DECISION

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

26735

FILE: B-212242 DATE: November 8, 1983

MATTER OF: Certified Testing Corporation

DIGEST:

1. While, generally, GAO will not consider a protest of a nonresponsibility determination where the Small Business Administration has denied a certificate of competency, the issue will be considered at the request of a court.

2. The issue of whether evidence of a bidder's lack of ability to perform is sufficient to warrant a finding in a particular case that the bidder is not responsible is a matter primarily for determination by the administrative officers concerned, and such determination will not be disturbed by GAO absent a clear showing of the lack of a reasonable basis for the finding. The contracting officer's finding that one of the protester's two production facilities lacked adequate quality control was a reasonable basis for determining that the protester was nonresponsible for those contract items to be produced at that facility.

3. The nature and extent of a preaward survey needed to assure the contracting officer that a company will meet its contractual obligation are for the contracting officer's judgment.

Certified Testing Corporation (CTC) protests the rejection of its low bids and subsequent awards to other bidders under invitations for bids (IFB) Nos. 7CF-52209/M4/75B and 7CF-52176/J4/75B issued by the General Services Administration (GSA). The IFB's were multiple-award Federal Supply Schedule procurements for various types of industrial gases. CTC was found nonresponsible by GSA and CTC was denied a certificate of competency by the Small Business Administration (SBA).

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While this protest was pending with our Office, CTC filed suit against GSA in the United States District for the Eastern District of Virginia (Civil Action No. 83-114-NN). The bases for the suit are the same as those raised in CTC's protest. The court requested an opinion from our Office to aid the court in rendering its decision in the suit.

Under the Small Business Act, 15 U.S.C. § 637(b)(7) (1982), the SBA has conclusive authority to determine a small business bidder's responsibility by issuing or refusing to issue a certificate of competency. Thus, our Office generally will not question a contracting agency's nonresponsibility determination where the SBA affirms that determination by refusing to issue a certificate of competency. See Stoner-Caroga Corp., Inc., B-204307, August 26, 1981, 81-2 CPD 182. However, in view of the request for an opinion from the court, we will consider this protest under our Bid Protest Procedures, 4 C.F.R. § 21.3(g)(3) (1983). See Speco Corporation, B-211353, April 26, 1983, 83-1 CPD 458.

In view of the court's request for an opinion, we have reviewed the protest and find it to be without merit.

CTC listed two production facilities in its low bids on various items in the two IFB's--Hampton, Virginia, and Jacksonville, Florida. In March 1983, a preaward survey was requested on both of CTC's facilities. Following plant inspections, negative reports were rendered on both facilities. Also, a financial responsibility inquiry was conducted on CTC and the company's financial resources were found to be inadequate.

Based on the negative preaward surveys and the determination of an unsatisfactory financial condition, GSA's contracting officer found CTC to be nonresponsible and requested the SBA to ascertain if CTC was eligible for a certificate of competency. After conducting its own inspections of the facilities, the SBA certified CTC's Jacksonville, Florida, facility competent as to capacity and credit, but found CTC's Hampton, Virginia, facility to be inadequate. Subsequently, GSA made award to CTC for those contract items that CTC would produce at its Jacksonville, Florida, facility.

CTC continued to express dissatisfaction to GSA with the agency's negative findings regarding CTC's Hampton facility and made a written request in May 1983 to meet with GSA on the matter. At the meeting arranged as a result of the request, CTC presented evidence concerning the

production of its Hampton facility and argued that the GSA inspector who conducted the inspection of its Hampton facility had misrepresented the overall condition of the facility. GSA agreed to conduct another survey of CTC's Hampton facility, which was performed on May 31, 1983.

The preaward survey report resulting from the second inspection of CTC's Hampton facility was again negative. GSA's contracting officer then discussed with the SBA's office in San Francisco, California, whether a second letter requesting an SBA certificate of competency was necessary. The SBA informed the contracting officer that the SBA determination declining to issue a certificate of competency would take care of GSA's second preaward survey on CTC's Hampton facility. The SBA further informed the contracting officer that the SBA did not intend to go back and reinspect the facility.

Because of the second negative preaward survey report on CTC's Hampton facility, GSA made awards between June 10 and 20, 1983, to other bidders for those items that CTC had listed as being produced in its Hampton facility. On June 29, 1983, CTC protested to this Office, objecting to the awards to these other bidders.

With respect to CTC's charge that the preaward survey reports contained outright fabrications, CTC alleges that in preparing the first preaward survey in March 1983, the representative never made a physical inspection of CTC's Hampton facility, but instead wrote the preaward survey report based on very limited discussions with two of CTC's corporate officers and with CTC's quality control manager. CTC further alleges that the GSA representative did not ask to observe various sampling and inspection tests and refused CTC's request that he observe such tests.

While CTC alleges that GSA's conduct of the preaward surveys was generated by an awareness of a number of deficient performance reports issued by certain naval activities misinterpreting the time of performance clause in the contract, we find this issue irrelevant. It is within the discretion of the contracting officer whether a preaward survey will be conducted prior to a responsibiltiy determination on a bidder. See section 1-1.1205-4 of the Federal Procurement Regulations (FPR) (1964 ed., amend. 95); American Safety Flight Systems, Inc., B-183679, August 5, 1975, 75-2 CPD 83, and Ikard Manufacturing Company, B-190104, September 30, 1977, 77-2 CPD 251. We have held that the nature and extent of a preaward survey needed to assure the procuring agency's contracting officer that a firm will meet its contractual

obligation are for the contracting officer's judgment since he must bear the consequences of any difficulties experienced on account of the contractor's inability to perform in the time and manner required. Edw. Kocharian & Company, Inc.--request for modification, 58 Comp. Gen. 516, 520 (1979), 79-1 CPD 326. Whether the deficient performance reports or, as GSA alleges, the fact that a sensitive commodity was being procured was the reason for the requested surveys is immaterial. Further, we know of no requirement that the GSA inspector had to coordinate his findings with those of a Defense Contract Administration Services (DCAS) inspector, as CTC also alleges should have been done.

GSA states that FPR § 1-2.407-2 requires a contracting officer to determine whether a prospective contractor is a responsible bidder. GSA further states that there was "cause for concern" when the plant facility reports revealed that CTC's quality control system at Hampton, Virginia, was inadequate and that CTC's quality control manager at that facility was unfamiliar with the requirements of the solicitations and the procedures to be followed. Therefore, GSA takes the position that the contracting officer properly determined that CTC was not a responsible bidder.

In addition, GSA points out that the primary focus of CTC's protest is the negative preaward survey reports on CTC's plant. GSA argues that CTC has ignored the fact that GSA also found that CTC had an unsatisfactory financial condition with regard to both of the protested solicitations. GSA argues that FPR § 1-1.1203-1 requires that a prospective contractor have adequate financial resources for performance of the contract. Thus, GSA contends that its negative financial determination alone would have been sufficient to find CTC nonresponsible.

In response, CTC contends that GSA illogically split corporate credit standing between CTC's corporate branch offices. CTC questions how GSA can find that CTC's Jacksonville, Florida, plant had adequate financial resources and, thus, award items in the protested solicitations that would be produced at this plant and, at the same time, find that CTC had inadequate financial resources for production at CTC's Hampton, Virginia, plant.

CTC further contends that GSA denied its constitutional due process rights by failing to render a timely and formal opinion on CTC's March 1983 request for an interpretation of the time of performance clause in CTC's chemical products contracts. CTC emphasizes that GSA did not respond to CTC's

request until June 1983. In CTC's view, a timely opinion from GSA would have eliminated the ongoing dispute between CTC and the Navy over the proper methods for computing performance periods under Navy delivery orders. Finally, CTC charges that from January 1983 to July 1983, GSA violated CTC's due process rights by requiring unnecessary and costly preaward surveys of CTC's Hampton, Virginia, facility without due regard for the fact that CTC had produced various gases from that facility for GSA under prior Federal Supply Schedule contracts.

The question of whether evidence of a bidder's lack of ability to perform is sufficient to warrant a finding of nonresponsibility in a particular procurement is a matter primarily for determination by the administrative officers concerned and is essentially a business judgment involving considerable discretion on the part of these officers. West Electronics, Inc., B-190173, February 10, 1978, 78-1 CPD 118. Our Office will not question a determination of nonresponsibility in the absence of a clear showing that the determination lacked a reasonable basis. Speco Corporation, supra; Mayfair Construction Company, B-192023, September 11, 1978, 78-2 CPD 187. From our review of the record, we find that GSA's determination of nonresponsibility had a reasonable basis.

The March 1983 preaward survey on CTC's Hampton facility found CTC inadequate in the areas of past performance because of a high "delinquency rate" in deliveries and that the production capacity could not be determined because CTC's commitments for raw materials were either absent or insufficient to assure timely deliveries of raw materials. Also, two contract products, hydrogen and acetylene, were not to be produced at CTC's Hampton facility, but were to be subcontracted elsewhere, but CTC had no commitment for the subcontract work.

More importantly, the preaward survey report reveals that CTC's quality control system was found to be inadequate. CTC's inspection records did not show test methods, sample sizes, criteria for the acceptance or rejection of test samples, identification of the material being examined, and the number of defects found. In addition, the report shows that CTC's quality control manager was questioned about control methods and was unable to identify the proper documents pertaining to marking standards for shipments and special markings for compressed gas cylinders. Further, the questioning revealed an unfamiliarity of CTC's manager with the quality assurance provisions of the solicitations.

As noted above, CTC asserts that the March 1983 preaward survey of CTC's Hampton facility was prepared solely on the basis of discussions that GSA's quality control representative had with CTC's quality control manager. CTC alleges that GSA's representative never entered CTC's Hampton plant to actually evaluate CTC's ongoing quality control system, procedures, and production personnel. A review of the information furnished our Office by CTC shows that CTC's offices were visited in connection with preaward surveys in August 1982 and January, March and May 1983 and, except for the March visit, the plant was surveyed on each of these occasions. In addition, the May 1983 survey, when the plant was visited, confirmed the results of the March survey. Therefore, we do not find the failure of the inspector to survey the plant in March requires a disregard of those findings, particularly in view of the fact that the quality control manager was interviewed.

The March 1983 preaward survey shows that the major reason that CTC was found incapable of performing was the deficiency of CTC's quality control system. In this regard, the record shows that in the May 1983 preaward survey of CTC, GSA's representative found that CTC had "made an effort to improve its inspection reports." However, GSA's representative found that CTC's quality control manager was "still not able to draw out all necessary information required to test and inspect in accordance with the contract." Especially glaring in the opinion of GSA's representative was CTC's failure to have the government specifications for grade "A" carbon dioxide. Also, GSA's representative noted that CTC intended to identify the purity of carbon dioxide by means of gas chromotograph, but determined after questioning CTC's quality control manager that the quality control manager did not have sufficient knowledge to judge the proper operation of the machine. GSA's representative also found that CTC's quality control had inadequately identified a standard test sample in the machine.

CTC contends that the second preaward survey of its Hampton facility was incomplete and the findings were the result of bias towards CTC's staff. According to CTC, the company stressed to GSA officials in the May 1983 meeting that a different GSA representative conduct the second preaward survey and that the local DCAS inspector, who conducts the inspections for CTC's military customers, be involved. CTC asserts that the GSA representative placed undue emphasis on selective aspects of CTC's management expertise in the second preaward survey and did not address more

important matters such as the suitability of CTC's production equipment, CTC's production control capabilities, the suitability of CTC's proposed subcontractors, the suitability of CTC's plant facilities, and the skills of CTC's production staff. CTC charges, moreover, that the questioning of CTC's quality control manager became an adversarial "interrogation."

In our opinion, the GSA representative was justified in emphasizing quality control. The protested solicitations were for potentially dangerous industrial gases and GSA had to be certain that adequate safeguards were in place. Moreover, there was no need for the GSA representative to conduct a survey of the other aspects of CTC's operation since the representative's survey found that CTC had adequate space, equipment, and personnel to produce the industrial gases. With respect to the questioning of CTC's quality control manager, we see no basis for CTC's objection to the GSA's representative focusing in on the manager's technical qualifications since this was the individual who was responsible for production testing and inspection.

Furthermore, we note that in a preaward survey of CTC's Hampton facility dated July 7, 1983, on a subsequent GSA solicitation for aviator's breathing oxygen, the same GSA quality control representative determined that CTC was capable of performing. The GSA representative specifically found that CTC's inspection records show "marked improvement" over the records from past surveys and that CTC had the required paperwork which set forth the test methods CTC used. More importantly, GSA's representative found that CTC's vice president had taken over all the testing responsibilities from CTC's quality control manager. The GSA representative emphasized that the vice president demonstrated an understanding of required government specifications, test methods, and other quality control procedures and concluded that CTC's quality control system was adequate.

Regarding CTC's contention that it was denied its due process rights because of GSA's failure to render a timely interpretation of the performance clauses in CTC's 1982 Federal Supply Schedule contracts, under which the Navy placed orders, the record clearly reveals that the performance problems were not a factor in the negative preaward surveys. While GSA's March 1983 survey did note that CTC's past performance had "not been good as regards timeliness," the survey listed inadequate personnel and quality control system as the specific reasons for the negative responsibility determination.

As to the adequacy of CTC's financial resources, we find that GSA did not split CTC's corporate credit standing between the Jacksonville facility and the Hampton facility. In September 1982, CTC had submitted a corporate financial statement which indicated a working capital of $15,000. The record further reveals that at the time the financial responsibility report was prepared regarding the two protested solicitations, GSA had awarded CTC contracts totaling approximately $286,000. An additional award under the protested solicitations was considered inappropriate by GSA in light of CTC's limited financial resources. However, the SBA subsequently determined that CTC had the credit to perform any contracts awarded under the protested solicitations. Our Office has obtained, as part of the record in this protest, the files of the SBA in connection with the SBA's denial of the issuance of a certificate of competency. These files show that in the financial review of CTC, the SBA determined that CTC had an available line of credit up to $450,000 and that CTC had an adequate cash flow and liquidity to perform any awarded contracts.

In any event, the SBA declined to grant a certificate of competency on CTC's Hampton facility, thus affirming the contracting officer's nonresponsibility determination with regard to that facility. Essentially, the SBA found that CTC's production planning was inadequate at CTC's Hampton facility because the company had no plan whatsoever for the overall plant workload, the number of necessary personnel, and the time sequences for performing various production operations. Consequently, SBA concluded that CTC's Hampton facility lacked the capacity to handle any additional workload and, therefore, CTC could not meet the requirements of any contracts awarded to it which involved performance at that facility.

However, we do note from our review of the SBA's files that the SBA found that CTC's quality control "procedures" were adequate. These files indicate that the SBA reviewed CTC's quality control manual for processing aviators breathing oxygen, argon, nitrogen, and carbon dioxide and also inspected CTC's testing equipment. There is no indication though that the SBA interviewed CTC's quality control manager, as GSA did, to ascertain the adequacy of the manager's knowledge of quality control procedures and familiarity with test equipment. Nor is there any indication that the SBA looked at CTC's records as GSA did. While the SBA affirmed GSA's nonresponsibility determination on a basis not directly dealt with by GSA, we have found it is reasonable, following an independent evaluation, for SBA to refuse to issue certificate of competency for a reason different from

the contracting officer's. Roller Bearing Company of America, B-178914, February 22, 1974, 74-1 CPD 91.

Accordingly, we find CTC's protest to be without merit.

for Milton J. Socolar
Comptroller General
of the United States