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DECISION

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

FILE: B-212444.2 **DATE:** August 28, 1984

MATTER OF: Eastern Marine, Inc.

DIGEST:

1. Protest that contracting officer improperly used the Small Business Administration's (SBA) certificate of competency (COC) procedures in awarding a contract in Panama for a tugboat to be delivered there is denied. There is nothing in either the Small Business Act or SBA's regulations implementing the Act that restricts COC procedures to contracts awarded or items to be delivered in the United States.

2. GAO will not consider protest by a U.S. firm alleging that agency discriminated against foreign bidders.

3. Since SBA's COC determinations are conclusive, GAO will not review SBA's issuance of a COC to a firm that did not comply with the solicitation's definitive responsibility criterion where the record indicates that SBA was aware of the criterion and there has been no showing of possible fraud on the part of government officials.

Eastern Marine, Inc. protests the award of a contract by the Panama Canal Commission to Boston Shipyard Corporation under invitation for bids (IFB) No. P-83-8. We deny the protest in part and dismiss it in part.

The IFB was for a diesel-powered, twin-screw tugboat to be delivered in Panama. The solicitation provided that the successful bidder must have been engaged in the construction of similar tugboats for the past 5 years. As a result of a preaward survey, the contracting officer

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determined that the low bidder, Boston Shipyard, did not satisfy this requirement and therefore was not a responsible prospective contractor. However, because Boston Shipyard had represented in its bid that it was a small business concern, the contracting officer referred the matter to the Small Business Administration (SBA) for possible issuance of a certificate of competency (COC). SBA, without mentioning the 5-year experience requirement, issued a COC to Boston Shipyard certifying that the firm was competent to perform the contract. The contracting officer then awarded the contract to Boston Shipyard.

The protester, who was the second low bidder, contends that the contracting officer acted improperly in referring the matter of Boston Shipyard's responsibility to SBA and in making award to that firm based on SBA's issuance of the COC. In addition, the protester disputes SBA's conclusion that Boston Shipyard is responsible, arguing that SBA did not apply the solicitation's 5-year experience requirement and that the issuance of the COC must have been based on fraud or misinformation.

The protester's contention that the referral to SBA and the subsequent award following issuance of the COC were improper is based on Federal Procurement Regulations (FPR), 41 C.F.R. § 1-1.700(b), which provides that the small business subpart of these regulations applies only in the United States. Since Panama is not part of the United States, the protester says that the COC program described in these regulations is not applicable to this procurement. In making an award based on the COC notwithstanding the inapplicability of the COC program, the contracting officer acted arbitrarily, says the protester. We disagree.

The Small Business Act, as amended, 15 U.S.C. §§ 631 et seq. (1982), authorizes the SBA to certify to government procurement officers all elements of responsibility of any small business concern. Id. § 637(b)(7)(A). The Act prohibits a contracting officer from denying a contract to a small business concern based on a determination of nonresponsibility without referring the matter to SBA. If the SBA issues a COC, this certification of responsibility

is conclusive and the contracting officer is directed to award the contract to the small business concern without requiring it to meet any other standard of responsibility. Id. § 637(b)(7)(C). The Act and the COC program it authorizes apply, in general, to agencies within the executive branch of the government, see Fry Communications, Inc., 62 Comp. Gen. 164 (1983), 83-1 CPD ¶ 109, and the Panama Canal Commission is an executive branch agency. See 22 U.S.C. § 3611 (1982). We find nothing in the Act, either express or implied, that would exempt this procurement from its requirements.

The purpose of the Small Business Act is reflected in the regulations promulgated by the SBA, the agency primarily responsible for implementing the Act. These regulations define a "concern" as any business entity organized for profit with a place of business in the United States[1/] which makes a significant contribution to this Nation's economy. 13 C.F.R. § 121.3-2(i). In addition, under the COC program, a non-manufacturing concern bidding on a set-aside contract is eligible for a COC only if the end items to be furnished will be manufactured by a small business concern in the United States. Id. § 125.5(c). It is through these provisions requiring some nexus with the United States that the regulations give effect to the policy of the Act to benefit American small businesses. There is nothing in SBA's regulations, however, that would limit the application of the COC program to either contracts awarded or items to be delivered in the United States. In fact, the SBA has informed us that it believes that the COC program is not so limited. We therefore find no basis to object to the COC referral.

1/ The regulations define "United States" as including the states, the territories and possessions of the United States, Puerto Rico, the Trust Territory of the Pacific Islands, and the District of Columbia. 13 C.F.R. § 121.3-2(z). The term "United States" is similarly defined in the Small Business Act. 15 U.S.C. § 633(a) (1982).

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The protester contends also that the referral of Boston Shipyard's responsibility to SBA and the award to that firm based on the issuance of the COC discriminated against foreign bidders and therefore violated several treaties and statutes and the Constitution of the United States. We will not consider this issue, however, since the protester is a U.S. firm and thus was not prejudiced by any action alleged to have harmed foreign bidders. We dismiss this aspect of the protest.

We turn now to the protester's allegations concerning SBA. This Office does not review decisions by the SBA to issue a COC in the absence of a showing of possible fraud on the part of government officials or unless the record indicates that SBA did not consider vital information bearing on a small business concern's compliance with definitive responsibility criteria contained in the solicitation. J. Baranello and Sons, 58 Comp. Gen. 509 (1979), 79-1 CPD ¶ 322; Surgical Instrument Company of America, B-212653, Nov. 30, 1983, 83-2 CPD ¶ 628. Since the SBA is not bound by a solicitation's definitive responsibility criteria, however, J. Baranello and Sons, supra, and may, as here, decide that compliance with these criteria is not necessary for the issuance of a COC, the "vital information" test is satisfied so long as SBA was aware of the criteria. E-Systems, Inc., B-199550.5, Feb. 27, 1981, 81-1 CPD ¶ 137. In this case, the SBA was aware of the solicitation's 5-year experience requirement since the Commission informed the SBA of the experience requirement in its letter submitting the matter to the SBA. There also has been no showing, only a speculative allegation, of fraud by the government officials. We therefore dismiss this aspect of the protest.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States