

DECISION

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

FILE: B-219449 **DATE:** November 8, 1985
MATTER OF: General Painting Company, Inc.

DIGEST:

1. Evidence does not prove agreement between contracting agency and Small Business Administration (SBA) to extend the stipulated time period for SBA to issue a certificate of competency (COC) where contracting agency merely did not object to SBA's advice that it was holding the matter in abeyance while attempting to obtain more information.
2. Where the Small Business Administration does not act on a nonresponsibility referral because it believed it needed additional information from another agency, so that bidder did not obtain a review of the nonresponsibility determination, GAO will review the determination.
3. Contracting agency reasonably determined that bidder was nonresponsible based on Department of Labor letter advising agency that the offeror underpaid employees under 11 contracts awarded over a recent 1-year period.

General Painting Company, Inc. (GPC) protests the award to another firm of a contract to perform interior painting in family housing quarters under United States Army Tank-Automotive Command (TACOM) invitation for bids No. DAAE07-85-B-Q004. GPC basically contends that TACOM improperly and in bad faith awarded the contract before the Small Business Administration (SBA) had the opportunity to decide whether to issue a certificate of competency (COC) conclusive of GPC's responsibility--that is, its capability to perform the prospective contract.

We deny the protest.

On May 16, 1985, the contracting officer determined GPC to be nonresponsible due to a lack of integrity. The determination was based upon a Department of Labor (DOL)

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letter requesting TACOM to withhold contract payments because GPC had underpaid its employees under 11 TACOM contracts awarded from October 1984 through September 1985, in violation of the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act. The letter advised that DOL was considering further action.

Since GPC is a small business, the question of its responsibility along with the DOL letter was referred to the SBA by letter dated May 17 for SBA's consideration of whether a COC should be issued. That letter advised that award would be withheld 20 business days after May 17, and that if no COC was issued by then, award would be made. SBA failed to make a determination within the 20-day period, and TACOM therefore awarded a contract to the second low bidder.

No COC was issued because SBA held GPC's case in abeyance while attempting to obtain documentary evidence of the violations referenced in DOL's letter. The protester contends that TACOM agreed with SBA to extend the time period for issuing a COC until sufficient information regarding GPC's alleged lack of integrity could be obtained. TACOM denies that it agreed to an extension.

GPC has furnished affidavits from SBA officials as evidence of an agreement between SBA and TACOM. These affidavits show that SBA initially requested evidence of the violations from TACOM and advised TACOM that any action on the COC would be held in abeyance, and that when TACOM made no objection, SBA interpreted that as an agreement to extend the period for issuing a COC. TACOM later informed SBA that it lacked any information aside from the DOL letter, and suggested that SBA contact DOL. DOL, however, refused to disclose any information to SBA. One affidavit states that SBA advised the Acting Chief of TACOM's Small Business Office about the problems in obtaining more information, and that the latter agreed to hold the matter in abeyance until TACOM decided what action to take. The Acting Chief in his own affidavit denies making such an agreement.

Applicable regulations provide that contracting agencies must withhold awarding a contract until 15 business days after a COC referral unless SBA and the contracting agency agree to a longer period (here 20 business days). Federal Acquisition Regulation (FAR), 48 C.F.R. § 19.602-2(a) (1984). While the contracting agency may grant an extension for processing a COC, the decision whether to do so is a matter within the contracting agency's discretion. American Contract Services, B-218039.2, June 12, 1985, 85-1 CPD ¶ 674.

We believe that the protester, which has the burden of submitting sufficient evidence to prove its case, Harry Kahn Associates, Inc., B-216306.2, June 28, 1985, 85-1 CPD ¶ 739, has not met its burden of showing that TACOM agreed to extend the period for issuing a COC beyond the 20 business-day period to which it initially agreed. The affidavits from SBA show that it tended to infer TACOM's agreement to an extension from TACOM's willingness to have SBA withhold action until it obtained more information. Such willingness by no means can be reasonably construed as an agreement by TACOM to extend the time period for making an award. While an affidavit from one SBA official states that the TACOM Acting Chief agreed to an extension, the Acting Chief denies making the agreement, and the record contains no basis to resolve the conflicting evidence in the protester's favor. Rather, the fact that the SBA affidavit alleges the Acting Chief's agreement to an extension of indefinite duration casts doubt on the reasonableness of the SBA official's understanding that there was an agreement.

While the protester alleges that TACOM deliberately frustrated the COC proceedings by failing to send an adequately documented referral, TACOM denies that it had any information more than the DOL letter requesting TACOM to withhold payments to GPC, and there is nothing in the record that indicates otherwise. Under these circumstances, we find no merit in GPC's allegation that TACOM failed to send pertinent information to SBA.

While the discussion above disposes of the bases for protest presented to us, we recognize that GPC was unable to get a review of the nonresponsibility determination from SBA because SBA was unwilling to review TACOM's determination without supporting evidence from DOL. Since GPC was not afforded an opportunity to have TACOM's nonresponsibility determination reviewed, we believe it appropriate for us to review the matter. See C.W. Girard, C.M., 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704.

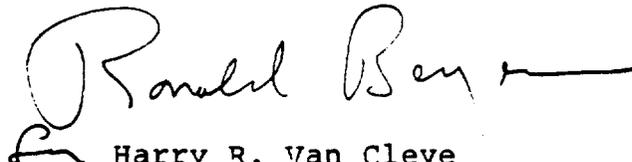
The law applicable to this situation is clear. Before awarding a contract, the contracting agency must determine that the prospective contractor is responsible, including that the offeror has a satisfactory record of integrity. FAR, 48 C.F.R. § 9.103 and § 9.104-1(d). Whether evidence of an offeror's lack of integrity is sufficient to warrant a nonresponsibility determination is a matter primarily for the contracting agency's judgment, and we will not question

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a nonresponsibility determination unless it is shown to lack a reasonable basis. Americana de Comestibles S.A., B-210390, Mar. 13, 1984, 84-1 CPD ¶ 289.

The evidence supporting a nonresponsibility determination based on a lack of integrity must be substantial and consist of more than suspicions or allegations. P.T. & L. Construction Co., Inc., 55 Comp. Gen. 343 (1975), 75-2 CPD ¶ 208. In a prior case we held that the failure to pay prevailing wage rates under six contracts provided a reasonable basis for determining that an offeror, facing debarment because of that failure, lacked integrity and was nonresponsible. See Greenwood's Transfer & Storage Co., Inc., B-186438, Aug. 17, 1976, 76-2 CPD ¶ 167. Here it may be that the circumstances are different, e.g., that GPC's underpayments were not due to its willful disregard of the labor standards laws, but rather were caused by something else. We need not explore this further, however, because the facts indicate a record of GPC's unsatisfactory performance regarding minimum wage requirements included in its government contracts. Such unsatisfactory performance itself provided a sufficient basis for a nonresponsibility determination without regard to GPC's integrity. See FAR, 48 C.F.R. 9.104-3(c). We therefore find that TACOM reasonably determined GPC nonresponsible.

The protest is denied.


Harry R. Van Cleve
General Counsel