Jordan

Comptroller General
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** Leslie & Elliott Co., Inc.

**File:** B-237190; B-237192

**Date:** January 24, 1990

## DIGEST

1. Two determinations of nonresponsibility under two contemporaneous procurements do not constitute de facto suspension or debarment where they are based on currently available information, reasonably showing record of unsatisfactory performance.

2. Small Business Administration's denials of certificates of competency are not subject to review absent evidence that the denials were the result of fraud, bad faith, or a failure to consider vital information regarding protester's responsibility.

3. Small Business Administration's (SBA) failure to obtain protester's rebuttal to all of agency's unsatisfactory performance ratings did not constitute a failure to consider vital information, since SBA possessed relevant rebuttals submitted during prior certificate of competency (COC) process, and SBA states that it would have denied COCs on the basis of performance under a single contract for which the protester's rebuttal to proposed unsatisfactory performance rating was obtained and investigated by the SBA.

## DECISION

Leslie & Elliott Co., Inc. (L&E), protests the award of two contracts to other than the low bidders under invitations for bids (IFBs) No. N62472-89-B-3436, demolition and removal of the training tank in Building 70, and No. N62472-89-B-3378, construction of a ballfield jogging path, both at the Naval Submarine Base New London, Groton, Connecticut. L&E contends that it should have been awarded the contracts because the contracting officer and the Small Business Administration (SBA) acted in bad faith by, respectively, finding L&E nonresponsible, and failing to issue certificates of competency (COCs). L&E further contends that it was de facto debarred by the Navy's action.

We deny the protests.

When L&E was notified of the COC denials, it filed these protests with our Office. While these protests were pending in our Office, L&E filed suit for injunctive relief in the United States District Court for the District of Columbia, raising the same bases for the suit as are at issue in the protests. Ordinarily we will dismiss any protest where the matter involved is the subject of litigation before a court of competent jurisdiction; however, where, as here, the district court so requests, we will issue a decision on the protest. Bid Protest Regulations, 4 C.F.R. § 21.9(a) (1989).

Bids were opened for the jogging path procurement on July 27, 1989, and for the tank demolition procurement on August 24. In both instances, L&E was the low responsive bidder at $22,850 and $255,444, respectively. The contracting officer determined that L&E was nonresponsible based on its inadequate performance and a pattern of unsatisfactory performance over a 3-year period, on five prior contracts, ranging in value from $37,000 to $1.3 million. The determination also was based on L&E's consistent failure to apply the necessary tenacity, perseverance and integrity to accomplish an acceptable job. The basis of the unsatisfactory ratings on the older four contracts included deficiencies relating to progress schedules, job site superintendents, workmanship, compliance with safety procedures, timely completion, securing the area of construction, concrete testing, and quality of the finished building.

The most recent, and most valuable contract ($1.3 million), was for hurricane damage repairs to the waterfront and underground utilities. This contract was being performed after issuance of a COC, and the Navy had issued more than 100 construction compliance notices on various matters including failure to comply with administrative contract requirements, safety, health, workmanship, job site cleanliness, defective materials, and environmental issues. Further, in an effort to ensure quality and appropriate charging of change order hours, the Navy assigned a full-time construction inspector to the job.

The contracting officer's determinations of nonresponsibility on both procurements were referred to the SBA for COC reviews. The Navy requested that COCs be denied, challenging L&E's competence in the area of capacity, based upon L&E's performance on the waterfront contract. In response to SBA's invitation, L&E submitted a rebuttal to the waterfront contract evaluation. The SBA also obtained

copies of the four prior unsatisfactory performance evaluations from the Navy and, due to time constraints in the COC review process, did not request L&E's comments on those evaluations. The SBA denied L&E a COC in both procurements based on L&E's poor current and past performance.

L&E argues that the Navy's actions in two nonresponsibility findings constitute a de facto debarment, especially since the Navy relied on a lack of integrity to find it nonresponsible, but failed to provide it with an opportunity to rebut the allegation. It is improper for a contracting agency to exclude a firm from contracting with it without following the procedures for suspension or debarment, by making repeated determinations of nonresponsibility or even a single determination of nonresponsibility, if it is part of a long-term disqualification attempt. Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107.

We do not believe that this is a case of de facto debarment or suspension. First, a contracting officer may base a nonresponsibility determination on evidence in the record without affording a bidder the opportunity to explain or otherwise defend against the evidence. See Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. Second, we have held that where nonresponsibility determinations involve practically contemporaneous procurements of construction services, based on current information of a lack of integrity, de facto debarment is not established. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. In any event, successive determinations of nonresponsibility of a small business do not constitute de facto debarment where, as here, each such determination was subject to the SBA's authority to conclusively determine the responsibility of that small business. Spectrum Enters., B-221202, Dec. 31, 1985, 86-1 CPD ¶ 5.

L&E also contends that the SBA's review of its COC applications is suspect because the Navy misled SBA with regard to the waterfront contract and because the SBA failed to provide it an opportunity to rebut all prior unsatisfactory performance evaluations. Since the SBA has conclusive authority to determine a small business concern's responsibility by reviewing an agency's nonresponsibility determination, under the COC procedures, our Office will only review COC determinations when a protester alleges that the SBA action may have been taken fraudulently, or in bad faith, or that the SBA failed to consider information vital to a determination of responsibility. See Alaska Lee's, Inc., B-233973, Mar. 20, 1989, 89-1 CPD ¶ 286.

Government officials are presumed to act in good faith and, therefore, to establish bad faith, a protester must submit convincing evidence that government officials had a specific and malicious intent to injure the protester. Sard Enters., Inc., B-233661, Mar. 16, 1989, 89-1 CPD ¶ 280. Here, the SBA's decision to deny the COCs was based on its review of the noncompliance notices on the waterfront contract, L&E's rebuttal, discussions with the Navy and L&E, and SBA's own observations in monitoring the waterfront contract, as well as evidence of prior unsatisfactory performance evaluations. In particular, the SBA considered the observations of its own industrial specialist as to a number of deficiencies in placement of filter stone and filter cloth on the waterfront contract as well as the absence of supervision on the job site. The SBA also noted that since one of the contracts was to be performed in a secured area, part-time supervision could not be tolerated, and that the Navy had stated it had to assign a full-time inspector to oversee L&E to "force quality" out of it. From that review, the SBA concluded that L&E was not entitled to a COC in either procurement due to its unsatisfactory performance ratings, current production, and quality.

In view of the evidence which was before the SBA, we find no indication of bad faith or fraud in its determination. We find nothing improper in the SBA's consideration of L&E's unsatisfactory performance on five prior contracts even though the unsatisfactory rating on the waterfront contract and apparently one other contract had not been made final. The protester relies on the fact that in the COC review on the waterfront contract, the SBA's industrial specialist declined to deny a COC recommendation because the evaluations were not final. From this, L&E argues that since the unsatisfactory evaluations would not support a denial of the COC on the waterfront contract, it is bad faith for the SBA to rely upon them now. In the alternative, L&E argues that inasmuch as the waterfront contract evaluation is not final, it cannot be used to deny a COC.

We find no basis to conclude that the SBA improperly considered L&E's unsatisfactory performances in the waterfront and four prior contracts. First, the only reason why SBA did not consider the four prior contract evaluations sufficient to deny a COC was their lack of finality but, at least three of the four are now final.1/ We also note that although the industrial specialist did not previously

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1/ SBA advises us that the fourth evaluation is also final, however, the record does not contain evidence of that finality.

recommend denial of a COC, he only rated L&E's performance as "marginally acceptable." Second, it appears that while the industrial specialist personally prefers to see that performance evaluations are final, there is nothing which precludes the SBA from considering non-final evaluations.

We also do not agree that the SBA failed to consider information vital to a determination of L&E's responsibility due to the Navy's "misleading" of the SBA. L&E argues that the Navy misled SBA by failing to reveal that the full-time inspector had little other work to do when assigned to L&E's waterfront contract, and that he was assigned not only to ensure quality performance, but also to ensure proper charging of change order hours. L&E also cites the failure to reveal that the inspector once told L&E "not to worry" about the number of noncompliance notices it received. We find the record fails to establish that the SBA's decision on the COC's would have been any different had it been aware of the information cited. Thus, we do not believe it was "vital." In our view, the reason why the inspector was available to spend full-time on L&E's contract does not lessen the negative impact of the need for such inspection. Likewise, the need to have a full-time inspector to ensure that proper change order hours are reported does not present a more positive image for L&E.

Similarly, regardless of the inspector's opinion whether L&E should "worry" about its more than 100 noncompliance notices, the fact remains that the Navy reasonably advised SBA that these notices established a pattern of unsatisfactory performance. Moreover, to the extent L&E suggests that it relied on the inspector's opinion, the protester had the opportunity and the burden to bring this information to the SBA's attention during the COC process, and having failed to do so during that process, it may not now use its bid protest to do so. See Fastrax, Inc., B-232251.3, Feb. 9, 1989, 89-1 CPD ¶ 132.

With regard to the SBA's failure to provide L&E an opportunity to rebut the unsatisfactory performance ratings on the four contracts prior to the waterfront contract, we note that the SBA already had available a substantial rebuttal to the unsatisfactory evaluations on the contracts from the waterfront COC investigation. Further, the industrial specialist conducting the investigation for the COC decisions at issue asked L&E about any prior unsatisfactory performance ratings. L&E only acknowledged one. While the SBA did not request L&E's comments in rebuttal, we find that L&E had reason to know that more than its waterfront contract performance was being considered.

In any event, notwithstanding its failure to seek L&E's comments, the SBA informs our Office that L&E's poor performance on the waterfront contract alone provided a sufficient basis to deny COCs on the contracts in question. Thus, we find that any information L&E might have furnished regarding the other four contracts would not be "vital" to the determination of L&E's responsibility.

Finally, L&E argues that it was not provided an opportunity to rebut the Navy's attack on its integrity at the SBA. The contracting officer's determination and findings, prepared for both contracts alleged that L&E had a pattern of bidding low, only to exploit "obscure flaws" in the plans in order to demand change orders "exorbitant in terms of money, time or both." He also noted that, given the difficulty in drafting perfect plans, it was "incumbent upon both the government and the contractor to exercise integrity in the reasonable solution" of any problems. Based upon our review of the record, we find no evidence that the SBA considered these allegations in its COC determination. Its denial of a COC was based solely on a lack of acceptable production, performance, and quality control. Thus, as before, there was no failure to consider vital information.

Accordingly, the protests are denied.

for Seymour Efros
James F. Hinchman
General Counsel