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Comptroller General  
of the United States

United States Government Accountability Office  
Washington, DC 20548

## Decision

**Matter of:** Tenderfoot Sock Company, Inc.

**File:** B-293088.2

**Date:** July 30, 2004

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Bernadine M. Solwey for the protester.

Maura C. Brown, Esq., Department of Veterans Affairs, and John W. Klein, Esq., and Kenneth Dodds, Esq., Small Business Administration, for the agencies.

Paul E. Jordan, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### DIGEST

Protest that agency improperly failed to award contract to protester after Small Business Administration (SBA) issued Certificate of Competency (COC) for protester, is denied where agency prematurely—*i.e.*, before selecting protester’s proposal for award—referred protester’s responsibility to SBA for COC review, and record shows that subsequent decision to make award to another offeror was based on price/technical tradeoff that reasonably concluded that protester’s higher-technically-rated proposal did not justify award at its significantly higher price.

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### DECISION

Tenderfoot Sock Company, Inc. protests the award of a contract to Southern Hosiery Mills, Inc. under request for proposals (RFP) No. 797-NC-03-0024, issued by the Department of Veterans Affairs (VA) for diabetic socks.<sup>1</sup> Tenderfoot asserts that it should have received the award, since the Small Business Administration (SBA) issued it a Certificate of Competency (COC).<sup>2</sup>

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<sup>1</sup> The solicitation defined a diabetic sock as “hosiery specifically designed to reduce pressure or friction to the foot. They should be devoid of large seams or creases that could impart clinically significant pressure to an insensitive foot and should be loose fitting proximally, as not to restrict circulation.” RFP at 4.

<sup>2</sup> A COC is a written instrument issued by SBA to a contracting officer certifying that a small business concern possesses the responsibility to perform a particular contract. Federal Acquisition Regulation (FAR) § 19.601; 13 C.F.R. § 125.5(a).

We deny the protest.

The RFP, issued as a small business set-aside, contemplated the award of a fixed-price requirements contract for a base year, with four 1-year options, for diabetic socks. Offerors were required to submit product samples that were to be evaluated by experts in treating VA's elderly diabetic population and other patients at risk of limb-threatening foot problems. The evaluation was to consist of an initial determination of whether the offered items met the minimum requirements and, for those found acceptable, an evaluation under three factors—technical, price and quality/past performance (in descending order of importance). Award was to be made, without discussions, to the offeror whose proposal would be most advantageous to the government, that is, on a “best value” basis.

The agency received proposals from 32 offerors, including Tenderfoot and Southern. The technical evaluation panel (TEP), which included two doctors of podiatry and a chief of prosthetics trained as an orthotist, evaluated each proposed sock. Agency Report (AR) at 3. The TEP rejected a significant number of socks in the initial evaluation and then evaluated those remaining. The final evaluation for Tenderfoot and Southern was as follows:

	<b>Tenderfoot</b>	<b>Southern</b>
<b>Technical</b>	Very Good	Acceptable
<b>Price</b>	\$3,782,400	\$1,572,000
<b>Past Performance</b>	Highly Acceptable	Acceptable

The contracting specialist initially considered Tenderfoot and other offerors for the award based on their technical ratings. Prior to making an award determination, however, since the contracting specialist was unable to make a financial responsibility determination as to Tenderfoot, she obtained additional information from Tenderfoot and then referred the matter to SBA for a COC review. At the same time she made the referral, another offeror, Apex Foot Health Industries, filed a protest with our Office challenging the rejection of its offered socks. The procurement was suspended until issuance of our decision denying Apex's protest. See Apex Foot Health Indus., B-293088, Jan. 23, 2004, 2004 CPD ¶ 30.

During this delay, SBA completed its review and issued a COC to Tenderfoot. After Apex's protest was denied and the procurement resumed, the contracting specialist reviewed the TEP's evaluations of Tenderfoot's and Southern's socks and found no quality differences between them sufficient to justify Tenderfoot's significantly higher price. She then conducted a tradeoff analysis between Southern and each of the other offerors, concluded that Southern represented the best value, and recommended that it receive the award. The contracting officer agreed with the recommendation and awarded Southern the contract. This protest followed.

Tenderfoot asserts that VA had determined that Tenderfoot was in line for the award, as evidenced by its referral of the firm's responsibility to SBA for a COC review, which occurs only where the agency has identified the offeror otherwise in line for award, but has found the firm nonresponsible. In the protester's view, once SBA issued it a COC, the agency could not then change its award decision—it was required to award Tenderfoot the contract.

Under the FAR, a contracting officer must make an affirmative determination of an offeror's responsibility before making award to it. FAR § 9.103(b). Where a small business concern's offer would otherwise be accepted for award, but the firm is determined to be nonresponsible, the contracting officer must refer the matter to SBA, which will determine whether the firm is responsible and, if so, issue a COC. FAR § 9.104-3(d). Where SBA issues a COC, agencies are to make award to the concern, without requiring it to meet any other responsibility or eligibility requirement. 15 U.S.C. § 637(b)(7)(C) (2000); FAR § 19.602-4.

The award to Southern was unobjectionable. The FAR requirement that agencies make award to a concern where SBA issues a COC presumes that the COC referral will occur after the concern has been determined to be otherwise in line for the award. FAR § 9.104-3(d). The record in this case shows that, at the time of the referral, the contracting specialist had not yet determined that Tenderfoot was in line for the award; she had determined only that Tenderfoot was one of several firms that could receive the award. Contracting Officer's Statement at 1. Nevertheless, apparently not fully understanding the COC process, and having questions about Tenderfoot's financial capability, the contracting specialist (prematurely) submitted the matter to SBA for a COC review. AR at 3. Although SBA acted on the referral and issued a COC to Tenderfoot, VA was not required to make award to Tenderfoot at that juncture, since it had not yet determined that Tenderfoot was otherwise in line for the award. The agency could not deny Tenderfoot the award based on matters of responsibility, but nothing prohibited it from selecting another offeror for award based on a price/technical tradeoff in accordance with the RFP's evaluation scheme. See The Gerard Co., B-274051, Nov. 8, 1996, 96-2 CPD ¶ 177 at 3 (agency properly obtained best and final offers—due to issuance of amendment—after COC was issued to protester).<sup>3</sup>

Tenderfoot asserts that the award determination was flawed because Southern's offered sock is of a lower quality than Tenderfoot's.

Agency officials have broad discretion in determining the manner and extent to which they will make use of technical and price evaluation results. Price/technical tradeoffs may be made; the extent to which one may be sacrificed for the other is

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<sup>3</sup> SBA's view—furnished at our request—is consistent with our conclusion. SBA Report, June 16, 2004, at 3-4.

governed by the test of rationality and consistency with the established evaluation factors. Randolph Eng'g Sunglasses, B-280270, Aug. 10, 1998, 98-2 CPD ¶ 39 at 5.

The award determination was reasonable. Upon reviewing the technical ratings and prices of the proposals, the contracting specialist noted that Tenderfoot's proposed sock was rated as very good and that the firm's past performance was rated as highly acceptable, while Southern's proposal was rated as acceptable under both technical factors. However, she also noted that Tenderfoot's price was some 141 percent higher than Southern's. Seeing no apparent quality differences sufficient to justify this price difference, she consulted with the diabetic sock working group to obtain its input. Their consensus was that there were no strengths associated with the protester's sock that would justify paying its substantially higher price. Contracting Officer's Statement at 2. Finding that Tenderfoot's price was excessive for a slightly better product, the contract specialist concluded that Southern's proposal represented the best value to the government. While Tenderfoot disagrees with the award determination, the tradeoff was reasonable and was in no way inconsistent with the terms of the RFP.<sup>4</sup>

Tenderfoot asserts that the agency should have provided it with discussions regarding its sock and its high price. However, a contracting agency generally is not obligated to conduct discussions where, as here, the RFP specifically instructs offerors of the agency's intent to award a contract on the basis of initial proposals. ACC Constr. Co., Inc. B-288934, Nov. 21, 2001, 2001 CPD ¶ 190 at 3. Based on this notice, Tenderfoot knew that it might not have an opportunity to revise its proposal prior to award, and it therefore was incumbent upon Tenderfoot to submit an initial proposal containing its best terms and pricing. Tenderfoot made a business judgment in choosing to propose as it did, and the agency was not obligated to open discussions to permit the firm to change its approach.

The protest is denied.

Anthony H. Gamboa  
General Counsel

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<sup>4</sup> Tenderfoot asserts that, in finding its price unreasonably high, the agency "in effect determined that [the firm] was not sufficiently financially responsible to sell its product at a reasonable price." Comments at 5. This argument is without merit. While the agency termed Tenderfoot's price excessive, its award decision turned on the price/technical tradeoff contemplated by the best-value evaluation scheme--the agency determined that the quality of Tenderfoot's sock was insufficient to justify paying its higher proposed price. This determination had nothing to do with Tenderfoot's capability to perform, that is, its responsibility.