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**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D. C. 20548

*John Carter*  
*Per*

FILE: B-186199

DATE: November 21, 1977

MATTER OF: Consolidated Service, Inc.

**DIGEST:**

1. Procuring activity's determination of urgency based upon long procurement leadtimes for materials necessary for reserve ship's overhaul and operational commitment for ship immediately following completion of overhaul will not be questioned, since it is not established that determination was unreasonable when it was made.
2. Protester has burden of proof. Where conflicting statements of protester, third party with direct pecuniary interest in award of contract to protester, and contracting agency constitute only evidence in record, protester has not met burden.
3. Where on May 13 SBA withdrew COC issued on May 6, fact that matter of responsibility was referred to SBA would not thereafter preclude application of nonreferral authority based upon competent urgency determination. Waiver of SBA referral may be involved at any time prior to SBA determination when bona fide procurement urgency requires accelerated contractual action.
4. Record does not substantiate conflict of interest where there was no information that head of procuring activity's preaward survey team of protester was negotiating for future employment with contractor (subsequently obtained) while involved in survey.

Consolidated Service, Inc. (CSI), protested the award of a job order to Braswell Shipyards, Inc. (Braswell), for the topside overhaul of the reserve fleet ship USS CONE under invitation for bids (IFB) N62673-76-B-85 issued by the Sixth Naval District, Charleston, South Carolina. The IFB was structured on a "lot" basis with lot 1 representing the drydocking portion of the work scheduled to be performed from April 30, 1976, through June 7, 1976, lot 2 representing the topside portion scheduled to be performed between June 10, 1976, and November 1, 1976, and lot 3 representing the total work to be performed on the vessel. The following bids were received:

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	<u>Lot 1</u>	<u>Lot 2</u>	<u>Lot 3</u>
CSI	-	\$1,977,000	-
Braswell	-	2,391,371	-
Savannah Machine & Shipyard Company (Savannah)	\$1,140,866	-	-
Detyens Shipyards	-	-	\$4,154,969

Since the combined total of the lot 1 price of Savannah and the lot 2 price of CSI was lower than the lot 3 price of Detyens Shipyards, the contracting officer initiated preaward responsibility surveys of CSI and Savannah pursuant to Armed Services Procurement Regulation (ASPR) § 1-905.4 (1976 ed.). After a positive responsibility determination, a job order was awarded to Savannah on April 25, 1976, for lot 1.

The preaward survey of CSI, however, uncovered various deficiencies, chief among which was the inadequate water depth in the channel leading to CSI's facility where the CONE was to be moored during overhaul. These deficiencies were reported to CSI in a letter from the contracting officer dated March 26, 1976.

CSI responded by letter dated March 29, 1976, proposing the South Carolina State Ports Authority pier in Charleston, South Carolina, as an alternate mooring site for the CONE. However, on April 7, 1976, the contracting officer determined CSI to be nonresponsible. On April 8, 1976, the contracting officer referred the matter of CSI's capacity to the Atlanta, Georgia, field office of the Small Business Administration (SBA) for consideration under the Certificate of Competency (COC) procedures. Subsequently, SBA Atlanta referred the matter to SBA headquarters in Washington, D. C. It is unclear from the record whether this referral was made pursuant to ASPR § 1-705.4(f)(ii)(1976 ed.), as an "appeal" by the Navy of SBA Atlanta's impending issuance of a COC, as counsel for CSI contends, or merely to obtain headquarters approval prior to the issuance of a COC pursuant to ASPR § 1-704.4(e)(1976 ed.).

In any event, it is uncontroverted that on May 6, 1976, the SBA issued a COC and on May 13, 1976, after consultation with the Navy, withdrew the COC by means of a message from the Director, Office of Procurement Assistance, SBA, to the Supervisor of Shipbuilding, Sixth Naval District, which stated in pertinent part:

"THE COC IS WITHDRAWN PENDING THE RESOLUTION OF THE ACCURACY OF CERTAIN MATERIAL INFORMATION FURNISHED IN THIS MATTER.

"THIS, ADDITIONAL TIME IS REQUIRED TO EVALUATE THE NEW INFORMATION AND THEREFORE SBA REQUESTS UNTIL MAY 21, 1976, TO COMPLETE THE COC ACTION."

On May 14, 1976, the contracting officer executed a determination of urgency and made an award to Braswell.

Counsel for CSI first challenges the Navy's urgency determination. Counsel contends (1) at a May 11, 1976, meeting with representatives of SBA, CSI and the South Carolina State Ports Authority, the Navy agreed to the SBA's request for additional time, until May 21, to complete action on the COC and (2) the Navy's determination of urgency is suspect in view of the fact that (a) the SBA requested only 7 additional days to complete action on the COC; (b) the CONE is a reserve ship; and (c) performance was scheduled to begin June 1976 and to be completed November 1976.

The Navy's determination of urgency, as justification for the determination, cites (1) long leadtimes in the procurement of certain materials to be used in the topside overhaul (which CSI challenges); and (2) scheduled operational commitments for the CONE immediately following the completion of its topside overhaul.

The Navy reports that the CONE, despite the fact that it is a reserve ship, had operational commitments just like ships in the active fleet. In this instance, the CONE was committed to participate with other ships in a test of the ship's performance with reduced manning as part of Operation SMORELANT (Ships Mobilization Readiness Atlantic). Hence, the Navy indicates that an additional 7-day delay (which would have occurred had the Navy deferred to the SBA's request for additional time) could not have been permitted. The determination of urgency was made before the exercise was canceled because of its cost on July 1, 1976, and before the 1-month extension for performance of lot 1 work by supplemental agreement dated July 1, 1976.

With regard to the leadtime for material, the letters furnished by the protester from suppliers to show that certain material in question could be delivered in less time than estimated by the Navy speak as of August 16 and 17, 1976, the dates of the letters.

As a general rule, our Office will not question administrative determinations of procurement urgency if such determinations are reasonably supported by the record. 53 Comp. Gen. 15 (1973). In the instant case, the protester has offered no substantive evidence that establishes that the Navy's determination when it was made in May 1976 was unreasonable with regard to the leadtimes and the importance of the CONE meeting its operational commitment in a timely manner.

Further, the Navy denies the contention that, at the May 11 meeting between representatives of the Navy, SBA, CSI, and the South Carolina State Ports Authority, the Navy agreed to the SBA's request for additional time (until May 21) to consider the matter of CSI's capacity and that the Navy's award of a contract to Braswell on May 14 was a breach of this agreement. The Navy maintains that it made clear to representatives of CSI and the SBA that it "intended to proceed at once to take the necessary steps to make an immediate award."

In support of the protester's contention, counsel for CSI has furnished a letter from the executive assistant of the South Carolina State Ports Authority to CSI dated May 21, 1976, which stated in pertinent part:

"\* \* \* [A Navy representative] informed me early the morning of Thursday, May 13, that the Navy was abiding by the agreement of all parties for a 10-day review period which would end May 21. He assured us the Navy had no intention of altering this review schedule. \* \* \* [The Navy representative] today confirmed my understanding of the May 13 conversation."

The record thus reflects that of the four organizations to participate in the May 11 meeting, representatives of two of them, CSI and the Ports Authority, came away with the impression that the Navy had agreed to the SBA's request and would not make an award prior to May 21, 1976. The Navy, as noted above, denies that any such agreement was made. The fourth participant, the SBA, has declined to comment on this matter for the record.

The protester has the burden of affirmatively proving his case. Where conflicting statements of the protester, a third party with a direct pecuniary interest in the award of a contract to the protester, and the contracting agency constitute the only evidence in the record, we do not believe that this burden has been met. Cf. Reliable Maintenance Service, Inc., B-185103, May 24, 1976, 76-1 CPD 337.

Counsel for CSI has argued that the Navy had no authority to award a contract to Braswell once an "appeal" had been made to SBA headquarters. However, we have held that the fact that a contracting officer had referred a matter of responsibility to the SBA would not thereafter preclude application of the nonreferral authority based upon a competent determination of urgency and that the waiver of SBA referral may be invoked at any time prior to the SBA determination when it appears that a bona fide procurement urgency requires accelerated contractual action. B-157090, September 30, 1965; 49 Comp. Gen. 639 (1970).

Counsel has attempted to distinguish our holding, as stated above, in 49 Comp. Gen., supra, by pointing out that in that case we went on to state:

"The record shows that from a practical standpoint, your agency had been advised of the SBA's determination prior to the withdrawal action. We therefore believe that the withdrawal of the referral to SBA--after that agency had advised of its intention to issue a COC to Chausse--was not legally effective to remove that low bidder from consideration for award."

Counsel argues that the facts of 49 Comp. Gen., supra, are analogous to those of the instant case and, thus, the Navy's de facto withdrawal of its referral to the SBA in the instant case was not legally effective to remove CSI from consideration for award.

We disagree. In 49 Comp. Gen., supra, the SBA gave the procuring activity notice of its intention to issue a COC (although not actually issuing a COC) prior to the procuring activity's urgency determination. Here, as noted above, the SBA first issued a COC and then withdrew it on May 13, 1976. Thus, at the time that the Navy awarded a contract to Braswell on May 14, 1976, a COC was not in existence. Further, although counsel attempts to draw a parallel to 49 Comp. Gen., supra, by contending that the issuance of a COC in the instant case was imminent on May 21, 1976, the record shows only that the SBA had indicated that its decision would be forthcoming by the May 21 date. Whether this decision would have been favorable or unfavorable with regard to the issuance of a COC is, we believe, speculation unsupported by the instant record. Thus, we conclude that our precedents, cited, supra, are controlling and the Navy's urgency determination effectively withdrew the matter from SBA consideration.


Finally, CSI has raised the possibility of a conflict of interest by questioning whether Lieutenant Commander R. L. Gosselin who headed the Navy's preaward survey team is the same R. L. Gosselin subsequently employed by Braswell.

The Navy reported that it had no information that Mr. Gosselin was negotiating for future employment with Braswell while involved in the preaward survey of CSI in violation of 18 U.S.C. § 208 (1970). "Hence there is nothing to indicate \* \* \* that Mr. Gosselin was in a conflict of interest situation while still an active duty naval officer, or that his judgment in matters relating to the preaward survey of CSI was in any way affected by considerations unrelated to the ability of that contractor to perform the overhaul of the USS CONE." However, the Navy added that "\* \* \* owing to the allegation raised \* \* \*, the Inspector General for this Command is being requested to look into the matter."

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We note that 18 U.S.C. § 208 is a criminal statute whose interpretation and enforcement are primarily matters for the Department of Justice. Cf. Riggins & Williamson Machine Co., Inc., B-186723, December 6, 1976, 76-2 CPD 463. Moreover, we do not believe that the present record suggests any basis to question the validity of the procurement in terms of a possible conflict of interest at this time.

Accordingly, the protest is denied. In view of this decision, CSI's claim for bid preparation costs need not be considered.

  
Deputy Comptroller General  
of the United States

