Burkard

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: R.T. Nelson Painting Service, Inc.

File: B-237638

Date: February 22, 1990

Kenneth A. Kopf, Esq., for the protester.
Timothy S. Kerr, Esq., Starfield & Payne, for Douglas Call Company, Inc., an interested party.
Maryann L. Grodin, Esq., Office of the General Counsel, Department of the Navy, for the agency.
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

There is no legal requirement that the contracting agency again refer the question of an offeror's responsibility to the Small Business Administration (SBA) where, following agency determination that offeror was nonresponsible and SBA refusal to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by offeror and reasonably determined that reversal of the nonresponsibility determination is not warranted.

DECISION

R.T. Nelson Painting Service, Inc., protests the Department of the Navy's failure to again refer the question of the firm's responsibility to the Small Business Administration (SBA) for a second certificate of competency (COC) review, under request for proposals (RFP) No. N68335-89-R-0161, for cleaning and resurfacing of aluminum runway matting. The protester also alleges that the agency acted unreasonably in finding the firm nonresponsible in light of new information submitted to the contracting officer after the SBA declined to issue a COC.

We deny the protest.

The RFP was issued on January 26, 1989, and, by amendment, the closing date for receipt of proposals was March 10. Nelson was the apparent low offeror of the six offers

received. The agency conducted a pre-award survey of Nelson consisting of a review of the prospective contractor's technical capability, production capability, quality assurance capability, financial capability, and environmental considerations.

First, the agency found that the protester's production plan was not considered realistic to meet required delivery schedule for first article testing since the plan did not allow for sufficient time to acquire property, build facilities, train personnel, and produce and inspect a first article lot. While the agency recognized that the protester was performing a similar contract in Oklahoma, Nelson had indicated that it planned on leasing or constructing a facility in Virginia for performance of this contract.

With respect to quality assurance capability, the Navy concluded that Nelson did not have a satisfactory quality history during the past year since Nelson had been issued seven Quality Deficiency Reports (QDRs) on its current government contracts. The agency noted that four of the QDRs were issued for repetitive discrepancies due to ineffective corrective action by Nelson. The agency determined that Nelson was delinquent by 129 days on one contract for various causes such as insufficient quality manual, excessive dust, and water seepage from completed mats that caused corrosion and discoloration. The other contract for the same services was 112 days delinquent due to vendor-owned equipment breaking down.

The third major reason for the nonresponsibility determination was Nelson's failure to demonstrate that it would comply with environmental and safety regulations or statutes. The agency pointed out that in a previous contract, Nelson was unaware of the environmental laws and regulations covering its place of performance. This situation caused a serious impact on that contract which the Navy stated could not be tolerated for any future contracts requiring this type of services. The agency stated that the protester did not provide any evidence of having checked into the environmental laws for this requirement. In light of Nelson's past record and the need for strict adherence to environmental laws, the agency considered failure to address these concerns as a serious oversight.

Finally, while the agency found that the financial capability of Nelson was acceptable, it noted that the critical financial ratios were at undesirable levels and concluded that the contractor's financial condition was considered fair. It noted particularly that the firm carried a large amount of debt.

Based on the three factors discussed above, the contracting officer determined that Nelson was nonresponsible and therefore ineligible for award. Since Nelson was a small business concern, the Navy referred the nonresponsibility determination to SBA for a COC review pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7)(A) (1988); the SBA denied a COC by letter dated June 20, 1989. The reasons stated by the SBA were the firm's lack of production facilities and inadequate financial resources.1/

By letter dated June 25, 1989, to the contracting officer, Nelson objected to the nonresponsibility determination and the SBA's refusal to issue a COC. The letter contained enclosures indicating that the firm had been approved by a bank for a line of credit. The protester had also submitted a letter from a real estate company, dated June 16, indicating that Nelson had the "first option on a facility [in Virginia] for the term of contract should it be awarded the contract." Nelson's June 25 letter to the agency specifically requested that the contracting officer reverse his nonresponsibility determination and "withdraw the referral from the SBA."

The contracting officer called a meeting on July 24 to discuss the June 25 letter. Present at the meeting were a price analyst and representatives of the quality assurance department, technical department, and contracts department. The contracting officer states that the quality assurance representative was adamant that Nelson had not corrected its quality problems which served as one of the bases for the original nonresponsibility determination. In addition to the meeting to discuss the new information, the contracting officer reviewed the entire case, including the SBA COC case report.2/ By letter dated October 4, the contracting officer notified Nelson that he did not consider the new

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1/ While the SBA apparently did not consider as deficient the other areas found by the agency as deficient during the agency's initial nonresponsibility determination, the record shows that the principal reason for the SBA's denial of a COC was the fact that Nelson did not have a production facility in place. As noted above, this was also one of the reasons for the Navy's initial nonresponsibility determination.

2/ The contracting officer reviewed the entire SBA COC case report, including internal SBA findings and recommendations concerning various aspects of Nelson's responsibility, such as the SBA industrial specialist's report to the COC committee and the COC committee deliberations.

information sufficient to overturn his initial nonresponsibility determination. Nelson then requested the SBA to review this decision by the contracting officer, but the SBA stated that it would conduct another COC review only if the contracting officer submitted a new referral to the SBA. The contracting officer declined to do so. This protest followed.

As background, under the Small Business Act, 15 U.S.C. § 637(b)(7), the SBA has conclusive authority to review a contracting officer's negative determination of responsibility and to determine a small business firm'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. Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5. However, where new information probative of a small business concern's responsibility comes to light for the first time prior to contract award, the contracting officer may reconsider a nonresponsibility determination even though the SBA already may have declined to issue a COC. Marlow Servs., Inc., 68 Comp. Gen. 390 (1989), 89-1 CPD ¶ 388. In cases where new information is submitted, our review is limited to whether the contracting agency reasonably reassessed the new information concerning the offeror's responsibility. Id.

Following the SBA's refusal to issue a COC, the record shows that the agency carefully considered the new information and, in our view, reasonably found that the information did not warrant the agency's reversal of its initial determination.

The agency evaluated the real estate company's June 16 letter and concluded that it merely indicated that Nelson might be able to obtain a facility in the future. The agency determined that the conditional nature of the agreement continued to raise doubts about Nelson's ability to meet the production requirements in the time frame specified. In this regard, the protester contends that the agency should have recognized that the contract could have been performed at its Oklahoma site and that it therefore had an acceptable facility. We do not think that this constitutes new information which the agency should have reviewed. Prior to the SBA's denial of a COC, the protester clearly indicated that performance would take place at a Virginia facility which it was in the process of securing. Consequently, the agency had no reason to evaluate the Oklahoma plant as an alternative. We do not think that the agency should now be required to conduct another pre-award

survey to determine if the Oklahoma site would be acceptable.

With respect to the new financial information, the record shows that although the Navy previously found Nelson to be financially capable, it was concerned about what it considered to be Nelson's excessive amount of debt. Therefore, the fact that the protester had an additional line of credit available to it had no effect on the agency's assessment of Nelson's financial capability. In fact, the agency could have reasonably interpreted the acquisition of further debt as weakening an already questionable aspect of Nelson's financial situation.

Finally, the new information submitted did not refute the agency's concerns regarding quality control or compliance with environmental laws, and the agency's conclusions on these deficiencies did not change. Consequently, we find that the agency carefully assessed the new information and reasonably determined that it did not warrant reversal of its initial negative determination.

In addition to objecting to the contracting officer's determination, Nelson also alleges that the contracting officer should have referred the new information to the SBA. The protester cites Federal Acquisition Regulation (FAR) § 19.602-4(b) (FAC 84-50) to support its assertion that the SBA's determination is conclusive for all responsibility elements it reviews. It further asserts that since the SBA apparently disagreed with the agency's negative evaluation of quality control assurance and environmental compliance, the only remaining deficiency was the production capability. Nelson argues that the new information should have been submitted to the SBA since the SBA may have found the new information sufficient to convince it to issue a COC.

We have recently held that where the contracting agency has reassessed the offeror's responsibility in light of new information and determined that it does 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 Marlow Servs., Inc., 68 Comp. Gen. 390, supra. The contracting officer could reasonably conclude that the new information does not warrant reversal of the initial determination where the information either was substantially the same as previously considered or, if not previously considered, did not materially alter the initial nonresponsibility determination. Id. In this regard, the new information should be evaluated for its effect on the agency's initial nonresponsibility determination. The contracting officer,

in our view, is not required to speculate as to what impact the new information might have on SBA officials.

Similarly, contrary to the protester's assertions, we do not think that the SBA's internal findings (short of COC issuance) are binding on the contracting officer's subsequent responsibility determination. While we recognize that the agency and the SBA review the same information, we are aware of no requirement that an agency incorporate specific internal findings of the SBA into its reassessment of the firm's responsibility where SBA itself declines to issue a COC. In short, it is the COC, not the internal findings of the SBA, which is conclusive and binding on the agency. FAR § 19.602-4 (FAC 84-50).3/ Here, the SBA refused to issue a COC and declined to reconsider its decision unless it were asked to do so by the contracting officer. Consequently, we have no basis to object to the contracting officer's determination not to again refer the matter to the SBA.

Accordingly, we deny the protest.

Ronald Berger
for James F. Hinchman
General Counsel

3/ This provision states that where the SBA issues a COC, an agency may not find a contractor nonresponsible on any element.