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The decision issued on the date below was subject to a GAO Protective Order. The decision has now been approved for public release in its entirety.

## Decision

**Matter of:** Dehler Manufacturing Company, Inc.

**File:** B-416819; B-416819.2

**Date:** December 19, 2018

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Kristi Morgan Aronica, Esq., and Mark A. Weitz, Esq., Weitz Morgan PLLC, for the protester.

James W. Kim, Esq., and Llewelyn M. Engel, Esq., McDermott Will & Emery LLP, for the intervenor.

Garry L. Brewer, Esq., Department of the Army, for the agency.

Glenn G. Wolcott, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

1. Agency reasonably evaluated protester's quotation as unacceptable with regard to past performance, where information in the past performance information retrieval system established that protester's performance under four recent contracts had been assessed as marginal or unsatisfactory.
2. Protest that an agency acted improperly in requesting an assessment of the protester's responsibility in connection with the placement of a task order under the Federal Supply Schedule is denied; while an agency is not required to make a new responsibility determination in a task order procurement conducted pursuant to Federal Acquisition Regulation subpart 8.4, it is not precluded from doing so.
3. Protest record fails to provide an adequate basis for Government Accountability Office to consider protester's challenge to the Small Business Administration's denial of a certificate of competency.

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### DECISION

Dehler Manufacturing Company, Inc., of San Antonio, Texas, protests the Department of the Army's award of a contract to Chicago American Manufacturing, of Chicago, Illinois, pursuant to request for quotations (RFQ) No. W912DY-18-T-0113, to provide and install furnishings at specified locations at Fort Jackson, South Carolina. Dehler protests that the agency unreasonably evaluated Dehler's past performance as

unacceptable and/or improperly found Dehler nonresponsible. Dehler also protests the Small Business Administration's (SBA) decision not to issue a certificate of competency (COC).

We deny the protest in part and dismiss it in part.

## BACKGROUND

On March 14, 2018, the Department of the Army, Corps of Engineers, issued the above-referenced solicitation as a total small business set-aside, pursuant to Federal Acquisition Regulation (FAR) subpart 8.4.<sup>1</sup> The solicitation sought fixed-price quotations from contractors holding FSS contracts for specifically identified furnishings,<sup>2</sup> and established the following evaluation factors: technical, schedule, past performance, and price. RFQ, at 11. Of relevance to this protest, the solicitation provided that "past performance will be rated 'Acceptable' or 'Unacceptable'," and added that the agency would "use any available information to evaluate past performance." Id. With regard to source selection, the solicitation stated:

The successful contractor will be the one whose quote is rated acceptable on technical, schedule, and past performance, and provides the best value to the Government. Best value will be determined by the quote that is technically acceptable and has the lowest total price.

### Id.

On or before the April 13 closing date, quotations were submitted by four vendors, including Dehler and Chicago American. Dehler's quotation reflected the lowest price (\$879,032), and Chicago American's quotation reflected the second-lowest price (\$970,857). AR, Tab 26, Contracting Officer's Determination, at 2. Thereafter, both Dehler's and Chicago American's quotations were determined to be acceptable under the technical and schedule evaluation factors,<sup>3</sup> and Chicago American's quotation was determined to be acceptable with regard to past performance.

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<sup>1</sup> Subpart 8.4 of the FAR establishes procedures for conducting acquisitions under the General Services Administration's (GSA) federal supply schedule (FSS) program.

<sup>2</sup> Among other things, the solicitation sought quotations for beds, desks, washing machines, and dryers, which will be installed in barracks and common areas for enlisted personnel. Agency Report (AR), Tab 2a, RFQ, attach. 1.

<sup>3</sup> The solicitation provided that a quotation would be rated acceptable under the technical evaluation factor "if all line items meet the specifications shown in the [solicitation's] Furniture Item Description," and would be rated acceptable under the schedule factor "if the contractor install dates are within the dates [specified in the solicitation]." RFQ at 11.

In evaluating Dehler's quotation under the past performance factor, the agency considered information in the past performance information retrieval system (PPIRS) that reflected Dehler's performance of recent contracts, and found that "[f]our of the five reports available for reference in PPIRS contain Marginal or Unsatisfactory ratings." AR, Tab 19, Abstract of Bids, at 2; see AR, Tab 17, PPIRS Report. Accordingly, the agency concluded that the PPIRS information "render[s] Dehler's past performance unacceptable." Id.

Thereafter, the contracting officer was advised by agency counsel that a negative past performance evaluation regarding a small business can be considered tantamount to a nonresponsibility determination. AR, Tab 20, Contracting Officer's Letter to SBA, at 1. Accordingly, by letter to the SBA dated July 31, 2018, the contracting officer requested that the SBA make a COC determination regarding Dehler, and provided various relevant documents to the SBA with that request.<sup>4</sup> Id. at 1-2.

By letter to the Army dated August 28, the SBA responded to the contracting officer's request, stating that "SBA has declined to issue a Certificate of Competency for this contract."<sup>5</sup> AR, Tab 25a, SBA Letter to Contracting Officer. Thereafter, the agency selected Chicago American for award on the basis of its lowest-priced, technically acceptable quotation. This protest followed.

## DISCUSSION

Dehler protests that the agency unreasonably evaluated Dehler's past performance as unacceptable and/or improperly found Dehler to be nonresponsible. Dehler also protests the SBA's decision not to issue a COC. As discussed below, none of Dehler's contentions provide a basis to sustain its protest.

First, Dehler complains that the agency's evaluation of Dehler's past performance as unacceptable was "unreasonable" and/or "not consistent with applicable regulations." Protest at 3. More specifically, Dehler maintains that its past performance history "has been acceptable enough" because it has been awarded "numerous" prior contracts. Id. at 4. Dehler further asserts that, where it "encountered difficulty" in performing prior

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<sup>4</sup> Among other things, the contracting officer provided the SBA with: the solicitation; Dehler's quotation; the PPIRS report; the agency's technical evaluation document; and the contracting officer's assessment regarding Dehler's past performance. AR, Tabs 20a through 20f.

<sup>5</sup> The record establishes that, prior to the SBA's COC determination, the SBA sought Dehler's responses to various questions. Protest at 2. Following the communications between SBA and Dehler, the SBA declined to issue a COC citing three bases: (1) unsatisfactory past performance; (2) failure to demonstrate financial capacity; and (3) failure to comply with the nonmanufacturer rule. Protest, exh. P-9, Email from SBA to Dehler, Aug. 28, 2018.

contracts, the “issues” causing such difficulties were “rectified” and, in some instances, the procuring agency stated that it would contract with Dehler in the future. Id. Accordingly, Dehler maintains that it is “unfathomable” that the agency evaluated Dehler’s past performance as unacceptable. Id.

The evaluation of past performance, including assessments regarding the significance of an offeror’s performance history, is a matter of agency discretion which we will not disturb absent clear evidence that the assessments are unreasonable. Yang Enters., Inc.; Santa Barbara Applied Research, Inc., B-294605.4 et al., Apr. 1, 2005, 2005 CPD ¶ 65 at 5-7; Acepex Mgmt. Corp., B-283080 et al., Oct. 4, 1999, 99-2 CPD ¶ 77 at 3, 5; TPL, Inc., B-297136.10, B-297136.11, June 29, 2006, 2006 CPD ¶ 104 at 12. Further, while an agency may properly consider past corrective actions, an agency is not required to ignore instances of negative past performance. The Bionetics Corp., B-405145, B-405145.2, Sept. 2, 2011, 2011 CPD ¶ 173 at 7-8.

As discussed above, the agency found that four out of five of Dehler’s recent contracts had been rated either marginal or unsatisfactory with regard to some aspect of Dehler’s contract performance. AR, Tab 17, PPIRS Report.

For example, with regard to the two contracts that received unsatisfactory ratings, the record contains the following statements:

1) GSA Contract #GS27F026BA  
Delivery Order # W912DY-17-F-0229, \$1,042,170.00  
Ft. Benning, GA, 20 Buildings

Install completion for the referenced contract was not met. The install was completed five weeks beyond the contract completion. These delays impacted training schedules and cycles at Ft. Benning. The resolution of delays was also subpar, the proposed resolution extend[ed] the completion date by four weeks. The vendor was unsuccessful in meeting the four week resolution, an additional week was required to complete the install.

2) GSA Contract # GS27F026BA  
Delivery Order #W912DY-17-F-0958, \$770,068.00  
Fort Leonard Wood, MO, Buildings 659 & 660

Install for the referenced contract beg[a]n five weeks late and pushed the completion four weeks beyond the contract dates. A Show Cause letter was issued by the Contracting Officer on 12 Feb 18 and response received from the vendor on 14 Feb 18 proposing revised install dates. The proposed install dates were met. However, the delays did affect occupancy and negatively impacted training schedules.

AR, Tab 19, Abstract of Bids, at 2.

With regard to one of the contracts that received a marginal rating, the past performance documentation includes the following:

**SCHEDULE:** Due to delays in shipping the items, a majority of items were schedule[d] to be delivered after the original [completion date]. A modification was done to extend the [completion date] and consideration was offered by the vendor. This delay impacted the troops that were occupying rooms in the buildings as they had to be moved multiple times due to the change in schedule.

**MANAGEMENT:** Communication between the vendor/installer and the customer was lacking. Based on conversations with the customer, the installer was not providing updated information on their progress, which was needed in order to coordinate escorts for the installers and which soldiers would need to be relocated during the installation process.

Protest, exh. P-8, Contractor Performance Assessment Report for Order No. W912DY17F0640, at 2.

With regard to the second contract that received a marginal rating, the past performance documentation includes the following:

**QUALITY:** Satisfactory rating given due to response and effort when addressing the quality issues identified. The hasp lock on the bed did not align properly to accommodate the cadet's lock. This issue was addressed through a field modification to the hasp. The drawer fronts did not meet specification and there was a metal piece that would catch clothing or injure the user's leg. This was addressed by replacing the drawer front to ensure it extended below the metal piece. Where there were issues with quality and various products, the vendor addressed each issue to the customer's satisfaction.

**SCHEDULE:** Contract schedule was not met due to shipping delays from an OCONUS [outside continental United States] location. The quality issues documented in the Quality Rating also took additional time beyond the [completion date]. There was also a substantial delay in providing a replacement refrigerator that did not work properly. The schedule management by the contractor is rated at marginal.

Protest, exh. P-8, Contractor Performance Assessment Report for Order No. W912DY17F0239, at 2.

Based on our review of the record, specifically including the assessment of Dehler's past performance "difficult[ies]," we find nothing unreasonable in the agency's assessment of an unacceptable past performance rating. More specifically, neither the fact that Dehler "rectified" matters relating to its prior "difficult[ies]," nor the fact that, in

some of the procurements, the contracting agency stated that it would contract with Dehler in the future, provides a basis for concluding that, here, the agency's evaluation was unreasonable. Dehler's protest challenging the agency's evaluation of its past performance is denied.

Next, Dehler asserts that it was improper for the agency to consider Dehler's responsibility as part of the source selection process, since "this procurement was conducted under [FAR subpart] 8.4, which does not require the contracting officer to make a responsibility determination." Protest at 2.

While an agency is not required to make a new responsibility determination when awarding a task order to an FSS contractor (as opposed to the required determination at the time the FSS contract is awarded), an agency is not precluded from doing so. See, e.g., ESCO Marine, B-401438, Sept. 4, 2009 CPD ¶ 234 at 12. Further, the FAR provides that, where a contracting agency determines that a small business offeror lacks certain elements of capacity--including capability, competency, capacity, credit, integrity, perseverance, and tenacity--the matter should be referred to the SBA for a COC determination. FAR § 19.602-1.

As noted above, the solicitation placed vendors on notice that the agency would evaluate past performance on an acceptable/unacceptable basis and would consider any information available. RFQ at 11. The solicitation further provided that, to be eligible for award, a quotation must be evaluated as acceptable under all of the non-price evaluation factors. Finally, upon evaluating Dehler's quotation as unacceptable with regard to past performance, the contracting officer referred the matter to the SBA. On this record, we find nothing unreasonable or improper in the agency's consideration of matters associated with Dehler's responsibility--including its negative past performance assessments, nor in the agency's referral of that matter to the SBA.

Finally, Dehler's protest "challenges . . . the SBA's denial of a COC," complaining that the agency failed to provide adequate information to the SBA and/or that the SBA failed to comply with its own regulations. Protest at 2, 4-5.

Our Office will not generally review an SBA decision to issue, or not issue, a certificate of competency. Bid Protest Regulations, 4 C.F.R. § 21.5(b)(2); Integrity Mgmt. Servs., Inc., B-283094.2, May 3, 2000, 2000 CPD ¶ 67 at 3. The limited exceptions, which are narrowly construed, involve protests that show bad faith on the part of government officials, or that establish that the SBA failed to follow its own published regulations or failed to consider vital information due to the manner in which the information was presented or withheld by the procuring agency. 4 C.F.R. § 21.5(b)(2).

Here, we have reviewed the record and, as noted above, concluded that the agency reasonably evaluated Dehler's past performance as unacceptable, and that the agency forwarded the matter to SBA for SBA's consideration along with various documents related to the agency's evaluation of Dehler's quotation. Further, Dehler was given an

opportunity to respond to questions posed by the SBA. Protest at 2. On the record here, none of Dehler's complaints regarding the SBA's determination not to issue a COC provides a basis for GAO to consider that matter. Dehler's protest challenging the SBA's denial of a COC is dismissed.

The protest is denied in part and dismissed in part.

Thomas H. Armstrong  
General Counsel