The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Eagle Bob Tail Tractors, Inc.

File: B-232346.2

Date: January 4, 1989

DIGEST

1. Where contracting officer reassesses nonresponsibility determination based on new information submitted by protester, determination of continuing nonresponsibility is unobjectionable where, although protester disagrees with conclusions, they are reasonable and protester's arguments extend to only some of the negative indications of nonresponsibility.

2. Where contracting officer, following determination that bidder is nonresponsible and Small Business Administration (SBA) declination to issue certificate of competency, reconsiders nonresponsibility determination in light of new information presented by bidder and determines that it did not warrant changing the initial nonresponsibility determination, there is no legal requirement that agency request SBA's reconsideration.

DECISION

Eagle Bob Tail Tractors, Inc., protests the Department of the Air Force's failure to refer its second review of the firm's responsibility back to the Small Business Administration (SBA) for a second certificate of competency (COC) review, under request for proposals (RFP) No. F09603-86-R-1321, for a quantity of flightline tow tractors.

We deny the protest.

After receipt of best and final offers, the apparent low offeror under the solicitation was rejected as nonresponsible, and Eagle became next in line for award. A preaward survey by the Defense Contract Administration Service (DCAS) assessed Eagle's production, quality, and financial capabilities to be unsatisfactory, and recommended against award to the firm. On July 18, 1988, the contracting officer determined the firm to be nonresponsible

based on the negative indications in the preaward survey. The negative production determination was the result of (among other considerations) Eagle having three terminations for default during 1988, and three of six current contracts in delinquent status; the quality factor was based on a finding of poor quality procedures and history; and the negative financial determination was the result of the contractor having exhausted its bank line of credit, having liens against its assets, being in a loss position on the major contracts which it currently possesses, and being unable to demonstrate sufficient credit or assets to finance performance on the instant procurement. Since Eagle is a small business concern, the Air Force referred the nonresponsibility determination to SBA for a COC review; the SBA denied a COC on August 12. Consequently, the Air Force prepared to award a contract to the apparent third low offeror.

Eagle then requested that the contracting activity provide the firm with an opportunity to provide additional, new documentation to establish its responsibility. While a decision on that matter was pending before the agency, on August 19, Eagle filed a protest (B-232346) with our Office, alleging that the Air Force refused to consider the new information. We dismissed that protest as academic on September 8, when the contracting activity agreed to review the additional information.

The new information supplied by Eagle included a $500,000 line of credit commitment from a bank, a production supply agreement with a Chrysler Corporation dealership for tractor cab chassises, and a representation from the local DCAS office accepting the firm's quality manual with minor changes. The contracting activity reviewed the newly submitted information, determined that it failed to reveal any grounds to reverse the previous determination of nonresponsibility, and thus affirmed the earlier nonresponsibility determination. The protester was summarily notified of the determination in a letter dated September 12, and the Air Force made a formal, written determination of nonresponsibility on September 27. The contracting officer did not refer the affirmation of Eagle's nonresponsibility to the SBA, and again prepared for award to the apparent third low bidder.

Eagle now contends (in a protest filed with our Office on September 14), that the agency improperly failed to consider seriously the new information presented, disregarded key facts in the new information, and that the affirmation of Eagle's nonresponsibility was required to be

referred back to the SBA for a second COC review. We disagree.

As background, under the Small Business Act, the SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business bidder's responsibility by issuing or refusing to issue a COC; no small business may be precluded from award because of nonresponsibility without referral of the matter to the SBA for such a final disposition. 15 U.S.C. § 637(b)(7)(A) (1982); Sealtech, Inc., B-221584.3, Apr. 16, 1986, 86-1 CPD ¶ 373, aff'd, B-221584.4, July 19, 1986, 86-1 CPD ¶ 563. Specifically related to the protest here, we have indicated 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. Reuben Garment International Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191. In cases where new information on the responsibility of a concern referred to the SBA is submitted, our review is limited to whether the contracting agency reasonably reassessed the new information concerning the offeror's responsibility. See id.

Eagle first contends that the following circumstances show the agency failed to consider seriously the newly submitted information: (1) the brevity and timing of the agency notification letter dated September 12, affirming the original nonresponsibility determination, which Eagle received the same day it received our Office's September 8 dismissal of Eagle's first protest; and (2) the alleged belligerency of the contracting officer in communications with Eagle.

Our review of the record indicates extensive consideration of the new information. In the contracting officer's written determination dated September 27, affirming her initial nonresponsibility determination, she found that, although in some instances the new information indicated corrective action had been initiated for some of Eagle's negative indications, the information was not sufficient to refute the majority of the considerations upon which the initial nonresponsibility determination was based. The contracting officer recognized that the new information submitted tended to show that two of the default terminations had been converted into terminations for convenience; the actual percentage of Eagle's delinquencies was slightly lower than reported by DCAS; and some of the delinquencies were partially the fault of the government. The contracting officer nevertheless specifically concluded

that the information did not warrant reversal of the initial nonresponsibility determination.

Specifically, regarding production capacity, the contracting officer reaffirmed that Eagle had not corrected its performance problems to improve its delinquency rate significantly, or explained its past poor performance record. Concerning the quality factor, the contracting officer concluded that even if the new inspection manual Eagle developed was assumed to be adequate, it would not dismiss the firm's unsatisfactory quality history. As for Eagle's financial capacity, the contracting officer determined that the new information did not correct the firm's serious cash flow problems, its net losses on the contracts it currently possesses, or the ratio of cash on hand to current receivables. Further, the contracting officer found no change in the firm's high backlog of sales and low working capital balance, and found that statements in the bank letter of credit made it questionable whether the credit available was unconditional.

While the protester disagrees with the contracting officer's conclusions in reassessing the new information, we cannot say the conclusions were wrong or unreasonable. For example, Eagle disagrees with the agency's conclusion that the letter of credit is conditional; the letter of credit does refer to "other agreements in conjunction with this extension of credit," however, without indicating the nature of those agreements, and we see nothing unreasonable in the contracting officer's continuing concern, based on this language, that the letter of credit may not resolve Eagle's financial problems.

In any event, the new information submitted by the protester does not even purport to refute all of the negative indications upon which the nonresponsibility determination was based. For example, Eagle did not address its unsatisfactory quality history (except to submit that there were some customer complaints on one contract, after the one-year warranty period, which were corrected). The contracting officer thus determined that even if the new inspection manual developed by Eagle was adequate, Eagle still had not adequately addressed the quality problem in complaints against its products, which the contracting officer reported as being numerous and of a serious nature. In the absence of such an explanation, we think the contracting officer's concern with potential quality problems was reasonable, notwithstanding that the firm's new inspection manual appears acceptable. Under these circumstances, we find that the agency's conclusions in assessing the new information were reasonable.

Turning to Eagle's primary basis of protest, referral back to the SBA, we have held that where the contracting agency has reassessed the bidder's responsibility in light of new information and has determined that the information either was substantially the same as previously considered or, if not previously considered, did not materially alter the initial nonresponsibility determination (and accordingly did not warrant reversal of the initial nonresponsibility determination), the contracting agency is not legally required to refer the matter to the SBA for a second COC review. See Reuben Garment International Co., Inc., B-198923, supra, and cases cited therein; Sealtech, Inc., B-221584.3, supra.

Eagle argues, however, that, unlike our previous cases where the contracting officer reviewed the new information and affirmed the initial nonresponsibility determination, here the contracting officer instead made a new nonresponsibility determination. The protester argues that without referral back to the SBA after such a new nonresponsibility determination, final disposition of Eagle's responsibility would be made by the contracting officer, not the SBA, as required by law. See 15 U.S.C. § 637(b)(7)(A).

We do not agree that the circumstances here are distinguishable from those on which our prior decisions in this area were founded. The protester's position to the contrary notwithstanding, we do not view the contracting officer's characterization of her September 27 action as a new responsibility determination (in her statement on the protest), or her titling of the September 27 document "Determination of Responsibility," as determinative of what occurred here. Rather, as discussed above, we believe the record clearly indicates, in the language of the September 27 nonresponsibility determination itself, that the contracting officer was merely reassessing Eagle's responsibility in light of the newly submitted information, as Eagle had requested. The September 27 document just as clearly indicates the contracting officer determined that the information, while not previously considered, did not refute the majority of the negative indications upon which the original determination was based, and that there thus was no material change in Eagle's position since the initial determination of nonresponsibility. Accordingly, the contracting officer determined that her original assessment of nonresponsibility remained unchanged and therefore reversal of the initial nonresponsibility determination was not warranted.

This is precisely what happened in Reuben Garment International Co., Inc., B-198923, supra, where new information was the basis for a resurvey of the bidder's responsibility. As a result of the resurvey, some areas of responsibility were determined changed to satisfactory, but others remained unsatisfactory, so that the new information, in sum, did not warrant reversing the initial nonresponsibility determination.

We also do not agree, as urged alternatively by the protester, that our decisions in this area are incorrect. The legislative history of the Small Business Act, as amended, indicates that the provision for "final disposition" by the SBA was added to make clear that after the SBA issued a COC to a small business concern, the contracting officer would have to proceed with award to the firm without imposing any further responsibility requirements. In other words, the language was intended to preclude agencies from rejecting a small business for new reasons after a COC has been issued. House Small Business Comm., Small Business Act, H.R. Rep. No. 95-1, 95th Cong., 1st Sess. 13, reprinted in 1977 U.S. Code Cong. & Ad. News 821, 833; see also FAR § 19.602-4 and 13 C.F.R. § 125.5 (j)(1988). The Air Force's consideration of whether to award to Eagle notwithstanding the SBA's negative final determination without again referring its conclusion to the SBA thus is in no way inconsistent with the language or intent of the law.

The protest is denied.

James F. Hinchman
General Counsel