

DECISION



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

FILE: B-217263 **DATE:** March 27, 1985

MATTER OF: Lithographic Publications, Inc.

DIGEST:

1. In general, GAO will not question a contracting officer's nonresponsibility determination unless the protester can demonstrate bad faith, abuse of discretion, or a lack of any reasonable basis for the determination.
2. While poor performance on one contract does not by itself necessarily establish nonresponsibility, the circumstances of the prior deficiency are appropriate for consideration, and a contracting officer reasonably can determine that they constitute the grounds for a nonresponsibility determination.
3. Where bias is alleged, the protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition.
4. Solicitation provision stating that bids may be found nonresponsive on the basis of prior contract defaults improperly makes a matter of responsibility one of responsiveness. However, a contracting officer may still find a bidder nonresponsive because of poor prior performance which falls short of a default.
5. There is no requirement that contracting officials discuss preaward information with a bidder prior to making a determination of nonresponsibility. Since responsibility determinations are administrative in nature, they do not require the procedural due process otherwise necessary in judicial proceedings.

Lithographic Publications, Inc. (LPI) protests the award of contract No. USCA 50315 for the printing of court opinions to the incumbent contractor, Instant Copy and Printing Center, Inc. T/A G.M.C. (GMC), under an invitation for bids (IFB) issued by the Administrative Office of the United States Courts for the United States Court of Appeals for the Third Circuit (court). LPI contends that the contracting officer's determination that it was nonresponsible was improper.

Although LPI submitted the lowest bid, the contracting officer found that LPI was nonresponsible because of serious deficiencies in performance under a previous contract with the court. The matter was not referred to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) procedures because, as the protester concedes, the court does not fall within the relevant statutory definition of "agency" for purposes of COC referral requirements. LPI asserts that the nonresponsibility determination was the result of bias on the part of the court in favor of the incumbent. In addition, LPI asserts that its contract performance deficiencies were the result of last minute changes in requirements imposed by the court under only one contract. LPI also asserts that it was denied due process because it did not receive any notification of the agency's intent to find it nonresponsible, nor was it informed of the nature of the allegations against it, or given an opportunity to respond.

We find the protest without merit.

LPI was the low evaluated bidder at \$144,581.24 and GMC was next low at \$149,076.54. The court recommended against award to LPI on the basis of unsatisfactory past performance. In view of the 1-day turnaround time required for the printing of opinions, the court felt it unlikely that LPI would be able to meet the contract performance requirements. The contracting officer requested additional information from the court regarding the recommended nonresponsibility determination.

The court provided information which detailed unsatisfactory contract performance by LPI under a contract for the 1984 Third Circuit Judicial Conference performed during August and September of 1984. In particular, the information showed that LPI had failed to meet a number of critical deadlines; that the quality of galley proofs provided by LPI suggested serious problems in the quality control of LPI's printing which is critical for slip opinions; that LPI failed to deliver full orders in the

quantities requested; and that the degree to which LPI's representations regarding delivery could be relied upon was questionable, as evidenced by repeated failures. Based on this information, on November 13, the contracting officer determined that LPI was nonresponsible and award was made to GMC.

As a general matter, our Office will not question a contracting officer's nonresponsibility determination unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 C.P.D. ¶ 437. The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. We therefore defer to such judgment and discretion unless the protester, who bears the burden of proof, shows that it was abused. System Development Corp., B-212624, Dec. 5, 1983, 83-2 C.P.D. ¶ 644. Here, the protester has failed to make the necessary showing. While the mere fact of unsatisfactory performance under one prior contract does not necessarily establish a lack of responsibility, the circumstances of the failure to perform properly and in a timely manner under the contract may provide a reasonable basis for a nonresponsibility determination. C.W. Girard, C.M., B-216004, Dec. 26, 1984, 64 Comp. Gen. _____, 84-2 C.P.D. ¶ 704. In the present case, as in Girard, the contracting officer could properly make a nonresponsibility determination on the basis of unsatisfactory and untimely performance for which, while the protester suggests there were circumstances beyond his control, the contracting officer could reasonably conclude otherwise. Thus, in view of the required fast turn-around time and need for accuracy in opinion printing, the contracting officer had a reasonable basis to determine that LPI's recent performance deficiencies raised serious question as to its capability to meet contract requirements.

Regarding LPI's claim of bias, the protester has the burden of affirmatively proving its case in this regard, and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. Ted L. Bidy and Associates, Inc., B-209297.2, Apr. 22, 1983, 83-1 C.P.D. ¶ 441. LPI's claim is based primarily on a court officer's alleged statement of preference for the incumbent. In fact, the statement indicates only that the court's experience has been that award of such contracts to new printers has required an expenditure of time and effort by court personnel to educate the new printer. LPI's other allegation that the two companies were judged by different standards with respect to prior contract performance is

based on LPI's speculation and unsupported allegations regarding apparent delays in the production of opinions during two periods of performance under the incumbent's prior contract. LPI contrasts these with the deficiencies in LPI's performance. We find this insufficient to demonstrate bias; thus the protester's allegations are properly to be regarded as mere speculation. Todd Logistics, Inc., B-203808, Aug. 19, 1982, 82-2 C.P.D. ¶ 157.

LPI also points out that the IFB provision regarding responsiveness indicates that an offer would be declared nonresponsive if the offeror had defaulted under previous contracts with the government. It argues that since it did not default, it could not be found nonresponsive. Since the clause in question purportedly addresses itself to responsiveness, it would normally be inapposite to a nonresponsibility determination. However, the clause improperly characterizes deficient past contract performance as a basis for a nonresponsiveness determination. In fact, this criterion pertains to a bidder's performance capability which is germane to responsibility, not to bid responsiveness which concerns a bidder's promise to perform. Right Away Foods Corp., B-216199, Jan. 3, 1985, 85-1 C.P.D. ¶ 15; Propper Manufacturing Co. Inc., B-206193, Feb. 3, 1982, 82-1 C.P.D. ¶ 86. Even if prior contract defaults were properly listed as a basis for a nonresponsibility determination, lesser contract performance deficiencies may also provide a valid basis for a nonresponsibility determination.

Regarding LPI's argument that it was entitled to procedural due process since it is a small business, albeit one which is not entitled under these circumstances to referral to SBA for COC consideration, we are unaware of any such special procedural requirements. Indeed, in Fry Communications, Inc., 62 Comp. Gen. 164 (1983), 83-1 C.P.D. ¶ 109, we specifically held that where a small business offeror was not entitled to SBA referral for similar reasons, the standard of GAO review of the contracting officer's determination was the same as that ordinarily imposed by our Office. See also C.W. Girard, C.M., *supra*.

The protester has cited Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F. 2d 953 (D.C. Cir. 1980), for the proposition that it is entitled to the due process requirements of notice, opportunity to respond, and notification of agency intent to make a nonresponsibility determination. Old Dominion is inapposite since it concerns an agency's summary determination of an offeror's ineligibility for a large number of procurements, tantamount to a

debarment. No such considerations are present here where the protester is found nonresponsible with respect to this single procurement. Moreover, we have previously specifically held that the cited case is not applicable to this situation. Rather, since responsibility determinations are administrative in nature, they do not require the procedural due process, such as notice and an opportunity to comment, which is otherwise necessary in judicial proceedings. System Development Corp., supra. Accordingly, a contracting officer may base a determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence, and there is no requirement that bidders be advised of the determination in advance of contract award. United Aircraft and Turbine Corp., B-210710, Aug. 29, 1983, 83-2 C.P.D. ¶ 267.

We deny the protest.

for Seymour Efron
Harry R. Van Cleve
General Counsel