

**DECISION**



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

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FILE: B-183450

DATE: November 13, 1975

MATTER OF: Environmental Tectonics Corporation

**DIGEST:**

1. Where contracting officer determined offeror was nonresponsible due to unsatisfactory ratings in production capability, performance record, and ability to meet required delivery schedule, although some information in preaward survey was erroneous, and where SBA declined to issue COC primarily on basis of lack of financial capacity, it cannot be said that determination of nonresponsibility was unreasonable or without factual basis. Furthermore, denial of COC by SBA must be viewed as affirmation of nonresponsibility determination.
2. Although offeror denied COC by SBA contends denial was erroneous and should be reconsidered on basis of certain financial information, GAO has no authority to review SBA determination or to require SBA to issue COC or to reopen case.

Request for proposals No. DSA120-75-R-1050 was issued by the Defense Personnel Support Center (DPSC) of the Defense Supply Agency (DSA) for the procurement of surgical instrument and dressing sterilizers. The Environmental Tectonics Corporation (ETC) protests the decision of DPSC not to make award to ETC, the low offeror, due to a determination that ETC is not a responsible offeror. No award had been made.

The decision that ETC is not responsible was based upon a negative preaward survey of that firm made by the Defense Contract Administration Services District (DCASD). Of the nine factors evaluated, DCASD rated ETC as unsatisfactory on production capability, performance record, and ability to meet the required delivery schedule. The six remaining factors, including the financial capability of ETC, were rated as satisfactory. In view of these survey findings and in view of the fact that ETC is a small business, the matter was referred to the Small Business Administration (SBA), Region III, for review and consideration as to the possible issuance to ETC of a certificate of competency (COC), pursuant to Armed Services Procurement Regulation (ASPR) § 1-705.4 (1974 ed.). Although the SBA initially indicated it intended to issue a COC to ETC, the final SBA decision, dated March 17, 1975, was that based upon an analysis of all available information no COC would be issued.

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Because of the aforementioned determinations, a meeting of DPSC personnel and ETC representatives was held on March 27, 1975. At this meeting ETC presented a March 20 letter advising that the Fidelity Bank of Bristol, Pennsylvania, would, if permitted to retain a first lien on certain property and subject to periodic reviews of the ETC financial position, extend up to \$750,000 in credit to ETC. ETC stated that the SBA had indicated this information might create a basis for the reversal of its COC denial since the primary basis for the SBA decision was the determination that ETC was financially nonresponsible. Reportedly, the contracting officer was advised by the SBA that this additional information would not result in a reversal of its position. After a conference between the protester, DSA, and representatives of our Office, the contracting activity, while declining to conduct a second preaward survey, reviewed the information upon which its original decision was based and determined that its original finding of nonresponsibility was correct.

It is the position of counsel for ETC that, for various reasons, award should be made to ETC. First, it is contended that the preaward survey is full of factual errors and misstatements. The survey contained information to the effect that two ETC contracts for items identical to those being procured here were terminated for default. While ETC admits that two of its contracts were so terminated, it points out that these did not involve items identical to those being procured here. ETC points out, however, that it did perform contract No. DSA120-71-C-1622 for identical items, and, although 8 of the 100 items were untimely delivered, the contract was not terminated. It is stated that the satisfactory performance of this contract was ignored in the ETC responsibility determination. Also, it is noted that the preaward survey contained the incorrect statement that in the past 18 months 13 of the 21 contracts performed by ETC were performed in a delinquent manner. It is pointed out that when challenged the procurement activity admitted this statement to be wrong, ascribed its incorrectness to "computer inaccuracy," and now states that only 12 contracts were performed, 6 of which were delinquent. Counsel notes that "Since the Procuring Agency has not itemized these contracts in any detail, it is still impossible to comment on them adequately." Nonetheless, it is noted that certain of these contracts were performed delinquently by less than 30 days and that this fact should be considered favorable to ETC. Instead, it is argued, these "gross inaccuracies" were used to bolster a finding of nonresponsibility.

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The contracting activity admits that use of the word "identical" to describe the sterilizers made under two previous contracts terminated for default was incorrect; however, it is pointed out that two contracts for sterilizers were defaulted within the year preceding the survey. As regards the allegation that the survey report included incorrect numbers of contracts performed satisfactorily and delinquent in the past 18 months, it is stated in the agency's supplemental report that this error was occasioned by a computer inaccuracy which caused a duplication in the records utilized by DCASD. While the error is admitted, the corrected figures show that 50 percent of the ETC contracts performed during the 18 month period were delinquent due to causes attributed to ETC. Although counsel for ETC states that it is impossible to comment adequately on the new figures as the contracting activity did not itemize the contracts in any detail, it would appear that ETC's records would be available for this purpose since it was ETC's contention regarding the inaccuracies which led to the discovery of the error. Counsel also states that any delinquencies should not be given much weight as most did not involve substantial periods of time. We believe the weight to be accorded delinquent performance is a matter within the discretion of the procuring activity since they must bear the brunt of any difficulties experienced in obtaining timely performance. Furthermore, while ETC has appealed these default terminations to the Armed Services Board of Contract Appeals (ASBCA), we have held that such defaults may nevertheless support a determination of nonresponsibility. 43 Comp. Gen. 323 (1963).

Secondly, as regards the ETC contract No. DSA120-71-C-1621 for sterilizers, it is asserted that the procurement activity failed to mention that the main reason for the return of the sterilizers under the warranty provisions of the contract was a problem experienced with the cover, which was caused by a deficiency in the Government drawings. As regards the activity's allegation that certain of these sterilizers exploded, it is stated that no Government agency ever notified ETC of this fact, and, consequently, that any explosions, if they occurred at all, were the result of Government personnel misuse. As regards the alleged failure of the items to maintain the proper operating temperature, it is asserted that this alleged failure occurred outside of the warranty period; also the items had been tested by ETC in this area and also by the Government before its acceptance of them.

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Further, as regards contract No. DSA120-71-C-1620, it is contended that it is impossible for ETC to reply to the activity's statement that the contract was subject to a warranty action as notice of the alleged defects was given to ETC only after the warranty period had expired. It is also noted that the Government had accepted the units in accordance with the contract provisions. As regards the ETC contract No. DSA700-73-C-9495 for water purifiers, while it is admitted that there has been some delay in delivering the first article item, it is alleged that the reason for this is the numerous discrepancies found in the Government drawings, for which the Government admits responsibility. Also, it is alleged that the procurement activity misstated the cause for late delivery related to Government-furnished materials. It is stated that many more items than the truck chassis were furnished almost 7 months late, and the Government has accepted responsibility for this.

With regard to ETC's performance under contract No. DSA120-71-C-1621, referred to above, the agency reports that defective items were returned to ETC for breach of the contract warranty provision. As a result of negotiations for rework under the warranty, it is reported that technical design requirements which ETC did not meet were waived, provided the reworked units complied with performance requirements. However, it is reported that one of the first reworked sterilizers exploded and testing of random samples disclosed that other reworked units failed to perform as required. It is acknowledged by the agency that defects in items delivered under contract No. DSA120-71-C-1620 were noted after the warranty period and repaired at Government expense. With regard to the water purification equipment contract (DSA700-73-C-9495), it appears that ETC may have been delayed in timely performance to some extent by reason of late delivery of Government-furnished material. However, the agency disputes the length of the delay claimed and points out that even the extended date of April 1, 1975, had not been met as of July 21, 1975, the date of the agency's supplemental report to our Office.

Thirdly, as regards the present procurement, it is noted that the contention of the procurement activity that ETC would be unable to obtain the necessary forging rings in time for performance due to a lead time of 28 weeks is incorrect. This contention was based on the assumption that ETC would acquire the rings only after first article approval, whereas in fact the vice president of ETC verbally assured the activity that ETC would bear the risk of ordering the rings before first article approval. Also, regarding the ETC application for a COC, it is stated that the procurement activity misstated

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two facts: first, that the SBA did not request a return of the COC package for reevaluation (the SBA did allegedly request such); and, second, that SBA informally advised the activity that ETC was never told that the letter of March 20 reestablishing a line of credit for ETC would have altered the negative decision on the COC (an attorney in the SBA Regional Office allegedly did so advise certain ETC employees of this fact). Counsel for ETC concludes from these statements that either the procurement activity misconstrued the meaning of its communications with the SBA or the SBA representatives made inconsistent and contradictory statements. In either event, it is argued that ETC should not be made to suffer because of allegedly wrongful acts by Government officials.

With regard to ETC's position concerning obtaining the forging rings, we have not been furnished a satisfactory answer from the agency as to why it did not accept ETC's assurance in this regard or obtain a written commitment if that was considered necessary. As to the second point noted above, by letter of April 3, 1975, the contracting officer advised the SBA of the credit extension made to ETC and requested the SBA to "\* \* \* advise whether this additional information has a bearing on the SBA position in this matter." In a letter dated April 7, 1975, the SBA Assistant Regional Director for Procurement Assistance advised the contracting officer that "\* \* \* the additional information would not alter the previous negative decision."

In conclusion, ETC argues that it should receive award on the present procurement because it did not receive a fair responsibility evaluation and because in showing the nonresponsibility determination to have been based upon grossly erroneous and misleading information ETC has also established its ability to satisfactorily perform any contract it is awarded. Alternatively, ETC urges that a reevaluation should be made to fairly evaluate the true ability of ETC to perform the work in question.

The general rule of our Office is that unless it can be shown that the determination of the contracting officer as regards the responsibility of a prospective contractor is unreasonable or lacks a factual basis, our Office will not question that determination. Hydromatics International Corporation, B-181240, September 4, 1974, 74-2 CPD 142; 49 Comp. Gen. 553 (1970). Notwithstanding the fact

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that the preaward survey contained some inaccuracies, we believe that in view of the percentage of delinquent or terminated contracts out of the total awarded ETC, and in view of the disputes concerning whether ETC-furnished items met the pertinent specifications, some of which led to actions before the ASBCA, we cannot conclude that the contracting officer's determination of nonresponsibility was unreasonable or without a factual basis. See Halo Optical Products, Inc., B-178573, B-179099, May 17, 1974, 74-1 CPD 263.

Furthermore, under 15 U.S.C. § 637(b)(7), the SBA has the authority to issue or deny a COC. Our Office has no authority to review SBA determinations or to require the SBA to issue a COC or to reopen a case when a COC has been denied. Unitron Engineering Company, B-181350, August 20, 1974, 74-2 CPD 112; 51 Comp. Gen. 448 (1972). In this connection, our Office has held that when an offeror is denied a COC, the contracting officer's determination of nonresponsibility must be regarded as having been affirmed by the SBA. Marine Resources, Inc., B-179738(1), February 20, 1974, 74-1 CPD 82.

Furthermore, although issuance of the COC was denied to a large degree on the ground of ETC's lack of financial capacity, which the contracting officer had found acceptable, the SBA also noted in its letter to ETC that "management must show more awareness to the requirements and responsibilities of Government contracts, and positive action must be taken to improve the firm's performance." Thus, in effect, the SBA affirmed the findings of the contracting officer, and we are, therefore, unable to conclude that the contracting officer's subsequent affirmation of his nonresponsibility determination was without a reasonable basis. Marine Resources, Inc., *supra*.

Finally, since the SBA did reconsider its original denial of a COC upon ETC's presentation of the firm line of credit from a bank and affirmed its denial, we see no basis for suggesting further review of the matter as we did in 49 Comp. Gen. 619 (1970), as urged by ETC's counsel.

Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States