

**DECISION**

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

T 001

24986

FILE: B-211353

DATE: April 26, 1983

MATTER OF: Speco Corporation

**DIGEST:**

1. While generally GAO will not consider a protest of a nonresponsibility determination where the Small Business Administration has denied a certificate of competency, unless the bidder can show that there was fraud or bad faith on the part of the Government officials, the issue will be considered at the request of a court.
2. The lack of integrity of a key employee of a bidder/firm may properly constitute grounds for finding bidder nonresponsible when it appears that significant influence might be exercised by the employee in performance of the contract.
3. Question whether evidence of bidder's employees' lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the administrative officers concerned, and such determination will not be disturbed by GAO absent a clear showing of the lack of a reasonable basis for the finding.

Speco Corporation (Speco) protests the award of a contract by the Defense Construction Supply Center (DCSC) of the Defense Logistics Agency (DLA) under invitation for bids (IFB) No. DLA700-83-B-0285, to any firm other than Speco. Speco, a small business, alleges it submitted the low responsive bid under this IFB for the supply of burner assemblies for military heaters. Speco protests DLA's rejection of its bid because of DLA's determination that Speco is a non-responsible bidder.

While this protest was pending with our Office, we were advised that Speco had filed suit against the Government in the United States Claims Court in Washington, D.C. (Civil Action No. 238-83 C). The bases for the suit are substantially the same as those

025426

raised in Speco's protest. Upon joint motion of both parties, the court has requested an expedited opinion from our Office. 4 C.F.R. § 21.10 (1983).

We received notice of the request for our opinion on April 14, 1983, with the court requesting a decision by April 27, 1983. To meet the court deadline, we are resolving the issue on the record available to us without the usual full development of the record under our Bid Protest Procedures, 4 C.F.R. § 21 (1983).

The record consists of Speco's protest correspondence dated April 4 (received April 5), and April 6, (received April 7), and the Government's motion to dismiss or in the alternative for summary judgment, which includes documentation supporting the DLA nonresponsibility determination and the Small Business Administration's (SBA) decision in connection with its denial of the issuance of a certificate of competency pursuant to the Small Business Act, 15 U.S.C. § 637(b)(7) (Supp. IV, 1980).

Under 15 U.S.C. § 637(b)(7), supra, the SBA has conclusive authority to determine a small business bidder's responsibility by issuing or refusing to issue a COC. Thus, generally our Office will not question a contracting officer's nonresponsibility determination where the SBA affirms that determination by refusing to issue a COC. Aervoe-Pacific Company, B-206062.2, April 26, 1982, 82-1 CPD 384. We will question the SBA's refusal to issue a COC only where the small business can show that there was fraud or bad faith on the part of the Government officials or that information vital to a nonresponsibility determination was not considered by SBA. Martin Tool and Die, Incorporated, B-208796, January 19, 1983, 83-1 CPD 70; Jechura's Military Equipment Company, B-209996, December 15, 1982, 82-2 CPD 539. Speco has not alleged any of the exceptions are involved here and, thus, in the absence of a request for an opinion from a court, normally we would dismiss this protest under our Bid Protest Procedures, 4 C.F.R. § 21.3(g)(3) (1983).

In view of the court's request for an opinion, we have reviewed the protest and find it to be without merit.

DCSC issued this IFB on October 21, 1982, and bids were opened on December 13, 1982. A pre-award survey was conducted, and Speco was found to have the technical ability to perform the contract due specifically to the ability of Mr. Outlaw, Speco's plant manager. The preaward survey dated January 18, 1983, does not address Mr. Outlaw's integrity or the experience and capability of the president of Speco.

On March 10, 1983, the contracting officer determined that Speco was nonresponsible because of lack of integrity. The contracting officer obtained a copy of a Federal Bureau of Investigation (FBI) report which stated that an investigation of the Fiesta Corporation revealed that approximately one million dollars in progress payments paid to Fiesta under Department of Defense contracts was not accounted for and that the funds had not been applied to appropriate contracts at a time when Mr. Outlaw was president and sole stockholder of Fiesta. The FBI report also pointed out that Mr. Outlaw was being investigated for filing false financial and other statements to qualify for preferential status under the 8(a) program of the SBA. The contracting officer also had a letter dated February 16, 1983, from the United States attorney confirming an FBI investigation and a Grand Jury investigation. DLA concluded that since Mr. Outlaw was a key employee of Speco, his lack of integrity could be considered in determining Speco's responsibility and, therefore, Speco was determined nonresponsible and ineligible for award.

Since Speco is a small business, on March, 11, 1983, DLA referred the question of Speco's responsibility to the SBA for the possible issuance of a certificate of competency (COC). In a letter dated April 6, 1983 (received by GAO on April 15, 1983), the SBA declined to issue a COC.

The COC application was reviewed by a 5-person committee at SBA. Speco submitted arguments and affidavits to controvert DLA's position. Also, the SBA sent an investigator to Speco's plant. In addition to the information already available to DLA, this investigator found that Speco had in its possession heaters of the type currently being procured, identified as manufactured by Fiesta, which were marked with a Government contract number. Speco was unable to establish ownership of these items. The SBA committee

found that Outlaw was a key employee as Plant Manager supervising the actual production of the item. In addition, the SBA committee found that Mr. Outlaw had falsely reported that he had never been convicted of felonies. The SBA committee unanimously decided that "the allegations concerning integrity were sustained and that a COC should be denied."

Speco filed a bid protest with GAO on April 5, 1983, and a memorandum in support of its bid protest on April 7, 1983. DLA has made no award under the IFB.

Before the award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. Defense Acquisition Regulation (DAR) § 1-904.1 (1976 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. DAR § 1-902 (1976 ed.). Mayfair Construction Company, B-192023, September 11, 1978, 78-2 CPD 187; West Electronics, Inc., B-290173, February 10, 1978, 78-1 CPD 118. The determination of what constitutes a clear indication of responsibility is essentially a business judgment involving considerable discretion on the part of the contracting officer. West Electronics, Inc., supra.

In order for a prospective contractor to be determined responsible, he must have a satisfactory record of integrity. DAR § 1-903.1(iv) (Defense Acquisition Circular No. 76-15, June 1, 1978). Our Office has consistently taken the position that the question whether evidence of a bidder's lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the administrative officers concerned, and such determination will not be questioned by us in the absence of a clear showing of the lack of a reasonable basis for the finding. John Carlo, Inc., B-204928, March 2, 1982, 82-1 CPD 184; Mayfair Construction Company, supra; Keco Industries, Inc. v. United States, 203 Ct. Cl. 566, 492 F.2d. 1200 (1974).

We will first address Speco's contention that the agency had no basis for considering Mr. Outlaw's lack of integrity. The lack of integrity of officers, employees, or other associates of a bidder is properly for consideration in determining that bidder's responsibility when it appears that significant influence might be exercised by those persons in performance of the contract. John Carlo, Inc., supra.

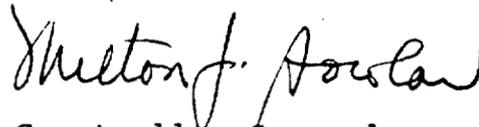
Here, Mr. Outlaw is alternatively referred to in the record as General Manager and Plant Manager for Speco. On this record, Mr. Outlaw, as manager of a corporation, would normally be expected to perform management of the work under the contract and have apparent, if not actual, authority to conduct business affairs and contract performance. Thus, Mr. Outlaw, in our view, would be in a position to significantly influence contract performance. See John Carlo, Inc., supra. The record supports this view. The DLA pre-award survey, the contracting officer and SBA found that Mr. Outlaw has a key role in contract performance. In fact, the SBA review committee stated its view that the firm virtually could not operate without Mr. Outlaw. The record also indicates that the president of Speco has no experience in Government contracting or in manufacturing the item solicited and that contract performance would be dependent on Mr. Outlaw. Under these circumstances, the contracting officer reasonably could conclude that Outlaw's lack of integrity could adversely affect Speco's operations and ultimately Speco's performance if awarded the contract. See John Carlo, Inc., supra.

Speco contends that the record fails to provide sufficient evidence to establish Mr. Outlaw's lack of integrity; that even assuming that the allegation of misappropriation of contract funds under prior contracts is ultimately proven to be true, Mr. Outlaw has no ability to control or apply funds that Speco may receive, that Mr. Outlaw denies any false certifications were made to qualify for the 8(a) program, and that prior felony convictions which occurred many years ago are unrelated to Speco's responsibility and there is no solicitation provision which bars hiring of exconvicts who have been pardoned. Finally, Speco contends that an FBI investigation of an employee's past Government contracting activities is not sufficient to render the employing firm nonresponsible for lack of integrity. Speco argues that a conviction for criminal activity is required for a nonresponsibility determination.

In view of the clear regulatory mandate that the contracting officer must determine a bidder nonresponsible if the information available to him "does not clearly indicate that the prospective contractor is responsible," DAR § 1-902, supra, we believe a contracting officer acts reasonably in considering information in an FBI report which is of such a serious nature as that previously referred to. As noted, this information was considered sufficient to warrant a Grand Jury investigation. Since what constitutes a clear indication of responsibility is essentially a business judgment involving considerable discretion on the part of the contracting officer, West Electronics Inc., supra, we find the negative determination of responsibility reasonable in view of the information available to the contracting officer.

We further note that the SBA reviewed this same evidence and declined to grant a COC, thus affirming the contracting officer's nonresponsibility determination. In fact, the SBA investigator found further support for questioning Mr. Outlaw's integrity and ultimately Speco's responsibility when his plant-site visit showed items lacking proof of ownership by Speco, identified to prior Government contracts with Fiesta, in Speco's possession. We find the SBA's decision not to issue a COC persuasive evidence of the reasonableness of the contracting officer's decision. Based on this record, we cannot say the contracting officer lacked a reasonable basis for finding that Outlaw lacked integrity, John Carlo, Inc., supra, and, therefore, in determining Speco nonresponsible.

Accordingly, we find the protest without merit.



Acting Comptroller General  
of the United States