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**Comptroller General  
of the United States**

**United States General Accounting Office  
Washington, DC 20548**

# Decision

**Matter of:** Quality Trust, Inc.

**File:** B-289445

**Date:** February 14, 2002

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Robert J. Symon, Esq., Spriggs & Hollingsworth, for the protester.  
Col. Michael R. Neds and Maj. Ralph J. Tremaglio, III, Department of the Army, and  
John W. Klein, Esq., and Gene Marie M. Pade, Esq., Small Business Administration,  
for the agencies.  
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General  
Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Where, following a contracting officer's determination that the protester is not responsible, the Small Business Administration declines to issue a certificate of competency, the contracting officer is not required to again review the protester's responsibility where the protester does not present new information on this subject.

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## **DECISION**

Quality Trust, Inc. (QTI) protests invitation for bids (IFB) No. DAKF19-01-B-0009, issued by the Department of the Army for asbestos abatement at Fort Riley, Kansas. QTI protests the agency's determination that QTI is a nonresponsible offeror, and the subsequent cancellation of the IFB.

We deny the protest.

On July 20, 2001, the agency issued the IFB as a total set-aside for HUBZone small business concerns. Five bids were submitted by the August 31 bid opening. The agency rejected the lowest-priced bid for failing to qualify as a HUBZone small business concern. The protester submitted the next-lowest bid of \$2,180,735.

After QTI verified its bid price, the agency conducted a pre-award survey to determine the responsibility of the firm. The agency interviewed financial and past performance references identified by QTI. The financial reference provided information, from which the contracting officer concluded that QTI did not have adequate financial resources to perform this contract. Army Report, Tab I, Army's

Referral to Small Business Administration (SBA), encl. 1, Determination of Non-responsibility (Sept. 18, 2001), at 1, 3. The past performance references rated QTI's performance on prior contracts from satisfactory to unsatisfactory, and did not recommend the firm for large jobs or jobs dealing with hazardous materials. The references identified a variety of concerns, including various problems concerning the firm's management of subcontractors, and noted that QTI was very dependent on subcontractors. *Id.* at 1-3. Although QTI identified an asbestos abatement contract as a reference, it turned out that QTI had not performed that contract and that this reference was for an asbestos abatement subcontractor that QTI intended to use (hereinafter "Company A") to perform the majority of work under the contract. Army Report, Tab I, Agency's Referral to SBA, encl. 8, E-mail Correspondence Between Army and QTI, at 1-2. On September 18, the contracting officer determined that QTI was not responsible because it did not have either the financial resources or technical capability to perform the requirements of a contract of this magnitude. Army Report, Tab I, Army's Referral to SBA, encl. 1, Determination of Non-responsibility (Sept. 18, 2001), at 3.

The contracting officer referred the matter of QTI's responsibility to the SBA pursuant to certificate of competency (COC) procedures. QTI applied to the SBA for a COC and, on October 16, the SBA declined to issue one because QTI "did not adequately demonstrate satisfactory past performance in a manner sufficient to give . . . reasonable assurance that all requirements of this solicitation would be met." Protest, exh. 3, Letter from SBA to QTI (Oct. 16, 2001). The SBA's decision was based in part on interviews with references provided by QTI in its COC application, who noted management and performance problems, as well as a dispute with a subcontractor. SBA Report, exh. B, Industrial Specialist's Report, Oct. 4, 2001, at 3-4. The COC committee considered QTI's proposed use of a subcontractor to perform asbestos abatement as follows:

SBA considered the fact that an apparently well-respected subcontractor would be performing the majority of the work for the applicant. Reliance upon the subcontractor's favorable reputation was tempered by the fact that the applicant has had prior difficulties performing even when relying on subcontractors to perform.

SBA Report, exh. B, COC Meeting Summary (Oct. 16, 2001), at 2.

Following receipt of the SBA's letter denying its COC application, counsel for QTI sent a letter to the contracting officer stating the following:

QTI strongly disagrees that it does not adequately demonstrate the requisite satisfactory past performance record to perform this contract and questions whether the Army (or SBA) considered the following in reaching this conclusion:

1. QTI, if awarded this contract, is committed to awarding a subcontract to [Company A] for approximately 75% of the value of the contract. [Company A] is currently satisfactorily performing asbestos abatement work at Ft. Riley.
2. Current [Company A] employees are committed to going to work for QTI if QTI is awarded the contract.<sup>1</sup>

Army Report, Tab L, Letter from QTI's Counsel to the Contracting Officer (Oct. 26, 2001.)

The contracting officer determined that no further review of QTI's responsibility would be undertaken, and confirmed that an award would not be made to QTI. Army Report, Tabs M, Q, Letters from the Army to QTI. Subsequently, the agency cancelled the IFB because the remaining bid prices were determined not to be fair and reasonable and because the IFB contained a potential ambiguity. Army Report at 3. This protest followed.

QTI alleges that the agency improperly failed to consider additional information submitted by the firm regarding the firm's responsibility, and that the basis for the Army's non-responsibility determination was unreasonable, so that the SBA's subsequent denial of a COC to QTI were thus not applicable to the matter of the protester's responsibility.

The Small Business Act, 15 U.S.C. § 637(b)(7) (2000), gives the SBA, not our Office, the conclusive authority to review a contracting officer's determination that a small business is not responsible. We therefore do not review challenges to the contracting agency's initial non-responsibility determination where the firm subsequently has been denied a COC by the SBA. Government Contract Advisory Servs., Inc., B-255989, B-255990, Jan. 18, 1994, 96-1 CPD ¶ 162 at 2-3; Inflated Prods. Co., Inc., B-188319, May 25, 1977, 77-1 CPD ¶ 365 at 2. Nor do we review challenges to the SBA's decision not to issue a COC unless there is a showing that the COC denial resulted from the possible bad faith of a government official, or from a failure to consider vital information because of how information was presented to, or withheld from, the SBA by the procuring agency. 4 C.F.R. § 21.5(b)(2) (2001); Joanell Labs., Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207 at 4-6.

However, Federal Acquisition Regulation (FAR) § 19.602-4(a) provides that "if new information causes the contracting officer to determine that the concern referred to the SBA is actually responsible to perform the contract, and award has not already been made . . . the contracting officer shall reverse the determination of

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<sup>1</sup> The letter also stated that "other factors exist" bearing on the firm's responsibility; the firm never presented other information to the contracting officer.

nonresponsibility, notify the SBA of this action, withdraw the referral, and proceed to award the contract.”<sup>2</sup> See Inflated Prods. Co., Inc., *supra*, at 2-3; Deval Corp., *supra*. On the other hand, where, after the SBA’s denial of a COC, no new information is presented to lead the contracting officer to determine that the concern is responsible, the contracting officer should proceed with award to another appropriately selected and responsible firm. FAR § 19.602-4(c); Goshen Excavators, B-279093.2, Apr. 20, 1998, 98-1 CPD ¶ 114 at 3. Here, since the SBA has declined to issue a COC and since none of the limited exceptions exist for our Office to review the SBA’s decision, the essential issue for our consideration raised by this protest is whether new information requiring reversal of the nonresponsibility determination was presented to the contracting officer after the denial of the COC.

The information presented by the protester following the SBA’s denial of a COC was not new information. The Army and the SBA had previously considered the capability and reputation of Company A in performing asbestos abatement contracts, as well as QTI’s proposed substantial reliance thereon to perform the solicited contract; the SBA explicitly concluded that QTI was a nonresponsible bidder for this requirement even with Company A as a significant subcontractor. Moreover, the letter of October 26 from QTI’s counsel to the contracting officer did not indicate that the information in question was new; to the contrary, the letter only stated that QTI disagreed with the agency’s and the SBA’s determinations, and alleged that neither agency had reasonably considered the identified information.

The protester also asserts that this non-responsibility determination constitutes a de facto debarment. We disagree. A de facto debarment occurs when the government uses nonresponsibility determinations as a means of excluding a firm from government contracting or subcontracting, rather than following the debarment regulations and procedures set forth at FAR Subpart 9.4. Firm Erich Bernion GmbH, B-233106, Dec. 28, 1988, 88-2 CPD ¶ 632 at 4. A necessary element of a de facto debarment is that an agency intends not to do business with the firm in the future. *Id.*; Lida Credit Agency, B-239270, Aug. 6, 1990, 90-2 CPD ¶ 112 at 3 n.2. The nonresponsibility determination here was based on current information regarding QTI’s performance on the contracts that QTI had identified for this purpose, and the record does not show that the agency intends to exclude the firm from other procurements. Firm Erich Bernion GmbH, *supra*.

Finally, QTI protests the cancellation of the IFB. Since the protester was determined to be a nonresponsible contractor, a determination affirmed by the SBA’s denial of QTI’s application for a COC, the protester is not eligible to receive an award under

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<sup>2</sup> In circumstances where new information arises, our review is limited to whether the contracting officer acted reasonably. See Deval Corp., B-272001, Aug. 14, 1996, 96-2 CPD ¶ 67 at 3; Inflated Prods. Co., Inc., *supra*.

this IFB, and thus it is not an interested party eligible to protest the cancellation of the IFB. RCI Mgmt., Inc., B-239938, Oct. 12, 1990, 90-2 CPD ¶ 283 at 4.

The protest is denied.

Anthony H. Gamboa  
General Counsel