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**The Comptroller General  
of the United States**

Washington, D.C. 20548

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## **Decision**

**Matter of:** McGhee Construction, Inc.

**File:** B-233763.2

**Date:** April 4, 1989

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### **DIGEST**

Where, after Small Business Administration (SBA) declines to issue a certificate of competency, protester furnishes to SBA, but not contracting activity, information allegedly sufficient to cure firm's nonresponsibility, agency decision to award to second low bidder was reasonable, since record contains no evidence to show that the contracting agency was apprised of new information until after award.

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### **DECISION**

McGhee Construction, Inc., protests the award of a contract to F.W. Mattigan Company under invitation for bids (IFB) No. N62472-88-B-0478, issued by the Department of the Navy for the complete interior rehabilitation of a Marine Corps Reserve Center building at Worcester, Massachusetts. McGhee argues that the contracting officer improperly failed to consider additional information allegedly available prior to award which warranted reversal of the contracting officer's initial finding that the firm was nonresponsive.

We deny the protest.

The IFB called for bid opening on September 8, 1988. The Navy received three bids and McGhee, a small business, was the apparent low bidder. The contracting officer concluded that McGhee was nonresponsive because it lacked adequate financial resources for performing this contract. On October 31, the matter of McGhee's responsibility was forwarded to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). By decision of November 30, the SBA declined to issue a COC. The protester and agency were notified by telephone on that date of the SBA's determination. The record shows that the protester's president was informed by the SBA during this telephone conversation that the SBA's denial was final absent a second referral from the Navy to the SBA. The SBA

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also confirmed its determination by letter dated November 30. In both its letter and telephone notification to McGhee, the SBA indicated that the firm had failed to demonstrate an ability to obtain an adequate line of credit for contract performance.

Because the bid acceptance period was expiring on December 8, the contracting officer initiated a review of the second low bidder's eligibility for award. Meanwhile, on December 1, the protester obtained a letter of commitment for financing from a bank. That same day, it sent to the SBA office via telefacsimile transmission a copy of the letter of commitment and a cover letter requesting that the SBA reconsider its previous COC denial. The SBA, by letter dated December 6, acknowledged receipt of McGhee's December 1 correspondence and advised that its previous ruling was final unless the matter was resubmitted by the Navy's contracting activity. Contract award was made on December 8 to the second low bidder.

The protester alleges that the Navy's contracting officer had knowledge of the letter of commitment from McGhee's bank before he awarded the contract and that his failure to consider this new information supporting McGhee's responsibility was improper. Specifically, McGhee has submitted an affidavit executed by its president in which he reports that two SBA officials had stated to him that, prior to award, they had communicated to the Navy the fact that the SBA had received a letter of commitment from McGhee and that the Navy's contracting officer had nonetheless declined to resubmit the matter to the SBA for reconsideration.

In response, the Navy has submitted affidavits executed by the contracting officer as well as the contracting specialist which deny that they had any knowledge of the fact that McGhee had obtained the letter of commitment prior to award to Mattigan. Both officials state that they had no knowledge of McGhee's letter of commitment until December 19, when the contracting activity received a letter dated December 13 from McGhee which contained a copy of the letter of commitment.

Furthermore, the SBA has also submitted affidavits executed by the SBA Deputy Assistant Regional Administrator and the two individuals whom McGhee alleges informed the Navy of the existence of McGhee's letter of commitment. The Deputy Assistant Regional Administrator's affidavit notes that he contacted the Navy on December 1, at McGhee's insistence, to inquire whether the Navy would resubmit the matter to the SBA should McGhee secure the necessary credit. He also notes that this call was made prior to the SBA's receipt of

McGhee's letter of commitment. The affidavit further states that the Navy contracting official responded that he would not resubmit the matter if financing was secured because the award had been delayed too long. Additionally, all three SBA officials deny communicating to the Navy the existence of McGhee's letter of commitment before the award.


We previously 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 where the SBA has declined to issue a COC. Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5; Reuben Garment International Co., Inc., B-198923, Sept. 11, 1980, 80-2 CPD ¶ 191. However, if the SBA has declined to issue a COC, and no new information causes the contracting officer to determine the concern is actually responsible, the Federal Acquisition Regulation (FAR) requires the contracting officer to proceed with award to the next low bidder. See FAR § 19.602-4(a) and (c) (FAC 34-12).

In our view, the record does not support the protester's assertion that the contracting officer was on notice of the its improved financial capacity prior to award. The Navy's contracting personnel deny having any actual knowledge of McGhee's letter of commitment until after the time of contract award. This denial is corroborated by the affidavits of the SBA's personnel in which all SBA representatives concerned, parties who are basically disinterested in the Navy's award decision, deny communicating to the contracting activity notice of McGhee's letter of commitment. In contrast, the protester has offered only the uncorroborated affidavit of one of its representatives attesting to conversations between the SBA and Navy officials to which he was not a party.

Further, even assuming the contracting officer was advised by the SBA of the SBA's receipt of McGhee's letter of commitment, it is undisputed that McGhee did not send the Navy the actual evidence of the financing until after the award. The responsibility for notifying the Navy of the protester's new information regarding McGhee's responsibility and submitting supporting documentation rested with McGhee. A bidder has the duty to timely and clearly establish that it has the capability to perform the contract, and an agency is not required to delay an award

indefinitely until a bidder cures the causes of its nonresponsibility. Dock Express Contractors, Inc., B-227865.3, Jan. 13, 1988, 88-1 CPD ¶ 23. McGhee simply failed to forward its proof of financial capability promptly to the contracting agency for its assessment. While the record indicates that the contracting officer told the SBA that, based on the COC denial, he intended to proceed to award and would not reconsider McGhee's responsibility, McGhee did not request reconsideration from the contracting officer prior to award. Moreover, McGhee failed to submit the letter of commitment until a week after the award, and 2-1/2 weeks after it first was advised of the COC denial. Since 2 months had elapsed since bid opening and McGhee's nonresponsibility had been confirmed by the SBA, we think the agency's decision to proceed to an award to the second low bidder was reasonable.

The protest is denied.

  
for James F. Hinchman  
General Counsel