

DECISION



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

FILE: B-220152; B-220152.2 **DATE:** November 20, 1985

MATTER OF: Pauline James & Associates

DIGEST:

1. 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. Although the protester argues that specific evidence of unsatisfactory performance, financial irresponsibility, and failure to meet solicitation and certification requirements were due to circumstances beyond its control or were otherwise explainable, GAO finds that the contracting officer reasonably concluded otherwise in making a negative responsibility determination.
3. Where bad faith is alleged in connection with a contracting officer's nonresponsibility determination, 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. Since responsibility determinations are administrative in nature, they do not require the procedural due process otherwise necessary in judicial proceedings, and 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.

Pauline James & Associates (James) protests the award of two contracts under invitations for bids issued by the Administrative Office of the United States Courts (the agency) for court reporting services for the United States Bankruptcy Court (the court). Contract number USCA 50731 (our B-220152) covers four bankruptcy judges within the

geographic area of Chicago, Joliet, and Geneva, Illinois; contract number USCA 50738 (our B-220152.2) covers four bankruptcy judges within the geographic area of Chicago, Waukegan, and Wheaton, Illinois.

The agency reports that, although James submitted the lowest bid on each of the solicitations, the contracting officer found that James was nonresponsible based on its unsatisfactory performance under a previous contract with the court, lack of financial responsibility, and failure to meet solicitation requirements regarding reporters' certificates and specific experience qualifications. (The matter was not referred to the SBA because the court does not fall within the relevant statutory definition of "agency" for purposes of the referral requirements. Lithographic Publications, Inc., B-217263, Mar. 27, 1985, 85-1 C.P.D. ¶ 357 at 2).

James protests to this Office that the contracting officer's nonresponsibility determination was not supported by the facts of the case and, therefore, was made in bad faith without affording the protester an opportunity to respond to the allegations.

We deny the protests.

The record shows that the court provided the contracting officer with information regarding serious past performance deficiencies by James, including failures to file transcripts within the prescribed time limits and failures to respond to inquiries regarding such late transcripts. James counters that such incidents were precipitated by circumstances beyond its control, such as attorneys providing erroneous information regarding dates or the names of presiding judges. The agency stresses that a responsible court reporting firm would possess sufficient records to enable it to react more effectively in such situations. Additional complaints regarding financial responsibility were made by the court concerning the problem of returned payroll checks which prompted individual James' reporters to ask the court to intervene on their behalf. Although James argues that these payment problems were caused by the staff court reporters themselves, the agency stresses that, regardless of fault, the financial disputes between James and some of its employees were having a seriously adverse effect upon James' performance of the contract and, thus, the operation of the court.

The record further reflects that the agency experienced difficulty in collecting debts owed by James for federal office space utilized by that contractor. Although James ultimately admits that a valid debt had been created concerning the office space, it argues that the agency contributed to the problem by failing to recoup amounts due by administrative offset against invoices submitted by James for reporting services rendered. The agency asserts that James' inaction on this debt is evidence of financial nonresponsibility.

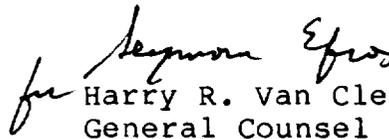
As a final matter, the agency points out that the solicitations in question required bidders to submit a brief biographical sketch of each reporter that the bidder intended to use to provide service under the contract and set forth the qualifications which each of the contractor's reporters must have in order to perform reporting services under the contract. These qualifications included 4 years of courtroom reporting experience and a certificate of proficiency from the National Shorthand Reporters Association, or an equivalent organization, as determined by the contracting officer. The biographical sketches submitted by James for each solicitation listed several reporters who did not meet the qualifications requirements of the solicitation. Although James alleges that one of its unqualified reporters had been used by an interim contractor and that another of its unqualified court reporters was being used by the current contractor, James does not contest that several of its listed reporters did not meet the solicitations' qualifications requirements for experience and certification.

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. Lithographic Publications, Inc., B-217263, supra. 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. Id., citing System Development Corp., B-212624, Dec. 5, 1983, 83-2 C.P.D. ¶ 644. Here, the protester has failed to make the necessary showing. As set out above, the contracting officer made the nonresponsibility determination on the basis of specific evidence of unsatisfactory performance, lack of financial responsibility, and the failure to meet

the solicitation's qualifications requirements. Although the protester suggests that these incidents were due to circumstances beyond its control or were otherwise justifiable, we think the contracting officer reasonably concluded otherwise. Thus, based on the record here, the contracting officer had a reasonable basis to determine that there were serious questions as to James' ability to meet contract requirements. Id.

Regarding James' allegation of bad faith on the part of the agency, 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. Id., citing Ted L. Bidy and Associates, Inc., B-209297.2, Apr. 22, 1983, 83-1 C.P.D. ¶ 441. The thrust of James' allegation is that the agency acted in bad faith by not affording an opportunity for the protester to explain the various incidents leading to the nonresponsibility determination. However, we have specifically stated that, 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., B-212624, supra. Therefore, 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. Lithographic Publications, Inc., B-217263, supra.

Accordingly, we deny the protests.

for 
Harry R. Van Cleve
General Counsel