

H. Wilson
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DECISION



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

FILE: B-216004

DATE: December 26, 1984

MATTER OF: C.W. Girard, C.M.

DIGEST:

1. Where a procurement agency withdraws its request to the Small Business Administration (SBA) to process a certificate of competency (COC) for the protester because the value of the contract to be awarded was less than \$10,000, GAO will review the agency's negative determination of responsibility because the SBA has made no determination with respect to the protester's responsibility.
2. In reviewing a negative determination of a protester's responsibility, GAO will defer to the agency's discretion unless the protester, who bears the burden of proof, shows that there was bad faith by the procuring agency or no reasonable basis for its determination.
3. Protester's contention that unsatisfactory performance on one contract is not sufficient to support a determination of nonresponsibility is denied. While poor performance on one contract does not necessarily establish nonresponsibility, the circumstances of the prior deficiencies are for consideration, and a contracting officer reasonably can determine that they are grounds for a nonresponsibility determination.
4. Protester's challenge to the agency's withdrawal of COC referral is denied where the withdrawal was made at the SBA's suggestion, based on an SBA regulation which leaves to the discretion of the contracting officer

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whether to refer the negative determination of responsibility to the SBA when the contract value will be less than \$10,000. Further, the SBA Administrator was authorized by statute to make such regulations as he deemed necessary to carry out his authority, and there has been no showing that the regulation was not reasonably related to the SBA's statutory authority.

C.W. Girard, C.M. protests the Department of Justice's determination that he was nonresponsible and therefore ineligible for award of a contract for court reporting services under invitation for bids (IFB) No. JVUSA-84-B-0026. Girard contends that there is no substantial evidence supporting the agency's determination and that the agency's withdrawal of its request to the Small Business Administration (SBA) for a certificate of competency (COC) was unauthorized.

We deny the protest.

The IFB was issued on March 2, 1984 as a total small business set-aside. The agency found the apparent low bidder nonresponsible, and the SBA denied a COC when the matter was referred to it as required by 15 U.S.C. § 637(b)(7) (1982). Girard was the next low bidder, but the agency also found Girard nonresponsible because he had an unsatisfactory record of performance under a current contract for court reporting services. When this determination was referred to the SBA for a COC, the SBA pointed out that because of the low dollar value of any contract (about \$7,400) which could be awarded to Girard for the remainder of the contract year, the agency had the authority to find Girard nonresponsible without referring the matter to the SBA. The SBA was apparently relying on 13 C.F.R. § 125.5(d) (1984), which leaves to the discretion of the contracting officer the matter of COC referral when the contract value is less than \$10,000. At the suggestion of the SBA, the agency then withdrew the referral and awarded a contract with an estimated value of \$7,000 to the next low bidder.

In support of its determination of nonresponsibility, the agency contends that Girard failed to comply with schedules for depositions and grand jury proceedings, disrupted a grand jury proceeding on at least one occasion by pretending to sleep and was late in the submission of some of the transcripts. While Girard concedes the existence of some problems, he explains that his schedule conflicts arose when the sessions lasted longer than he had been told they would and that on the day he was said to be pretending to sleep, he was actually falling asleep because of a change of medication. Girard attributes the late transcripts to the peaks and valleys in the court reporting business and the fact that his transcribers are independent contractors who are not always available. Girard contends that the isolated incidents cited by the agency do not amount to a serious performance deficiency when viewed in the light of his overall record of excellent performance, and argues that unsatisfactory performance on one contract is not sufficient to support a nonresponsibility determination in any event.

As a preliminary matter, we point out that when the SBA reviews an agency's determination of nonresponsibility and either issues or denies a COC, its decision is by law conclusive. Our Office will not review such a decision unless there is a prima facie showing of bad faith or fraud, or information vital to a responsibility determination was not considered. Georgetown Industries, B-214224, Feb. 22, 1984, 84-1 CPD ¶ 225. Here, however, the SBA has neither reviewed nor made any decision with regard to Girard's responsibility. Therefore, we will review the agency's negative responsibility determination. See United Aircraft and Turbine Corporation, B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267.

The determination of a prospective contractor's responsibility is the duty of the contracting officer who, in making the determination, is vested with a wide degree of discretion and business judgment. See S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437. We therefore defer to such discretion and judgment unless the protester, who bears the burden of proving his case, shows that there was bad faith by the procuring agency or a lack

of a reasonable basis for the determination. See John Carlo, Inc., B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184.

Girard has not made the necessary showing here. There has been no allegation of bad faith or fraud on the part of the procuring officials and, in our view, the record reflects a reasonable basis for the determination of nonresponsibility.

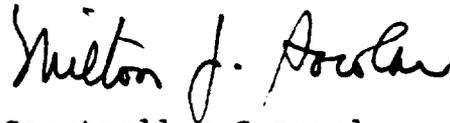
In support of its position that unsatisfactory performance on one contract is not sufficient to find a bidder nonresponsive, Girard cites B-166485, Apr. 23, 1969, where the second low bidder challenged the low bidder's responsibility because the low bidder was delinquent on its current contract. We stated that we would not question the affirmative responsibility determination absent a showing of bad faith or lack of a reasonable basis for the determination. We also stated that the failure to perform satisfactorily under one prior contract was an insufficient basis for rejection of a bid.

We therefore agree with Girard that the mere fact of unsatisfactory performance under one prior contract does not necessarily establish a lack of responsibility. Nevertheless, the circumstances of the contractor's failure to perform properly and in a timely manner under the contract are for consideration, and may provide a reasonable basis for a nonresponsibility determination. 39 Comp. Gen. 705 (1960).

Here, the contracting officer based her nonresponsibility determination on a number of instances of unsatisfactory and untimely performance by Girard under his existing contract. Although the protester suggests that these incidents were due to circumstances beyond his control, we think the contracting officer could reasonably conclude otherwise. The facts noted by Girard--that court sessions sometimes last longer than anticipated, that there are peaks and valleys in the court reporting business and that transcribers are independent contractors--are simply aspects of Girard's profession with which he should be reasonably equipped to deal. Further, while we do not dispute Girard's explanation for sleeping during a grand jury session, the contracting officer also noted that Girard had been noticed making "disparaging facial antics" during other grand jury sessions. Accordingly, we find that the contracting officer's nonresponsibility determination was reasonable.

Girard next contends that the Small Business Act provides no dollar threshold below which referrals to the SBA need not be made and that, therefore, the agency's determination "in the absence of any SBA referral, must be held to be unauthorized" The agency, however, not only referred the matter of Girard's responsibility to the SBA but withdrew its request only at the SBA's suggestion. Further, as previously noted, 13 C.F.R. § 125.5(d) permits a contracting officer to make a negative responsibility determination without referring it to the SBA when the contract value is less than \$10,000. We have never questioned the validity of this provision, see Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246; United Aircraft and Turbine Corp., supra; Columbus Jack Corp., B-211829, Sept. 20, 1983, 83-2 CPD ¶ 348, and we see no basis to question it now, since under 15 U.S.C. § 634(b) (6), the SBA Administrator is empowered to make such rules and regulations as he deems necessary to carry out the authority vested in him by the Small Business Act, and there has been no showing that section 125.5(d) is not reasonably related to the SBA's statutory authority. See Mourning v. Family Publications Services, Inc., 441 U.S. 356, 369 (1972). For the future, however, we note that the authority of the SBA to establish exceptions from the COC referral requirement has been eliminated by the Congress by its enactment on October 30, 1984 of Pub. L. No. 98-577.

The protest is denied.

for 
Comptroller General
of the United States