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# Decision

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

**File:** B-416939

**Date:** January 10, 2019

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

Howard J. Stanislawski, Esq., and Patrick K. O’Keefe, Esq., Sidley Austin LLP, on behalf of J. Squared, Inc., d/b/a University Loft Company, the intervenor.

Garry L. Brewer, Esq., Department of the Army, and Sam Q. Le, Esq., Small Business Administration, for the agencies.

Louis A. Chiarella, and Peter H. Tran, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest that the Small Business Administration (SBA) failed to consider vital information bearing on the protester’s responsibility in denying the issuance of a certificate of competency is denied where there is no evidence that the procuring agency provided incorrect information or withheld information from the SBA.

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## DECISION

Dehler Manufacturing Co, Inc., of San Antonio, Texas, protests the issuance of a delivery order to J. Squared, Inc., d/b/a University Loft Company (University Loft), of Greenfield, Indiana, under request for quotations (RFQ) No. W912DY-18-T-0144, issued by the Department of the Army, Army Corps of Engineers, Huntsville Engineering & Support Center (Corps), for furniture items. Dehler argues the Corps’ evaluation of the vendor’s quotation was improper, and that the Small Business Administration (SBA) erred in denying Dehler a Certificate of Competency (COC) because the procuring agency failed to present vital information to the SBA bearing on the firm’s responsibility.

We deny the protest.

## BACKGROUND

The RFQ was issued on April 6, 2018, as a small business set-aside to holders of General Services Administration Federal Supply Schedule contracts for furniture under the procedures of Federal Acquisition Regulation (FAR) subpart 8.4. Agency Report (AR), Tab 1, RFQ, at 1; Army Memorandum of Law (MOL) at 1. The solicitation contemplated the issuance of a fixed-price order for the delivery and installation of bedroom furniture (i.e., beds, mattresses, wardrobes) for unaccompanied personnel housing at Fort A.P. Hill, Virginia. RFQ at 2-3. Award was to be made on a lowest-priced, technically acceptable (LPTA) basis using three nonprice factors, including past performance. RFQ at 12.

Dehler and University Loft were among the vendors that submitted quotations by the May 8 closing date. The Corps evaluated Dehler's quotation and found the vendor's past performance to be unacceptable.<sup>1</sup> Contracting Officer's Statement at 1; AR, Tab 13, Abstract of Quotations, at 2. On August 6, the contracting officer referred the matter to the SBA under the SBA's COC procedures. AR, Tab 16, Dehler COC Referral, at 1-2.

On August 14, Dehler received notice from the SBA of the referral regarding the vendor's unacceptable past performance and opportunity to submit a COC application.<sup>2</sup> Id. at 1-2. Dehler timely applied for a COC with the SBA. On August 29, after performing an independent review, the SBA concluded that it would not issue Dehler a COC. AR, Tab 27, SBA Letter to Dehler, Aug. 29, 2018. Having been notified by the SBA of its decision not to issue Dehler a COC, the Corps issued the delivery order to University Loft. AR, Tab 30, Award Determination Memorandum, at 2-3, Tab 27, SBA Letter to Contracting Officer, Aug. 29, 2018. This protest followed.

## DISCUSSION

Dehler challenges the Corps' evaluation of the vendor's quotation which resulted in the COC referral to the SBA. Dehler also asserts that the SBA erred in refusing to issue the protester a COC, because the Corps failed to present vital information to the SBA as

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<sup>1</sup> The contracting officer found Dehler had received "Unsatisfactory" or "Marginal" ratings on multiple contractor performance assessment reports within the past 3 years, and that the Corps' Huntsville Engineering & Support Center furniture program had experienced significant performance issues (e.g., untimely delivery, show cause notices) with Dehler on other recent delivery orders. AR, Tab 13, Abstract of Quotations, at 2.

<sup>2</sup> The SBA provided Dehler with a "COC Submission Checklist" and also informed the vendor that it may "submit any additional information that has not been requested if you feel that it is pertinent to this case." AR, Tab 25, SBA COC Letter to Dehler, Aug. 14, 2018, at 2.

part of its review. Protest at 4. We have reviewed all of the protester's assertions and find no basis on which to sustain the protest.

Under the SBA's COC program, agencies must refer to the SBA a determination that a small business is not responsible if that determination would preclude the small business from receiving an award. 15 U.S.C. § 637(b)(7); 13 C.F.R. § 125.5; FAR subpart 19.6. Additionally, the SBA's regulations specifically require a contracting officer to refer a small business concern to SBA for a COC determination when the contracting officer has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a non-comparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility-type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii); see AttainX, Inc.; FreeAlliance.com, LLC, B-413104.5, B-413104.6, Nov. 10, 2016, 2016 CPD ¶ 330 at 4; Coastal Env'tl. Grp., Inc., B-407563 et al., Jan. 14, 2013, 2013 CPD ¶ 30 at 4; see also Phil Howry Co., B-291402.3, B-291402.4, Feb. 6, 2003, 2003 CPD ¶ 33 at 5-6.

The Small Business Act, 15 U.S.C. § 637(b)(7), gives the SBA, not our Office, the conclusive authority to review a contracting officer's determination that a small business concern is not responsible. Consequently, our Office does not review COC referrals to the SBA, or the issuance of, or refusal to issue, a COC absent limited exceptions "which GAO will interpret narrowly out of deference to the role of the SBA in this area." 4 C.F.R. § 21.5(b)(2). These exceptions are for protests that show possible bad faith on the part of government officials, or that "present allegations that the SBA failed to follow its own published regulations or failed to consider vital information bearing on the firm's responsibility due to the manner in which the information was presented to or withheld from the SBA by the procuring agency." Id.; see MPC Containment Sys., LLC, B-416188.2, July 23, 2018, 2018 CPD ¶ 251 at 4; Vetsummit, LLC, B-405187, Aug. 29, 2011, 2011 CPD ¶ 172 at 3-4.

Dehler protests the Corps' evaluation of the vendor's past performance and argues that its performance history was not "seriously deficient." Protest at 4. Dehler also contends that the Corps erred by treating the vendor's unacceptable past performance as a matter of responsibility and referring Dehler to the SBA. Id. at 2-3. The protester essentially challenges the contracting agency's underlying past performance evaluation, which has been overcome by the subsequent COC referral and SBA's independent review of Dehler's responsibility.

As set forth above, the Corps found Dehler's past performance to be unacceptable and, inasmuch as the agency's evaluation was done on a non-comparative (i.e., LPTA) basis, referred the issue to the SBA for review under its COC procedures. 13 C.F.R. § 125.5(a)(2)(ii); see Phil Howry Co., supra (finding past performance to be a responsibility-type evaluation factor when used on a non-comparative basis). The SBA separately reviewed Dehler's past performance after receipt of the vendor's COC application. Quite simply, in light of SBA's independent review and conclusive determination regarding Dehler's nonresponsibility, we need not review the contracting

agency's underlying past performance evaluation that resulted in the SBA referral. See Coast Canvas Prods. II Co., Inc.--Recon., B-222800.2, May 5, 1986, 86-1 CPD ¶ 435 at 1; Sermor, Inc.--Recon., B-219173.2, Oct. 28, 1985, 85-2 CPD ¶ 470 at 2. Moreover, Dehler's challenge of the agency's decision to refer it to the SBA for a COC determination raises none of the exceptions, e.g., bad faith on the part of government officials, that would allow our Office to review the contracting agency's referral action.

In challenging the SBA's refusal to issue Dehler a COC, the vendor contends the SBA erred because vital information bearing on the firm's responsibility was withheld from the SBA by the contracting agency. Protest at 4. In support of this contention, Dehler alleges generally that the Corps "did not present [a] full picture of [Dehler's] performance history relating to delivery to the SBA." Id. We disagree.

Here, the protester's allegations still do not meet the requirements for invoking our jurisdiction to review the SBA's issuance (or refusal) of a COC. In this respect, the protester has not shown that the alleged error was caused by the agency's failure to adequately inform the SBA of the information for its determination. MPC Containment Sys., LLC, supra, at 7.

The record shows that the Corps' referral to the SBA of Dehler's nonresponsibility consisted of a voluminous record of information that included the contracting officer's determination (i.e., "abstract of quotations") and recent evaluation reports on Dehler's prior performance on government contracts reviewed.<sup>3</sup> AR, Tab 16, Dehler COC Referral, at 1-2. The record further indicates that Dehler had an opportunity to and did, in fact, submit additional information to the SBA on its behalf with its COC application.<sup>4</sup> AR, Tab 25, SBA COC Letter to Dehler, Aug. 14, 2018, at 1-2; Tab 27, SBA Letter to Dehler, Aug. 29, 2018. The protester essentially argues that the Corps failed to be Dehler's advocate and inform the SBA of Dehler's alleged "corrective action addressing the [vendor's] past delivery deficiencies." Protest at 4. Inasmuch as the protester contends that the Corps did not accurately portray Dehler's performance history, its arguments reflect only disagreement with the Corps' assessment, which are inadequate to invoke our Office's limited jurisdiction to review the denial of a COC. See Vetsummit, LLC, supra, at 4. That is, Dehler's disagreement with the Corps' past performance assessment does not establish that the Corps' presentation of information to the SBA was inaccurate, incomplete, or misleading.

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<sup>3</sup> The Corps also utilized the SBA's COC referral checklist to ensure that a "complete COC referral package" was provided to the SBA for its review. AR, Tab 14, Agency Checklist for COC Referrals.

<sup>4</sup> The SBA also informed Dehler--prior to the vendor's submission of its COC application--of the specific adverse information on which the Corps had found Dehler's past performance to be unacceptable. AR, Tab 25, SBA COC Letter to Dehler, Aug. 14, 2018, at 1.

In short, Dehler has not shown that it was the manner in which the Corps presented information to the SBA that was improper, but only that the SBA found Dehler's response unpersuasive. Thus, Dehler has not provided a basis to invoke our Office's jurisdiction to consider the SBA decision not to issue a COC. MPC Containment Sys., LLC, supra.

The protest is denied.

Thomas H. Armstrong  
General Counsel