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**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Eastern Gas & Cylinder Services, Inc.

File: B-237926.2; B-241568; B-241571

Date: February 5, 1991

Terence Murphy, Esq., Kaufman & Canoles, for the protester. Michelle Harrell, Esq., General Services Administration, and David R. Kohler, Esq., Small Business Administration, for the agencies.

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

General Accounting Office will not object to Small Business Administration's (SBA) denial of a certificate of competency (COC) where protester alleges that SBA failed to consider a report which found protester conditionally capable of performing contracts, since record shows that the report does not rebut or contradict information upon which the COC denial was based.

DECISION

Eastern Gas & Cylinder Services, Inc., a small business, protests its rejection as nonresponsible under invitation for bids (IFB) Nos. TFTC-90-LF-683K (IFB-683K), TFTC-89-NS-683M (IFB-683M), and TFTC-89-NL-683L (IFB-683L), issued by the General Services Administration (GSA) for aviator's breathing oxygen and industrial gases. Eastern objects to the agency's determination that Eastern was not responsible and to the failure of the Small Business Administration (SBA) to issue a certificate of competency (COC).

We deny the protests.

IFB-683K was issued on February 16, 1990, IFB-683M was issued on March 14, and IFB-683L was issued on March 23. Eastern, the current contractor for these requirements, was the apparent low bidder for various line items under each of the IFBs. On July 17 and July 18, GSA found Eastern nonresponsible for IFB-683L and IFB-683M, respectively. The agency's findings were based on: (1) performance history

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reports completed by the GSA contract administrator stating that Eastern's performance had been unsatisfactory; (2) two cure letters sent to Eastern requesting that it take action to resolve performance problems; and (3) a GSA plant facilities report which indicated that Eastern was incapable of performing based on existing performance problems and an inadequate quality control program. In addition, the negative responsibility determinations were based on the Norfolk Naval Supply Center's (NSC) decision to terminate five delivery orders in full for default. A third nonresponsibility determination was issued on August 3, relating to IFB-683K. Since Eastern is a small business, the contracting officers forwarded the nonresponsibility determinations to the SBA for a COC ruling.

In addition to the information provided by GSA to SBA during the course of the COC review, Eastern availed itself of several opportunities it was given to submit comments and information. Further, an SBA industrial specialist conducted an independent investigation of Eastern to determine its capability to perform the contracts. By separate letters dated September 26, SBA declined to issue a COC to Eastern for each of the IFBs. The unanimous decision of the COC review committee was based on Eastern's poor performance record, management capability, and quality assurance. Following receipt of the three COC denials from SBA, GSA made award to the next low, responsive, responsible bidders. These protests followed.

Eastern argues that both GSA and SBA lacked vital information that was necessary to properly review Eastern's responsibility. The protester also alleges bad faith and possibly fraudulent actions on the part of Navy officials in terminating purchase orders for default under an Eastern contract with the Navy.^{1/} Finally, the protester asserts that the contracting officers should have found Eastern responsible based on new information provided to the agency after award of the contracts.

^{1/} In its December 11 comments to the agency's report and the bid protest conference, the protester alleges, for the first time, that SBA officials also acted in bad faith. We find that this allegation is clearly untimely since the record shows that Eastern knew of the basis of this allegation when it received the agency reports on November 21. Since the protester failed to raise this new allegation within 10 working days of learning of its basis, we will not consider this protest ground. See 4 C.F.R. § 21.2(a)(2) (1990). In any event, the allegation that SBA acted in bad faith is wholly unsupported by the record.

The protester argues first that GSA improperly found Eastern to be nonresponsible. Under 15 U.S.C. § 637(b)(7)(C) (1988), SBA, and not this Office, has the statutory authority to review a contracting officer's finding of nonresponsibility and to conclusively determine a small business concern's responsibility through the COC process. Oakland Corp., B-230717.2, July 27, 1988, 88-2 CPD ¶ 91. Our review is therefore limited to determining whether bad faith or fraudulent actions on the part of government officials resulted in a denial of the protester's opportunity to seek SBA review, or whether the SBA's denial of a COC was made as the result of bad faith or a failure to consider vital information bearing on the firm's responsibility. Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112.

The protester does not allege, nor is there any indication in the record, that bad faith or fraudulent action on the part of GSA in referring its nonresponsibility determinations to SBA resulted in the denial of Eastern's opportunity to seek SBA review. Thus, in these circumstances, our review is limited to determining whether SBA's denial of a COC was made as a result of bad faith or a failure to consider vital information, as alleged by Eastern.

The protester identifies two pieces of information which it alleges were not considered by SBA and which it asserts would have caused SBA to reach a different conclusion regarding its COC decision.^{2/} First, the protester states that a Defense Contract Administration Services (DCAS) plant facilities report, dated July 11, was not considered by SBA. The report, which was prepared at GSA's request and considered by GSA in its nonresponsibility determination, found that Eastern was only "conditionally capable," not "acceptable" as Eastern asserts, of performing the contracts and stated Eastern lacked adequately trained quality control personnel. While GSA states that this document was part of the referral package sent to SBA, SBA states that the document was not considered during the COC process.

We have reviewed the report and find that, as the SBA asserts, it does not constitute information which could be viewed as vital in determining Eastern's responsibility since SBA's COC decision would not have been different had it been aware of the information. See Leslie & Elliott Co., Inc., B-237190; B-237192, Jan. 24, 1990, 90-1 CPD ¶ 100. As stated, the

^{2/} In its initial protest, Eastern alleged that SBA also failed to consider other pieces of vital information. Eastern failed to pursue this allegation in its written comments on the agency report. We deem the matter abandoned. Logitek, Inc., B-238773, July 6, 1990, 90-2 CPD ¶ 16.

shows that SBA based its decision on Eastern's performance problems under GSA contracts, the GSA plant facilities report, NSC's termination of five delivery orders for default, as well as SBA's own investigation. We find that the July 11 DCAS report does not rebut or contradict these findings which served as the bases for the COC decision.

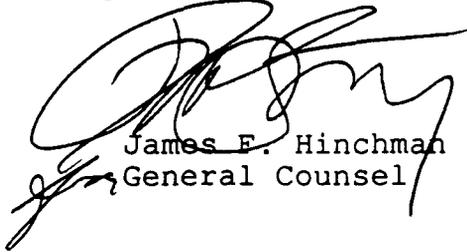
The other piece of information which the protester states was not considered was a DCAS report dated July 27. The SBA industrial specialist has provided our Office with an affidavit stating that he met with DCAS personnel to discuss Eastern's performance problems and "was made aware" of the July 27 report. The affidavit also states that the industrial specialist told the other members of the COC committee about the report. Thus, we find that SBA was aware of the report and that the protester merely disagrees with SBA's evaluation and weighing of evidence before SBA concerning Eastern's performance history. Similarly, Eastern's argument that SBA did not consider the fact that GSA had not terminated Eastern for default is essentially an objection that SBA did not view Eastern's performance history more favorably. Such disagreement does not bring the protest within the exception to our limited review role in this area. Ceredo Mortuary, Inc.-- Recon., B-241791.2, Nov. 27, 1990, 90-2 CPD ¶ 433.

The protester also alleges that the contracting officer failed to reconsider its nonresponsibility findings based on new information which was submitted to the agency after award had been made. In appropriate circumstances, such as when new information is presented after a COC has been denied but before award, the contracting officer may reconsider a nonresponsibility determination. RCI Management, Inc., B-239938, Oct. 12, 1990, 90-2 CPD ¶ 283. However, if the SBA has declined to issue a COC, and no new information causes the contracting officer to determine that 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). 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. McGhee Constr., Inc., B-233763.2, Apr. 4, 1989, 89-1 CPD ¶ 352.

Here, there is no indication that Eastern presented new evidence to the contracting officer after SBA denied its application for a COC and before the contracts were awarded. Therefore, the agency properly made awards to the next low, responsive, responsible bidders and was not obligated to

consider new information bearing on Eastern's responsibility after awards were made. See Id.; Appletown Food Serv. and Management Corp.--Recon., B-218201.5, July 1, 1985, 85-2 CPD ¶ 5.

The protests are denied.



James E. Hinchman
General Counsel