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**DECISION**



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

**FILE:** B-207191

**DATE:** February 28, 1983

**MATTER OF:** Amco Tool & Die Co.

**DIGEST:**

1. Contracting officer's nonresponsibility determination based on data supplied by the contracting office, which showed protester delinquent on 70 percent of contract line items, and by the Defense Contract Administration Services Management Area (DCASMA), which showed protester delinquent on 26 percent of contracts due was reasonable notwithstanding fact that some of the delinquencies may arguably have been agency's fault.
2. Fact that protester may have been found responsible by other contracting officers during same period in which protester was found nonresponsible under the protested procurement does not show that contracting officer acted in bad faith in making nonresponsibility determination because such determinations are judgmental and two contracting officers may reach opposite conclusions on the same facts.

Amco Tool & Die Co., a small business, protests the rejection of its quotation under request for quotation (RFQ) No. F41608-82-51332-02-23 issued on February 2, 1982 by the San Antonio Air Logistics Center, Kelly Air Force Base, Texas, for five eye lift compressors. Amco disputes the propriety of the contracting officer's determination that it is nonresponsible. For the reasons that follow, we deny the protest.

The procurement was conducted as a total small business set-aside under the small purchase procedures set forth in Defense Acquisition Regulation (DAR) § 3-600 et seq. Amco's quote, with a unit price of \$208.85, was low. The contracting officer determined, however, that

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Amco was nonresponsible<sup>1</sup> due to that firm's high rate of delivery delinquencies on contracts it held with Kelly AFB.. Award was then made to L&S Machine Company, the next low quoter with a unit price of \$355.35.

The determination of a prospective contractor's responsibility is the duty of the contracting officer. In making the determination, he is vested with a wide degree of discretion and business judgment. Generally, we will not question a nonresponsibility determination unless the protester can demonstrate bad faith by the agency or a lack of any reasonable basis for the determination. S.A.F.E. Export Corporation, B-203346, January 15, 1982, 82-1 CPD 35.

The contracting officer's nonresponsibility determination indicates that he reviewed Amco's current performance record at the Logistics Center's contracting office and at

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<sup>1</sup> The contracting officer did not refer the question of Amco's responsibility to the Small Business Administration (SBA) for consideration under the Certificate of Competency (COC) procedures. This action was consistent with Defense Acquisition Regulation § 1-705.4(c) (DAC 76-24, August 28, 1980), which provides that such referral shall not be made where small purchase procedures are used. We have previously held that a contracting agency, at least in the absence of SBA agreement, may not itself decide to avoid the referral requirement in the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV 1980). See Z.A.N. Co., 59 Comp. Gen. 637 (1980), 80-2 CPD 94; J.L. Butler, 59 Comp. Gen. 144 (1979), 79-2 CPD 412; The Forestry Account, B-193089, January 30, 1979, 79-1 CPD 68. The protester has not objected to the contracting officer's failure to refer the matter to SBA, however. Moreover, subsequent to the award made in this case, the SBA provided by regulation that "it is within the discretion of the contracting officer to determine if a referral should be made when the contract value is less than \$10,000." 47 Fed. Reg. 34973, to be codified at 13 C.F.R. § 125.5(d). Under these circumstances, we will not object to the failure to refer. Since there was no review of the nonresponsibility determination by SBA, the matter is appropriate for our own review. See, e.g., Indian Made Products Company, B-186980, November 17, 1976, 76-2 CPD 427.

the Defense Contract Administration Services Management Area (DCASMA), San Antonio. He found that the Center's records indicated an Amco delinquency rate of 70 percent based on the total number of contract line items due at Kelly Air Force Base, while DCASMA's figures showed a total delinquency rate of 26 percent from January 1 through March 31, 1982. DCASMA's rate was based on the total number of contracts where a delinquency existed rather than the total number of contract line items. Based on both of these figures and the fact that Amco's poor prior performance record caused it to be included on the contracting agency's Contractor Experience Information Index (an index of firms which because of their prior performance needed special attention), the contracting officer determined that Amco was not a responsible offeror.

Amco challenges the accuracy of the Center's delinquency figures. The protester argues that the method used by the Center to calculate the 70 percent figure was faulty and states that many of the delinquencies listed were in fact the Government's fault. We have reviewed the rather voluminous record submitted by the protester and find that while some of the delinquencies listed may arguably have been the agency's fault, there is no question that Amco has had significant problems in meeting its delivery obligations on many items. Amco, in fact, does not deny that some of its contracts are delinquent.

Amco argues, however, that its delinquency rate is no worse than any of the other contractors in its area doing similar work for Kelly Air Force Base. It states that the contracting officer acted in bad faith by singling Amco out for unfair treatment while other contracting officers within the same contracting activity have found Amco responsible and have continued to award it contracts.

We do not agree that the fact that Amco has been found responsible by other contracting officers indicates that the contracting officer here acted in bad faith. Responsibility determinations are made based upon the circumstances of each procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental, and two people can reach opposite conclusions as to a firm's responsibility based on the same facts without either acting

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in bad faith. GAVCO Corporation--Request for Reconsideration, B-207846.2, September 20, 1982, 82-2 CPD 242.

Amco is also concerned by its inclusion on the contracting agency's Index. The inclusion of a firm on the Index does not constitute a nonresponsibility determination, as evidenced by the awards Amco has received despite its inclusion on the Index. The Index is merely a management tool used by the Center, and the issue of whether a particular firm should be on the Index is a matter to be determined by the agency and is not the proper subject of a protest to our Office.

In sum, the contracting officer based his conclusion on both the delinquency rate supplied by DCASMA (which the protester does not seem to question) and that calculated by the contracting activity. Considering the informal nature of the procedures required in conducting this small purchase and the low value of this procurement, we think that the contracting officer acted reasonably in relying on the figures supplied by both these activities as a basis for his nonresponsibility determination and that the protester has not met its burden of establishing that the contracting officer acted arbitrary or in bad faith.

The protest is denied.

for *Milton J. Fowler*  
Comptroller General  
of the United States