 1978, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980), no small business concern may be precluded from award because of nonresponsibility without referral of the matter to SBA for final disposition under the certificate of

competency procedures. Section 1-1.708-2 of the FPR (Amendment 192, June 1978) is the implementing regulation. Under 15 U.S.C. § 637, SBA has authority to make final determinations with regard to "all aspects of responsibility" of small business concerns. However, we conclude that the certificate of competency procedures are not applicable to GPO procurements. Before reaching this conclusion, we reviewed reports from both GPO and SBA, as well as submissions from the protester. In addition, the legal issue concerning whether GPO is subject to SBA's certificate of competency review was before the United States District Court for the District of Columbia (Gray Graphics Corp. v. United States Government Printing Office, et al., Civil Action No. 82-2869, decided December 20, 1982) while we were considering this protest, and we reviewed certain documents submitted to the court before deciding this case. The views of SBA, in particular, are entitled to significant weight because of its statutory responsibility to administer the certificate of competency program. See System Development Corporation and International Business Machines, B-204672, March 9, 1982, 82-1 CPD 218.

GPO contends that it is not a Government agency covered by the Small Business Act. GPO submits that agencies covered by the act are defined in section 3(b) of the act, 15 U.S.C. § 632(b), which incorporates the following definition of agency found in the Administrative Procedure Act at 5 U.S.C. § 551(1):

> "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--
>
> "(A) the Congress * * *." (Emphasis added.)

Because GPO considers itself to be a congressional or legislative agency, GPO argues that it is excluded as an agency covered by the Small Business Act. GPO points to the legislative history of the Small Business Act amendments and, in particular, the language used by the Senate Committee on Governmental Affairs (quoted below) as a further indication that the act's definition of agency

excludes agencies in the legislative branch of Government. S. Rep. No. 1140, 95th Cong., 2nd Sess. 12 (1978). Moreover, GPO refers to Senate Document No. 96-44 entitled "Handbook for Small Business, A Survey of Small Business Programs of the Federal Government" (1980, 4th ed.) as a clear indication of congressional intent to exclude GPO from Small Business Act coverage because the handbook does not include the GPO, or any other legislative branch agency in its guide to agencies that administer Small Business Act Programs.

Fry argues that GPO is covered by the Small Business Act because nowhere in the Administrative Procedure Act or in the Small Business Act is GPO expressly exempted from the SBA's certificate of competency jurisdiction. Fry contends that, if Congress had intended to exclude "legislative-type agencies," it would have done so with specific language in the statute. Furthermore, Fry argues that the United States District Court for the District of Columbia has held that GPO is an agency within the meaning of the Administrative Procedure Act. Estes v. Spence, 338 F. Supp. 319 (D.C. 1972).

We note, as Fry points out, that GPO has been held to be an agency whose actions are subject to judicial review under the Administrative Procedure Act. Estes v. Spence, supra. Nevertheless, we do not think that Congress ever intended to make GPO subject to the Small Business Act. The legislative history of the Small Business Act indicates that Congress did not intend to include any legislative or judicial branch agency within the coverage of the Small Business Act. GPO, of course, is an agency within the legislative branch. See United States v. Allison, 91 U.S. 303 (1875).

Section 3(b) of the Small Business Act was added to the act by the 1978 Amendments, Pub. L. 95-507, 92 Stat. 1757, 1772, approved October 24, 1978. In explaining the wording of section 3(b), the Senate Committee on Governmental Affairs stated in Senate Report 95-1140, issued August 16, 1978, at page 12, that:

> "The Committee definition of 'agency' excludes the United States Postal Service, the General Accounting Office, and agencies in the legislative and judicial branches." (Emphasis added.)

We recognize that GAO, which is also considered to be within the legislative branch of Government (See, for example, Smithkline Corporation v. Staats, 668 F.2d 201, 204 (3rd Cir. 1981)), is specifically exempted from the Small Business Act while GPO is not specifically exempted. However, this does not mean that Congress therefore wanted to exempt GAO and not other legislative branch agencies from the act's coverage. Rather, the specific exemption for GAO is explained by the fact that GAO is defined as an executive agency for purposes of title 5, see 5 U.S.C. §§ 104 and 105, and thus could be considered subject to the Small Business Act unless there was a specific exemption.

The SBA has concluded that the Small Business Act was not intended to be applied to legislative agencies such as GPO, and the court in Gray Graphics gave deference to the SBA view of its own authority under that act. Based on the legislative history of the Small Business Act, we also conclude that GPO is not subject to the act.

We now consider Fry's contention that the contracting officer's determination that Fry was nonresponsible was improper because it was based upon the fact that Fry did not have the necessary security clearance at the time of contract award rather than at the time of performance. Fry cites FPR § 1-1.1203-1(b) (Amendment 192, June 1978) which requires only that the prospective contractor be able to comply with the proposed delivery schedule. Fry argues that it relied upon GPO's past practice of awarding similar contracts to contractors which did not have security clearances. Fry points out that there was no specific requirement for possessing a security clearance in the invitation. Fry also argues that since contract performance would extend over a 1-year period, there is sufficient time for obtaining any clearance if necessary.

The determination of a prospective contractor's responsibility--that is, its ability to perform the desired services or to deliver the required product in accord with the solicitation's delivery schedule and specifications--is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion. Therefore, our Office will not disturb a determination of nonresponsibility absent a

showing of either bad faith on the part of the procurement officials or the lack of a reasonable basis to support such a determination. Lear Colorprint Corporation, B-199523, September 6, 1980, 80-2 CPD 244.

Based on our discussion below, there is no showing of fraud or bad faith on the part of GPO officials. Moreover, we cannot conclude that there was no reasonable basis for the determination that Fry was nonresponsible. Therefore, this point of Fry's protest is without merit.

Concerning Fry's alleged reliance on past GPO awards to contractors without security clearances, GPO reports that it has always awarded contracts for the reproduction of classified material only to properly cleared contractors. Where, as here, the conflicting statements of the protester and the agency constitute the only available evidence of what really transpired in the past, the protester has not carried its burden of affirmatively proving its case. Kessel Kitchen Equipment Co., Inc., B-190089, March 2, 1978, 78-1 CPD 162. Furthermore, even if GPO had been making awards in the past without regard to security clearances, those prior actions would not necessarily justify award without regard to security clearance in the present case since prior improper contract actions do not prevent an agency from applying correct procedures in later procurements. SKS Group, Ltd., B-205871, June 14, 1982, 82-1 CPD 574.

In our opinion, the contracting officer's determination that Fry was nonresponsible had a reasonable basis. The solicitation clearly informed all offerors that half of the orders placed under the contract would involve classified material, that the Department of Defense "Industrial Security Manual for Safeguarding Classified Information" was incorporated and would be applicable to all phases of production and shipment of classified publications ordered under the contract, and that deliveries/pickups would have to be made by employees with proper security clearances. Thus, all offerors should have been aware that proper security clearance would be required of the contractor before performance could begin. Section 1-1.1203-1(b) of the FPR (Amendment 192, June 1978) specifically requires that, in order to be determined to be responsible, a prospective contractor must be able to comply with the required delivery or performance schedule. Here, after

discussing the matter with DISCO officials, the contracting officer ascertained that Fry would not be able to obtain the necessary security clearance before orders pertaining to classified documents were placed under the contract. In fact, an order related to a "NATO Confidential" publication was placed only 9 days after contract award. We think that the failure of Fry to obtain the necessary clearance in these circumstances was relevant to Fry's ability to perform the contract in an efficient and uninterrupted manner. Since the burden is on the prospective contractor to demonstrate its ability to perform properly before being awarded a contract, we find nothing improper in the contracting officer's determination here. See B-167536, October 17, 1969; What-Mac Contractors, Inc., 58 Comp. Gen. 767 (1979), 79-2 CPD 179; see, also, FPR § 1.1-1203 (Amendment 192, June 1978).

Accordingly, the protest is denied.

for Milton J. Socolar
Comptroller General
of the United States