



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Energy Management Corporation
File: B-234727
Date: July 12, 1989

DIGEST

1. Where procuring agency makes an award to the next low bidder after determining that the protester was nonresponsible because of an unsatisfactory record of integrity, protester's due process rights were not violated because the agency determination applied to one procurement only, which did not constitute a de facto debarment or suspension where due process considerations are applicable.
2. Contracting agency reasonably determined that bidder was nonresponsible based on information in a criminal investigation report which called into question the bidder's integrity based on performance under a recent government contract.

DECISION

Energy Management Corporation (EMC) protests the determination that it was nonresponsible based on an unsatisfactory record of integrity, under invitation for bids (IFB) No. DACA21-88-B-0212, a total small business set-aside, issued by the United States Army Corps of Engineers, Savannah District, for the replacement of steam generators at Fort Jackson, South Carolina. The Corps determined that EMC lacked integrity and rejected its low bid because the preaward survey revealed that the president of EMC was being investigated for procurement fraud on a prior Fort Jackson contract.

We deny the protest.

At bid opening, on September 16, 1988, the Corps received two bids. EMC bid \$102,588, and S&H Mechanical Contractors, Inc., bid \$110,105. On September 27, after completing the preaward survey, the contract specialist recommended no award to EMC because the president of the company was being investigated for theft, product substitution, and fraud on a

prior contract with Fort Jackson for the replacement of circulation pumps, sumps, high temperature valves, and controls. In every other category on the preaward survey, EMC was determined to be satisfactory. However, based on the unsatisfactory integrity record, the contracting officer determined EMC to be nonresponsible.

Subsequently, on October 6, 1988, the Corps referred the matter to the Small Business Administration (SBA) for consideration under the certificate of competency (COC) program and furnished the SBA all the relevant documentation, including a copy of the Army Criminal Investigation Division (CID) report. However, on October 14, the SBA returned the referral to the Corps without ruling on EMC's responsibility because the CID would not authorize release of the report to EMC and the SBA felt that it could not adequately process the referral unless EMC were informed of the allegations contained in the report.

The bid acceptance period expired on December 14, 1988, and on January 20, 1989, the Corps confirmed with Fort Jackson that EMC was still under investigation. Also, the Corps was advised that the United States Attorney was considering taking the case to the grand jury. Based on this information, the Corps rejected EMC's bid as nonresponsive by letter dated February 1, 1989.^{1/}

On February 10, after S&H agreed to revive its bid, the Corps awarded the contract to S&H; however, notice to proceed has been withheld pending the outcome of this protest. The Corps reports that the Federal Bureau of Investigation has joined the investigation of EMC and, in response to our inquiry, informally advises that, at present, EMC has been neither indicted nor proposed for suspension or debarment. EMC argues that both constitutionally-guaranteed procedural due process and the procurement regulations (Federal Acquisition Regulation, subpart 9.4-Debarment, Suspension, and Ineligibility) required the Corps to provide it a copy of the CID report and the opportunity to respond to the allegations against it before depriving it of the award.

^{1/} The Corps' letter erroneously referred to the nonresponsibility determination as a finding of nonresponsiveness. However, it is clear from the administrative report that the Corps actually rejected EMC's bid because it was determined to be nonresponsible and we are considering the propriety of the process that the Corps utilized to determine EMC nonresponsible and reject its bid here.

In Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980), the court held that a de facto debarment resulted from an agency's determination that a contractor lacked integrity; the court held that in such circumstances, due process guaranteed by the Fifth Amendment of the United States Constitution required that notice of the charges be given to the contractor as soon as possible so that the contractor could present its side of the story before adverse action was taken. Old Dominion, 631 F.2d at 968.

The facts in Old Dominion and cases which have followed^{2/} indicate that the nonresponsibility determinations involved more than one procurement, which led the courts to find de facto debarment or suspension. The instant protest involves only one procurement, however, and EMC has not argued that it has been deprived of other contracts. When a contractor is deprived of an award in only a single procurement, we have no basis to conclude that there has been a constructive or de facto debarment in the absence of specific facts warranting such a conclusion. See BMY, Division of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. We see nothing in the record warranting such a conclusion here. Accordingly, since we cannot conclude that EMC has been subjected to an actual or de facto debarment or suspension, we have no basis to view EMC as entitled to procedural due process rights in connection with this particular nonresponsibility determination or to any rights provided by the FAR provisions dealing with suspension or debarment.

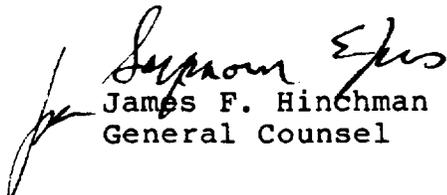
While the SBA has conclusive authority to review a contracting officer's nonresponsibility determination with respect to a small business, we will review such a determination when the SBA has refused to do so. See Airports Unlimited, Inc., B-222324, 2, July 25, 1986, 86-2 CPD ¶ 111. In making that review, we are mindful that in general the determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who, in making that decision, must of necessity rely on his business judgment. Firm Reis GmbH, B-224544 et al., Jan. 20, 1987, 87-1 CPD ¶ 72. While the determination should be based on fact and reached in good faith, the ultimate decision should be left to the discretion of the contracting agency because it must bear the brunt of any difficulties experienced during performance of the contract.

^{2/} ATL, Inc. v. United States, 3 Cl. Ct. 259 (1983); Viktoria-Schaefer Inter v. U.S. Dept. of the Army, 659 F. Supp. 85 (D.D.C. 1987).

Fund for Equal Access to Society, B-228167, Jan. 20, 1988, 88-1 CPD ¶ 54. Because of the broad discretion of the contracting officer in these matters, our Office generally will not disturb a nonresponsibility determination absent bad faith on the agency's part or a lack of a reasonable basis for the determination. Id.

Here, there is no evidence of bad faith and we think the record reflects a reasonable basis for the determination. The contracting officer based his nonresponsibility determination on information and recommendations contained in the CID report. We have reviewed this report and we find that it does contain information from which the contracting officer reasonably could conclude that EMC's performance under a recent government contract raises a serious doubt as to the integrity of the company and of its president. We have held that such CID report information may be used as the basis of a nonresponsibility determination without the conduct of an independent investigation by the contracting officer to substantiate the accuracy of the report. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; Americana de Comestibles S.A., B-210390, Mar. 13, 1984, 84-1 CPD ¶ 289. Accordingly, we conclude that the Army had a reasonable basis to determine EMC nonresponsible for a perceived lack of integrity based on the CID investigation report information.

The protest is denied.


James F. Hinchman
General Counsel