

DECISION



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

60441

FILE: B-184612

DATE: January 28, 1976

MATTER OF: Bill Ward Painting & Decorating

DIGEST:

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99181

1. Contracting officer's determination that bidder is nonresponsible because of lack of tenacity and perseverance based on bidder's poor record of previous performance as indicated by preaward survey is sustained. Record indicates lack of supervision and inadequate surveillance of subcontractors which is valid basis for determination of nonresponsibility. Where evidence reasonably supports conclusion of contracting officer, we will not object to such determination.
2. Although Air Force failed to follow ASPR § 1-705.4(c)(vi), requiring procuring activity to submit determination of nonresponsibility based on lack of tenacity and perseverance to SBA for review until protest was received in our Office, such failure does not justify terminating contract for convenience of Government since SBA did not appeal decision to head of procuring activity.

Bill Ward Painting & Decorating (Ward), a small business concern, was the low bidder under invitation for bids (IFB) No. FO4699-75-B-0094, issued by the Department of the Air Force (Air Force), McClellan Air Force Base, California, for interior painting work to be performed on base housing. However, Ward was declared nonresponsible pursuant to Armed Services Procurement Regulation (ASPR) § 1-903 (1974 ed.), because of past unsatisfactory performance due to its failure to apply necessary tenacity or perseverance to do an acceptable job.

Ward maintains that it was the low responsive, responsible bidder and, as such, it should have received the award. Counsel for the protester contends that the evidence relied on by the Air Force does not support a finding of nonresponsibility based on a preaward survey indicating lack of capacity and failure to apply necessary tenacity or perseverance to do an acceptable job. Counsel further maintains that the Air Force failed to follow mandatory ASPR procedures when it failed to submit its determination to the Small Business Administration (SBA) for review.

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The administrative record indicates that following the opening of bids on June 24, 1975, the contracting officer requested that the Defense Contract Administration Services Region (DCASR), San Francisco, California, perform a preaward survey of Ward. The report submitted by DCASR on July 16, 1975, recommended that "no award" be made to Ward primarily on the basis of past unsatisfactory performance. Specifically, in regard to Ward's past performance record, the survey revealed that Ward subcontracts out the work to do most of its on-base painting. The survey indicated that the subcontractors have consistently proven to be unreliable and their workmanship has been of poor quality. The indication is that this is because Ward does not provide adequate surveillance over subcontractor performance. Ward received unsatisfactory ratings for each of the following factors: factor No. 2 production capability, factor No. 5 purchasing and subcontracting, factor No. 11 labor resource, factor No. 12 performance record, and factor No. 13 ability to meet required schedule. Based upon the negative preaward survey, the contracting officer determined that Ward was nonresponsible due to lack of tenacity and perseverance. By letter dated July 23, 1975, Ward was informed that American Sheet Metal Partition Co., Inc., was awarded the contract as the low responsive, responsible bidder.

Before award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. ASPR § 1-904.1 (1974 ed.). If the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible," a determination of nonresponsibility is required. ASPR § 1-902 (1974 ed.). ASPR § 1-903.1(iii) (1974 ed.) requires that a contractor must have a satisfactory record of performance. In this regard, past unsatisfactory performance due to failure to apply necessary tenacity and perseverance to do an acceptable job is sufficient to justify a finding of nonresponsibility.

ASPR § 1-705.4(c)(vi) (1974 ed.) requires that a determination by a contracting officer that a small business concern is not responsible due to a lack of tenacity and perseverance in the performance of previous contracts "must be supported by substantial evidence

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documented in the contract files." Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion, we will not object to a contracting officer's determination of lack of tenacity and perseverance when the evidence of record reasonably provides a basis for such determination. Kennedy Van & Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334.

The evidence in support of the determination must be germane to the inquiry. A mere assumption or an unsupported statement by a contracting officer that a prospective contractor's past unsatisfactory performance resulted from a lack of tenacity and perseverance is insufficient for purposes of meeting the evidentiary test required. 49 Comp. Gen. 600, supra; 43 id. 298 (1963). We have also recognized that the cumulative effect of various minor deficiencies, which, when taken together, unduly increase the burden of administration from the Government's standpoint, can support a finding of nonresponsibility based, in appropriate circumstance, on lack of tenacity and perseverance. 49 Comp. Gen. 139 (1969). Furthermore, we have recognized that poor business practices go to questions concerning tenacity and perseverance rather than consideration of capacity. The Transport Tire Company, B-179098, January 24, 1974, 74-1 CPD 27. What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was reasonably necessary to resolve its problems. B-170224(2), October 8, 1970. We are concerned not with whether a firm has or can acquire the capability to perform, but whether a firm that is deemed to possess adequate capability applies it in sufficient measure to insure satisfactory completion of the contract. 51 Comp. Gen. 288 (1971); Consolidated Airborne Systems, Inc., B-183293, December 16, 1975, 55 Comp. Gen. _____. In effect, we have held that tenacity and perseverance is the willingness of the contractor to apply the necessary tenacity and perseverance to do an acceptable job whereas capacity is defined as the overall ability of a contractor to meet quality, quantity, and time requirements of a proposed contract. See 43 Comp. Gen. 257 (1963).

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It appears that the main thrust of the preaward survey relied on by the contracting officer directed itself toward factor No. 12, the prospective contractor's performance record. Since the region involved had never administered any contracts performed by Ward, other Department of Defense procuring activities were contacted to obtain performance information. At Mare Island and Concord Naval Weapons Center, the contracting officers experienced difficulty with Ward's subcontractors. At Long Beach Naval Base, the subcontractor is barely on schedule and barely performing adequately. At China Lake Naval Base, Ward's subcontractor provided extremely poor quality work and seldom met the scheduled completion of any unit. It is apparent that Ward does very little, if any, surveillance of its subcontractors. The subcontractors chosen by Ward have proved to be unreliable. The conclusions of the preaward survey based on all the information received were:

"The offeror proposes to subcontract the entire job to a two-man subcontractor who lacks sufficient capability to perform the proposed procurement and declines to employ additional painters as needed. The offeror subcontracts all jobs outside his local area, but does not regularly select reliable subcontractors. The labor force available to perform the proposed procurement is not sufficient. The performance of the offeror is unsatisfactory. The offeror cannot perform the proposed procurement on a timely basis by employment of the proposed subcontractor. In view of the foregoing, no award is recommended."

Although counsel for the protester maintains that the evidence relied on by the Air Force in its preaward survey actually relates to capacity rather than tenacity and perseverance and thus the matter should have been referred to the SBA pursuant to ASPR § 1-705.4(c) for issuance of a certificate of competency (COC), in B-158609, April 20, 1966, our Office held that a determination of nonresponsibility based in part on lack of supervision and inadequate surveillance of subcontractors was proper in that it related to tenacity and perseverance. Since the primary reason that Ward was determined to be nonresponsible was its lack of surveillance of its subcontractor, we concur with the contracting officer's administrative determination of nonresponsibility.

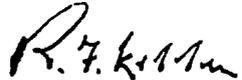
A determination by the contracting officer that a small business is not responsible pursuant to ASPR § 1-903.1(iii), supra, is not covered by the COC procedures. However, where a small business bidder is determined to be nonresponsible based on an unsatisfactory record of

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performance due to failure to apply necessary tenacity or perseverance to do an acceptable job, a copy of the documentation supporting the determination is required to be sent to SBA which may appeal the determination to the head of the procuring activity. The decision of the head of the procuring activity is final. ASPR § 1-705.4(c)(vi), supra. Environmental Tectonics Corporation, B-183616, October 31, 1975, 75-2 CPD 266.

We agree with counsel that the Air Force improperly failed to follow the procedures for referral to SBA of the contracting officer's determination of nonresponsibility for an appeal to the head of the procuring activity until a protest was received in our Office. However, we do not believe there is justification to terminate the existing contract for the convenience of the Government, since we note that once the determination was referred to the SBA, the procuring activity was advised by letter dated September 16, 1975, that SBA would not appeal the decision of the contracting officer.

For the foregoing reasons, the protest is denied.


Deputy Comptroller General
of the United States