

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

27448

FILE: B-210023.2; B-212217**DATE:** February 15, 1984**MATTER OF:** Tomko, Inc.**DIGEST:**

1. Where small business concern is found to be nonresponsible by procuring activity, subsequent denial of certificate of competency (COC) by Small Business Administration (SBA) constitutes affirmation of nonresponsibility determination which GAO does not review.
2. Although GAO does not review allegation that agency's nonresponsibility finding was improper after denial of COC by SBA, GAO will consider agency's refusal to consider new information probative of the bidder's responsibility where this information is presented to the contracting officer within a reasonable time before contract award.
3. Where contracting officer has explicitly agreed to consider new information relating to bidder's responsibility after COC denial, but refuses to do so because information arrived 5 minutes after an extended deadline, which was 1-1/2 months before the contract commencement date, this refusal was unreasonable and the protester was entitled to have the new information considered by the procuring agency. However, the protester was not prejudiced; GAO review of the "new information" discloses that it fails to satisfy the financial requirements which the agency and the SBA had indicated were required.

Tomko, Inc. (Tomko), protests the awards of contracts under requests for proposal Nos. F49642-82-R0038 and F49642-82-R1217, covering operation of Contractor-Operated Civil Engineer Supply Stores at Bolling and Andrews Air Force Bases. Tomko contends that the contracting officer led it to believe that its credit line was sufficient, that no credit requirements were stated in the solicitation, and that it was not given sufficient time to provide the line of credit requested by the contracting officer.

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We deny the protests.

Tomko submitted the lowest proposals, but after the Defense Contract Audit Service conducted a preaward survey, the contracting officer found Tomko nonresponsible for lack of financial backing. The Small Business Administration (SBA) subsequently denied Tomko a certificate of competency (COC).

Tomko requested the contracting officer to reconsider its nonresponsibility and the contracting officer agreed to do so if Tomko could obtain a bank line of credit by Tuesday, June 14, 1983. On that date, Tomko requested additional time and was given an extension until close of business at 4:30 p.m. on Friday, June 17. Tomko arrived at 4:35 p.m., but the contracting officer's secretary refused to accept the evidence of the credit line because, while she was still on the premises, it was after the close of the business day. The contracting officer had left the secretary instructions not to accept any material from Tomko after the 4:30 p.m. deadline. Thereupon, Tomko protested to our Office. Award was made to Century Industries at the end of July.

Under 15 U.S.C. § 637(b)(7)(A) (1982), the SBA has conclusive authority to determine a small business bidder's responsibility by issuing or refusing to issue a COC. That provision states in pertinent part that SBA is empowered--

"To certify to Government procurement officers . . . with respect to all elements of responsibility . . . of any small business concern. . . . A Government procurement officer . . . may not preclude any small business concern or group of such concerns from being awarded such contract without referring the matter for a final disposition to the Administration." (Emphasis added.)

Our Office generally will not question a contracting officer's nonresponsibility determination where the SBA affirms that determination by refusing to issue a COC. Speco Corporation, B-211353, April 26, 1983, 83-1 CPD 458. The only exceptions are when there is a showing of (1) possible fraud on the part of government officials or (2) such willful disregard of the facts as to imply bad faith

or (3) alleged failure of government officials to follow SBA regulations or to consider vital information bearing on a small business bidder's responsibility. See Tri-Marine Industries, Inc., B-210652.3, May 12, 1983, 83-1 CPD 503. Accordingly, we will not consider Tomko's protest grounds which relate to the initial nonresponsibility determination and to the denial of a COC by SBA.

We have indicated, however, that in appropriate circumstances, such as when new information bearing on a small business concern's responsibility is presented, the contracting officer may reconsider a nonresponsibility determination, even when the SBA has declined to issue a COC. See Cecile Industries, Inc., B-207277.3, September 30, 1982, 82-2 CPD 299; Reuben Garment International Co., Inc., B-198923, September 11, 1980, 80-2 CPD 191.

In this case, Tomko attempted to deliver evidence of having obtained a sufficient line of credit to the contracting officer well before the date that award had to be made to insure continuity of services. Moreover, the contracting officer explicitly had agreed to consider this evidence and to reconsider Tomko's responsibility notwithstanding the COC denial. The Air Force, citing 39 Comp. Gen. 895 (1960), contends that the contracting officer acted properly in declining to consider Tomko's evidence after the expiration of the extension granted. In this respect, the Air Force points out that award had already been delayed for over a month to permit SBA consideration of Tomko's COC application, and that time constraints required almost immediate action by the deadline date. The contracting officer states that the existing contracts were to expire on July 31, 1983, and that civil engineering operations at Bolling and Andrews Air Force Bases would have been seriously disrupted unless new contracts were in place by August 1, 1983.

In our view, the contracting officer's refusal to consider Tomko's evidence of sufficient lines of credit to render it responsible because the material arrived 5 minutes after the extension deadline was unreasonable. We note that while it may have been after the close of business the contracting officer's secretary was still on the premises and refused to accept the material because it was after the time deadline. The contracting officer was

not present and did not plan to review the material until the next business day. Under Defense Acquisition Regulation § 1-905.2 (Defense Acquisition Circular No. 76-41, December 27, 1982), information regarding a bidder's financial responsibility is to be obtained on as current a basis as feasible with relation to the date of contract award. Because of this requirement, we have held that where time permits, further consideration of a nonresponsibility determination is appropriate in circumstances such as these where there appears to be a material change in the principal factor on which a nonresponsibility determination was made and affirmed by denial of a COC. 49 Comp. Gen. 619 (1970); Inflated Products Company, Incorporated, B-188319, May 25, 1977, 77-1 CPD 365.

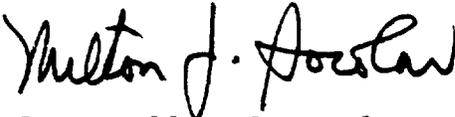
We have also recognized that a procuring activity is not required to delay an award indefinitely while a bidder attempts to cure the causes for its nonresponsibility. Roarda, Inc., B-204524.5, May 7, 1982, 82-1 CPD 438. We appreciate the need to process procurements in an orderly and efficient manner, and that there comes a time when an award must be made on the basis of the facts at hand. It is not the intention of this Office to unduly interfere with the timely processing of procurements by the agencies, and we have held that our Bid Protest Procedures should not be permitted to be used as a means for delaying contract awards to gain time for a bidder to improve its position after a contracting officer's determination of nonresponsibility has been affirmed through the denial of a COC by SBA. 51 Comp. Gen. 448 (1972).

In balancing these considerations, we believe that the present circumstances fall within the purview of those cases in which further consideration of the new responsibility information by the contracting officer is required. The contract had not been awarded at the time the information was proffered, and there was almost a month and a half to run on the existing contracts. We fail to see how any serious delay would have been occasioned by accepting the updated credit line material 5 minutes after the deadline which the contracting officer had imposed, particularly when the material was not to be reviewed until the next business day. We believe that the contracting officer incorrectly treated this deadline as absolute in the same manner as if it had been a bid opening time. This is impermissible with respect to information pertaining to responsibility, and we have so held even in the situation

where there is specific solicitation language which appears to impose such a deadline. International Business Investments, B-206474, May 27, 1982, 82-1 CPD 500. Such information does not affect bid responsiveness and post-bid-opening changes may be relevant in determining the bidder's responsibility until the time of award.

Accordingly, the contracting officer should have accepted and considered Tomko's evidence regarding its newly acquired lines of credit which could have established its financial responsibility. However, we have reviewed the material submitted by Tomko which purports to establish its financial responsibility. Both the SBA and the Air Force had previously determined that, in order to be found responsible for the purpose of performing the two contracts in question, Tomko required a bank line of credit in the amount of \$523,000 for working capital. While Tomko asserts that it had available sufficient credit resources, the evidence which Tomko has submitted to our Office documents only merchants' lines of credit--which amount to approximately \$810,000. Tomko has submitted no evidence of the availability of the requisite bank line of credit.

Both the SBA and the Air Force had previously considered similar evidence by Tomko relating to merchants' lines of credit and both had found these sources were insufficient, requiring instead a bank line of credit. The question of the acceptability of the evidence which Tomko was offering to establish its financial responsibility is a matter which involves a considerable range of discretion on the part of the contracting officer, and we will not substitute our judgment for that of the contracting officer unless it is shown to be arbitrary or capricious or not based on substantial evidence. 53 Comp. Gen. 344 (1973). In view of the previous finding that a \$523,000 bank line of credit was required, we do not believe that Tomko's "new information," which failed to evidence a bank line, could have been found sufficient by the contracting officer to warrant a determination of Tomko's responsibility. Therefore, while the contracting officer should have accepted and considered the information offered, his failure to do so had no prejudicial impact on Tomko.

for 
Comptroller General
of the United States