

**DECISION**

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

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**FILE:** B-213584**DATE:** March 13, 1984**MATTER OF:** Consolidated Building & Maintenance  
Corporation**DIGEST:**

1. GAO will not review protest against contracting officer's negative determination of responsibility which was affirmed by Small Business Administration (SBA) because protester has not made a showing of fraud or a willful disregard of the facts.
2. GAO will not review protest against affirmative determination of responsibility except in circumstances not applicable here. Contracting officer was not required to refer affirmative determination of responsibility to the SBA for a certificate of competency.

Consolidated Building & Maintenance Corporation (Consolidated), a small business, protests against a General Services Administration's (GSA) negative determination of responsibility and the Small Business Administration's (SBA) refusal to issue it a certificate of competency (COC) under GSA invitation for bids (IFB) No. OPR-9PPB-83-00937. The GSA and the SBA determined that Consolidated did not have the financial capability to perform this contract. Consolidated contends that the contracting officer's determination was arbitrary and the SBA failed to exercise an independent judgment. Consolidated also protests that Tom's Maintenance, which was awarded a contract under IFB No. OPR-9PPB-83-00838, should have been referred to the SBA for a COC.

The protests are dismissed in part and denied in part.

The SBA, not this Office, has statutory authority to review a contracting officer's negative determination of responsibility and to determine conclusively a small business concern's responsibility by issuing or refusing to issue a COC. 15 U.S.C. § 637(b)(7) (1982). Consequently, we will not undertake an independent review of a contracting officer's nonresponsibility determination, since such review

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would be tantamount to a substitution of our judgment for that of the SBA. Tar Heel Canvas Products, Inc., B-211537, May 6, 1983, 83-1 CPD 481.

Moreover, in light of the SBA's statutory authority, and where there is no suggestion that the contracting agency failed to forward all relevant information to the SBA in connection with a COC, this Office will not review the SBA decision or recommend the reopening of a case where a COC has been denied unless the protester makes a prima facie showing of fraud or willful disregard of the facts. Tar Heel Canvas Products, Inc., supra. The protester has not alleged that the SBA lacked, or refused to consider, pertinent information available at the time the GSA contracting officer made his determination, or shown that SBA officials otherwise harbored a specific intent to injure the protester. Instead, the protester expresses disagreement with the contracting officer and questions the independence of SBA's judgment. Thus, Consolidated has not made the showing necessary to warrant our review.


Consolidated was the fifth low bidder under IFB No. OPR-9PPB-83-00838. The low bidder was permitted to withdraw its bid, and the second and third low bidders were denied COC's by the SBA. Award was made to Tom's Maintenance, the fourth low bidder. Consolidated contends that Tom's Maintenance should have been referred to the SBA for a COC, and the fact that the contracting officer referred some bidders for a COC (for example, the second and third low bidder under -00938 and Consolidated under -00937), but did not refer others, was arbitrary and constitutes a failure to apply an objective criteria.

Before awarding a contract to any firm, the contracting officer must find that it is a responsible concern. Federal Procurement Regulations (FPR) § 1-1.1202 (1964 ed. amend. 192). Since, in making the determination, the contracting officer is vested with a wide degree of discretion and business judgment, the fact that he reaches different conclusions regarding the capabilities of different concerns is not unusual and certainly does not, by itself, demonstrate an abuse of discretion. In this case, the contracting officer's determination that Tom's Maintenance is capable of performing the contract constitutes an affirmative determination of responsibility. We have long held that we will not review affirmative determinations of responsibility in the absence of evidence of fraud on the part of the procuring officials or where the solicitation contains

definitive responsibility criteria which allegedly have been misapplied. E.J. Nachtwey, B-209562, January 31, 1983, 83-1 CPD 104; Data Test Corporation, 54 Comp. Gen. 499 (1974), 74-2 CPD 365. Neither exception applies here. We therefore decline to review whether Tom's Maintenance is capable of performing its contract.

We also find no merit in Consolidated's protest that the contracting officer should have referred the issue of Tom's Maintenance's responsibility to the SBA. A contracting officer is only required to refer negative determinations of responsibility to the SBA for a COC. See FPR § 1-1.708.2 (1964 ed. amend. 192). Tom's Maintenance received an affirmative rather than negative determination of responsibility from the contracting officer. This determination therefore was not subject to referral to SBA.

The protest is denied in part and dismissed in part.

for   
Comptroller General  
of the United States