

DECISION



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

10,105

FILE: B-192899

DATE: May 9, 1979

MATTER OF: Courier - Citizen ~~Company~~

DL601538

DIGEST:

1. Burden is on protester to establish prima facie showing of fraud in procurement. Allegations unsupported by substantial evidence are not sufficient for further consideration in context of bid protest.
2. Employment by successor contractor of prior contractor's supervisory personnel is not so inherently suspect as to put contracting officer on notice of possible misappropriation of proprietary information.
3. [Protest that awardee did not meet definitive experience and facilities requirements of solicitation] is denied where contracting officer relied on substantial objective evidence in making affirmative determination of responsibility. Relative quality of evidence is matter for judgment of contracting officer and not our Office.

ALC00004

On July 26, 1978, the Internal Revenue Service (IRS) issued a solicitation requesting offers for the provision of tax form distribution services, including the storage and maintenance of an inventory of forms and publications, order receipt, and shipping. Offerors were required to have experience in operations like or similar in nature to the tasks to be performed under the contract and to possess physical facilities adequate for performance. Supervisory and key employees of the contractor were required to have at least 2 years of full time experience in the line of work for which they would be responsible under the contract. Bids were opened on August 30, 1978. The General Distribution Services Company (GDSC) was the low bidder.

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On September 6, 1978, Courier-Citizen Company (Courier), the incumbent, advised the IRS that it would file a protest with our Office if the contract were awarded to any firm other than Courier. Because of the urgency of the requirement, the IRS determined to continue with the award process notwithstanding Courier's protest. The IRS awarded the contract to GDSC on September 19 after a preaward survey.

There have been several rounds of submissions by Courier and the IRS, culminating in what may be summarized as allegations by Courier that GDSC does not meet the responsibility requirements of the solicitation. In this regard, Courier questions the accuracy of a resume provided by the president of GDSC which referred to his prior experience as the owner of the General Carpet Corporation which, it was stated in the resume, "has been in business for fourteen years as a manufacturer and distributor of materials." Courier contends that this statement is not true because it does not disclose that General Carpet Corporation ceased operations in 1976. Courier also questions the quality of experience which might have been acquired through General Carpet Corporation, suggesting that it falls far short of Courier's own experience gained through performance of the predecessor contract, and infers from General Carpet Corporation's cessation of activities that the president of GDSC's "experience is punctuated with a business failure."

In support of an allegation that GDSC lacks its own facilities, Courier states that it is presently leasing from the president of GDSC the warehouse previously occupied by the General Carpet Corporation and that GDSC, without Courier's permission, removed from this warehouse a forklift truck which Courier also leases from the president of GDSC. Courier also contends that GDSC's inventory control system was plagiarized from Courier and, hence, that GDSC had no system of its own.

Courier also questions GDSC's business integrity and suggests the presence of fraud in this procurement. In this connection, Courier has expressed its belief that GDSC's bid was prepared with knowledge of the

amount of Courier's bid based on the fact that two of its supervisory employees, both of whom had been directly involved in Courier's costing and pricing on this procurement and one of whom Courier states it has been advised was previously the recipient of money from the president of GDSC, have left Courier's employ to join GDSC. Courier notes also that its typed bid was submitted a day in advance of bid opening whereas GDSC's handwritten bid was submitted just prior to bid opening. Courier also states that it has been advised by an informant that GDSC had "fixed the whole thing" and "had a friend at the IRS."

Courier also asserts that GDSC's bids for certain categories of services could only have been computed as they were with assurances from the IRS contract administrator that the 1978 requirements history would be repeated in 1979. In connection with this assertion, Courier explains that the level of services in these categories may be manipulated by the IRS contract administrator through the substitution of alternate categories of services. And, finally, in its initial communications to our Office Courier advised that certain unidentified IRS personnel directly associated with the administration of this contract had obtained carpets from the General Carpet Corporation when it liquidated its inventory.

Courier contends that the foregoing amounts to a demonstration of palpable fraud in the award of this contract which the IRS has not refuted.

The IRS contends that the contracting officer's affirmative determination of GDSC's responsibility was reasonable and, with respect to Courier's allegations of misconduct by IRS employees, that Courier has presented only conclusions and allegations unsupported by substantial evidence. The IRS recommends that the protest be dismissed.

Courier argues that its written statements are "evidence" amounting to an offer of proof which would warrant a finding by our Office that the award of the contract to GDSC should be canceled.

We agree substantially with the IRS. Courier's objections are directed against the contracting officer's affirmative determination of GDSC's responsibility. We do not review protests against affirmative determinations of responsibility unless either fraud is alleged on the part of contract officials or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Illitron, B-192309, August 7, 1978, 78-2 CPD 100; The Center for Education and Manpower Resources, B-191453, July 7, 1978, 78-2 CPD 21; Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. We require more than a mere allegation of fraud or an expression of a suspicion of wrongdoing in order for our Office to undertake a review of such charges; before we will intervene, a protester must submit evidence establishing a prima facie case of fraud or of such wilful disregard of the facts or such misconduct as to be tantamount to fraud on the part of contracting officials. Fairbanks Bedding Company, B-193425, December 20, 1978, 78-2 CPD 426; Surveillance Systems, B-185562, April 8, 1976, 76-1 CPD 235. Generally, a prima facie showing requires the presentation of evidence sufficient to establish the given fact or cause of action if the evidence were to remain uncontradicted or unexplained. An offer to prove a fact, or an allegation of fact, is not "evidence." Duncan Foundry and Machine Works, Inc. v. National Labor Relations Board, 458 F.2d 933 (1972).

We have consistently rejected arguments based on conjecture and speculation and lacking supporting evidence. See, e.g., Pioneer Recovery Systems, Inc., B-192120, September 28, 1978, 78-2 CPD 242; Kurz-Kasch, Inc., B-192604, September 8, 1978, 78-2 CPD 182; Mil-Air, Inc., B-191424, July 20, 1978, 78-2 CPD 55; Batteries Division of Information Services Industries, B-191046, May 31, 1978, 78-1 CPD 407. The burden is on protesters to present the information and evidence necessary to substantiate their cases. Peter Rosen Productions, Inc., B-192481, September 28, 1978, 78-2 CPD 243; Dependable Janitorial Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1; Phelps Protection Systems, Inc., B-181148, November 7, 1974, 74-2 CPD 244. It is not our practice to conduct investigations incident to a bid protest to establish the validity of a protester's speculative statements. Peter Rosen Productions, Inc., supra; Kurz-Kasch, Inc., supra.

We note initially that Courier has failed to demonstrate that the IRS contracting officer either was aware or should have been aware at the time of her affirmative determination of GDSC's responsibility that the employees which GDSC proposed to hire from Courier may have been in possession of cost or pricing information related to Courier's bid or that such information may have been communicated to GDSC. It is fairly commonplace for the employees of one contractor to be employed by a successor contractor; we do not consider such employment to be so inherently suspect as to put a contracting officer on notice of the possible misappropriation of proprietary information. See, e.g., William Brill Associates, Inc., B-190967, August 7, 1978, 78-2 CPD 95.

Courier offers no supporting evidence for its assertion that the IRS contract administrator asked GDSC to bid on this contract and, even if that were true, we are not convinced that the soliciting of competition is necessarily an impropriety. Also, while Courier asserts that GDSC expected help from its "friend in Atlanta," no evidence is offered that such assistance may have been provided. And, while Courier suggests that GDSC's low bids for some categories of services could only be attributable to assurances from IRS personnel that the levels of those services could be manipulated, we think that these bids are just as likely attributable to GDSC's own estimates of IRS utilization of these services or a willingness to bid below total cost and accept a contribution to fixed costs. We note also that Courier's assertion that IRS personnel obtained carpeting from the General Carpet Corporation appears unrelated to the events in question here since, in the absence of evidence to the contrary, we presume that General Carpet Corporation's liquidation of its inventory would have coincided with its cessation of business activity 2 years prior to the award of this contract.

We do not think that this record affords us a basis for concluding that Courier has sustained its burden of establishing a prima facie case of fraud or misconduct on the part of IRS contracting officials. Accordingly, this question is dismissed and will not be considered on the merits in the context of our bid protest function.

Courier's assertion that GDSC did not meet the facilities and experience requirements of the solicitation implicitly questions the application of certain definitive responsibility criteria contained in the solicitation. In addition to the general responsibility criteria set forth in Federal Procurement Regulations (FPR) § 1-1.1203-1, the solicitation required:

- (1) That prospective contractors have immediately available a minimum of 30,000 square feet of floor space based on high pallet storage, excluding space for order processing, with forklift trucks or similar equipment, and with loading docks adequate to receive large truckloads of forms; and
- (2) That the warehousing facility be warm and dry and located within 75 road miles of the Capitol of Georgia; and
- (3) That the contractor be experienced in like or similar operations with key employees to have a minimum of 2 years of full time experience in the particular or related line of work for which they were to be responsible.

We have examined the documents and information, obtained in a preaward survey, relied on by the contracting officer in reaching her affirmative determination of GDSC's responsibility. The record shows that GDSC offered a facility of approximately 56,000 square feet with access and equipment sufficient to comply with the solicitation requirements. All contacts with business associates and customers of the General Carpet Corporation resulted in favorable comments on the business experience and reliability of the president of GDSC. And, while it was noted that the president of GDSC's several years' experience in distribution was not precisely analagous to the distribution of tax forms, it was considered that his related experience coupled with the specific experience of the key personnel he proposed to hire from Courier was more than adequate to meet the needs of the IRS and the requirements of the solicitation. The record also shows that the contracting officer considered Courier's allegations of inadequacies in GDSC's experience and facilities in arriving at her determination.

We will not object to a contracting officer's affirmative determination of responsibility unless it is shown to be without a reasonable basis. In this instance, there was substantial objective evidence relevant to the definitive responsibility criteria and favorable to GDSC before the contracting officer at the time of her determination. This in itself is sufficient to satisfy our review standard. The relative quality of the evidence is a matter for the judgment of the contracting officer, not our Office. Mayfair Construction Company, Inc., B-192670, November 28, 1978, 78-2 CPD 372; Superior Technical Services, B-191712, September 11, 1978, 78-2 CPD 186.

Accordingly, the protest is denied.

We note parenthetically that the IRS has initiated an investigation in response to Courier's allegations of misconduct by IRS employees. We have been assured that the IRS will take appropriate action if it is found necessary.



Deputy Comptroller General
of the United States