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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20543**

FILE: B-187168

DATE: January 12, 1977

MATTER OF: Ekistics Design Group, Inc.

DIGEST:

1. Where SPA took no action within 5 days regarding procuring agency's referral of nonresponsibility determination based, in part, on lack of integrity, contract award to next low bidder will not be questioned because responsible SBA official was notified pursuant to regulation and no objection was raised regarding determination that small business concern lacked integrity. Fact that other office of SBA disagreed nearly one month after appropriate SBA official was notified of contracting officer's views is not compelling reason to justify review by GAO.
2. Recommendation is made that FPR 1-1.708.2(a)(5) be revised to conform to ASPR 1-705.4(c)(vi) which requires notification to SBA regional office as well as to SBA adviser where contracting officer proposes to reject small business concern as nonresponsible based on factors other than capacity or credit.

Ekistics Design Group, Inc. (Ekistics) protests a determination by the Environmental Protection Agency (EPA) that Ekistics is not responsible for purposes of contract award under solicitation EPA WA 76-E273 for an indefinite quantity contract for the storage and mailing of various documents prepared by EPA's Effluent Guidelines Division.

Ekistics' low bid was rejected because the firm was considered to be nonresponsible. EPA determined that Ekistics lacked capacity to perform timely and, after attempting to verify information supplied by Ekistics regarding its arrangements for performing the work, that the firm lacked integrity.

Pursuant to Federal Procurement Regulations § 1-1.708.2(a)(5), the contracting officer advised the assigned Small Business Administration (SBA) representative in Washington, D. C., that Ekistics was considered nonresponsible for lack of integrity notwithstanding that the factors leading to that determination also affected the bidder's capacity. The SBA official receiving this advice and supporting documentation did not submit notice of any contrary views. Under the

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cited regulation, such notice could be filed within five workdays. The record shows, however, that nearly one month later SBA's Seattle Regional Office objected to the procuring activity that the supporting documentation indicated that Ekiatics may have lacked capacity or credit rather than integrity and that the matter, more appropriately, should have been referred to the regional office, presumably for consideration under the certificate of competency procedures. The matter, however, was not pursued by the regional office in view of SEA's failure to provide the notification contemplated by the above regulation.

As a general rule, we will not review determinations of non-responsibility based on alleged lack of integrity, tenacity or perseverance where SBA declines to contest that determination pursuant to applicable regulation unless there is a compelling reason to justify review, such as a showing of bad faith or fraud on the part of procurement officials. Zinger Construction Co., B-186426, September 27, 1976, 76-2 CPD 288. Here, the responsible SBA official who was properly notified of the contracting officer's position apparently had no objection. The fact that nearly one month later another element of SBA voiced its disagreement is not, in our opinion, a compelling reason to justify a review by this Office of the nonresponsibility determination.

In this connection, we note that if the Armed Services Procurement Regulation (ASPR) were applicable in this case rather than the FPR, both the regional office and the small business adviser would have been notified of the contracting officer's views concerning the protester's responsibility and the regional office could have pursued the matter in a timely fashion. ASPR 1-705.4(c)(vi) (1976). The FPR, however, requires the contracting officer to notify either the small business representative or the appropriate regional office. Moreover, we note that nonresponsibility determinations as to capacity or credit are referred to the regional office with cognizance of the small business concern in question under both the FPR and ASPR. We see no justification for the multiplicity of procedures and lack of uniformity between the ASPR and FPR. We therefore are recommending to the Director, FPR, that the procedure followed by the civilian agencies be made identical to the procedures applicable to the military departments which we believe provide for more enlightened decisions in this regard.

Accordingly, the protest is dismissed.


Paul G. Demuling
General Counsel