DECISION

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

60150

FILE: B-181866 DATE: November 13, 1975

MATTER OF: Columbia Loose-Leaf Corporation

97748

DIGEST:

1. Reasonable basis existed for contracting officer's determination that low bidder was nonresponsible, where pre-award survey team concluded that bidder was "incapable of performing" on basis of delinquencies on existing contracts, poor past performance, insufficient production capacity and lack of sufficient personnel. Furthermore, SBA's denial of COC affirms contracting officer's determination of nonresponsibility.

2. Contracting officer's determination that low bidder was nonresponsible which was based upon negative "Plant Facilities Report" by GSA quality control personnel, will not be disturbed or questioned where bidder has not shown determination to be in crror, and it cannot be concluded from evidence of record or GAO's independent investigation of procurement, that determination was unreasonable.

3. Where evidence of record and GAO investigation indicate that low bidder's delay in performance of its previous contracts, resulting in contracting officer's determination of nonresponsibility for current contract, was the result of its own weakened financial condition, increasing prices, shortage of supplies and raw materials and insufficient personnel, and not the result as alleged of arbitrary inspection procedures or other improper action on the part of activity's quality control personnel, determination of nonresponsibility was reasonable and will not be disturbed or questioned.

4. Protester's contention that GSA official exerted improper influence on SBA officials performing COC review of its plant and facilities is without merit, since GSA official's presence at plant on day of survey and conversation with SBA officials does not establish that SBA findings were tainted and survey was not impartial. Furthermore, protester's mere suspicions not supported by clear or convincing evidence of any wrongdoing by either GSA or SBA personnel, is not sufficient to cast doubt on reasonableness or validity of SBA determination to deny COC.

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Invitation for bids (IFB) No. FPNSO-EC-80105-A was issued on February 12, 1974, by the Office Supplies and Paper Products Division (New York), Federal Supply Service, General Services Administration (GSA). The IFB solicited bids for an annual requirements-type contract for various types and sizes of loose-leaf binders. The prior fiscal year's contract No. GS-005-92600 for these supplies was held by Columbia Loose-Leaf Corporation (Columbia).

When bids were opened on March 13, 1974, Columbia was determined to be the low bidder on 32 of the 53 items it offered to supply. In order to make a determination of the low bidder's ability to perform the contract, on April 1, 1974, the contracting officer requested that GSA's quality control personnel conduct a pre-award survey of Columbia. The pre-award survey team's Plant Facilities Report to the contracting officer, dated April 17, 1974, recommended that no award be made to Columbia because that firm was deemed "incapable of performing" the proposed contract in view of its delinquency on its existing contracts (delinquent on the delivery of 328,586 binders under then-current GSA contracts) poor past performance, insufficient production capacity and lack of sufficient personnel. In addition, a "Financial Responsibility-Inquiry and Report" concluded that Columbia's financial status was unsatisfactory, based on the firm's failure to supply requested financial information.

On the basis of the above negative findings of the pre-award survey team, the contracting officer made a determination that Columbia was nonresponsible because it did not meet the minimum standards for responsible prospective contractors as set forth in Federal Procurement Regulations (FPR) § 1-1.1203 (1) (c) (1964 ed. amend. 95). Since Columbia was a small business concern, GSA referred the matter, pursuant to FPR § 1-1708-2 (a) (1964 ed. amend. 71) to the Small Business Administration (SBA) for a determination regarding the possible issuance of a Certificate of Competency (COC). By letter dated June 12, 1974, the SBA informed GSA that after a "comprehensive analysis of all available information", it declined to issue a COC. On June 24, 1974, the contracting officer rejected Columbia as nonresponsible, and a contract for most of the items for which Columbia was low bidder was awarded to Norwood Industries, Inc. A contract for the remainder of the items in question was awarded to Bindercraft Enterprises, Inc.

Columbia has protested the above awards on the basis that it has been unduly harassed by GSA quality control personnel in New York resulting in delays in the performance of its present contract for similar items which, together with other covert activities by other GSA personnel, has effectively prevented the award to Columbia of

the contract in question. It is submitted by Columbia that the following circumstances when taken as a whole show "beyond a doubt that the decision of the contracting officer to deny award of the new contract to Columbia was improper, made in bad faith, and constitutes an abuse of discretion."

Specifically, Columbia attributes its difficulties in meeting the delivery requirements under its present contract primarily to an "extremely intensive, harsh, and time-consuming" quality assurance inspection procedure utilized by the New York office of GSA. Columbia asserts that it has never experienced such strict inspection procedures in the past, that Norwood has not been subjected to such stringent procedures, and that these procedures were designed to harass and delay Columbia's performance so as to assure its disqualification for the subject contract. It claims that a plan of deliberate harassment has been directed at Columbia by GSA inspection officials, including, since the issuance of the present solicitation, a significant increase in the time required by GSA to conduct and report the results of the laboratory testing on Columbia's binders and extremely harsh sampling techniques of Columbia's output. Furthermore, Columbia contends that personality conflicts between GSA's quality control representatives and Columbia personnel over the conduct of the inspections and the time required for release of shipments has resulted in personal animosities interfering with the judgment of these individuals and adversely affecting Columbia's performance. Columbia also asserts that the negative findings of the pre-award survey of Columbia's facilities conducted by the GSA quality control representatives can be linked to the increasingly poor personal relationships between these individuals and Columbia.

Columbia further contends that GSA exerted improper influence on the SBA officials performing the COC review of Columbia's plant and facilities. In this regard, Columbia asserts that it had informed the GSA Supervisory Quality Assurance Specialist that he would not be welcome at the plant the day of the SBA review because it was not his scheduled day at the plant and because the SBA would, in effect, be examining the negative results of the pre-award survey conducted by him. Nevertheless, Columbia states the GSA employee appeared at the plant and escorted one of the SBA representatives to a parked car where the two conversed for approximately one-half hour. Columbia contends that this action illustrates the exercise of improper pressures during a survey by an independent agency of the Federal Government which, in Columbia's view, irrevocably tainted the results of the SBA survey and denied the firm of its statutory right to an independent and impartial review of its capacity to perform.

Finally, Columbia states that it has reason to believe that Norwood knew prior to the award of the contract in question that it would be successful despite the fact that Columbia was the low bidder. It is reported that the basis for this belief stems from information furnished by one of Columbia's suppliers that Norwood had told the supplier that Columbia would not be receiving the award, but instead Norwood would be the successful bidder. Thus, Columbia contends that "either the contracting officer had judged the issue of Columbia's capacity and had so informed Norwood long before the formal award of the contract and long before the giving of any notice to Columbia, or Norwood had been assured of the outcome of the bid prior to the contracting officer's decision."

It is GSA's position that the contracting officer's determination of nonresponsibility, based on the pre-award survey of Columbia and the refusal of SBA to issue a COC, was reasonable and substantially supported by the evidence of record. In regard to Columbia's contentions alleging harassment, unequal inspection standards and bias by members of GSA's quality control division (who are responsible for inspection under Columbia's current GSA contracts as well as conducting the pre-award plant survey), GSA contends that the pre-award survey as well as the inspections were conducted pursuant to and within the limits of its regulations and good business practices. Concerning Columbia's allegation that GSA unduly influenced SBA's investigation and determination, GSA states that it did not infringe upon the province of the SBA and, in this regard, GSA reports that SBA's position is that there was "no untoward or irregular action by any SBA personnel involved in processing the COC application and in conducting its surveys." Finally, GSA advises that the contracting officer neither predetermined to award the contract to Norwood or Bindercraft, nor so notified them, nor was information communicated to either of those suppliers until Columbia had been determined nonresponsible and the official notices of award were given.

FPR §§ 1-1.1202 (1964 ed. amend. 95) and 1-1.1203 (1964 ed. amend. 95) set forth the general policy and the minimum standards for making a determination of responsibility of prospective contractors. Under FPR § 1-1.1202 (d) (1964 ed. amend. 95), the following guidance is given to the contracting officer:

> "A determination of nonresponsibility shall be made by the contracting officer if, * * * the information obtained does not indicate clearly that the prospective contractor is responsible. Recent unsatisfactory performance regarding either quality or timeliness of delivery, whether or not default proceedings were instituted, is an example of a problem which the contracting officer must consider and resolve as to its impact on the current procurement prior to making an affirmative determination of responsibility. * * *"

Under FPR § 1-1.1203-1 (b) (1964 ed. amend. 95) a prospective contractor must:

> "Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing business commitments, commercial as well as governmental".

We have consistently held that the question of a prospective contractor's responsibility is a matter for determination by the contracting officer involved. See RIOCAR, B-180361, May 23, 1974, 74-1 CPD 282, and cases cited therein. Resolving this question of fact necessarily involves the exercise of a considerable range of judgment and discretion by the contracting officer. 43 Comp. Gen. 228, 230 (1963). Therefore, it is not the function of our Office to determine whether Columbia has the capability to perform the subject contract; rather, our function is to review the record to determine whether the contracting officer's determination that Columbia was nonresponsible was reasonable under the circumstances. Leasco Information Products Inc., 53 Comp. Gen. 932 (1974), 74-1 CPD 314; 51 Comp. Gen. 233 (1971). In this regard, our Office has recognized that when an offeror's application for issuance of a COC is denied by SBA, the contracting officer's determination of nonresponsibility must be regarded as having been affirmed by SBA. Marine Resources, Inc., B-179738, February 20, 1974, 74-1 CPD 82.

In view of the seriousness of the allegations regarding the conduct of the subject procurement and conflicting reports of the pertinent facts surrounding the award of the contract, our Office conducted an independent investigation to determine whether GSA's evaluation and subsequent rejection of Columbia's low bid was consistent with pertinent regulations and policies. Our investigation focused primarily on the period prior to the June 1974 rejection of Columbia's bid to determine whether the problems in performance encountered under Columbia's previous GSA contract, which formed the basis for the nonresponsibility determination in the subject procurement, were attributable, as alleged, to improper action on the part of GSA quality control personnel.

For the following reasons, it is our position that a reasonable basis existed for the contracting officer's determination of Columbia's nonresponsibility.

As stated previously, the determination to reject Columbia as nonresponsibile was based primarily on the negative findings of the April 17, 1974 "Plant Facilities Report", from which the contracting officer concluded that Columbia did not satisfy FPR § 1-1.1203 (1964 ed. amend. 95) which requires, in part, that a prospective contractor

be able to comply with the proposed or required delivery schedule and have a satisfactory record of performance. Columbia asserts that the negative findings of the pre-award survey of its facilities were attributable to an extremely intense, harsh, and time-consuming quality assurance inspection procedure utilized by the New York Office of GSA as well as to the poor personal relationships existing between the parties. Thus, in order to determine whether Columbia's difficulties in meeting the delivery requirements of its previous GSA contract, which formed the principal basis for the contracting officer's determination to deny it the award in the instant procurement, was the result of improper actions on the part of GSA personnel, we closely examined the period preceding the contracting officer's determination to determine the impact of GSA's inspection procedures on Columbia's performance. While Columbia makes reference to specific allegedly improper actions occurring subsequent to that determination, such allegations are not relevant to our review of the contracting officer's determination. Any further delay in Columbia's performance of its then current GSA contract, did not contribute to the determination that Columbia lacked responsibility for the instant award and accordingly will not be discussed.

Our examination of the record and our independent investigation do not support Columbia's allegation that the delinquencies under its prior fiscal year's contract (No. -92600), a major factor contributing to the negative pre-award survey, resulted from "harassment" by GSA officials. In the first instance, the record indicates that prior to the award of contract -92600, Columbia submitted a written commitment that if awarded the contract, it would increase production by employing an additional work shift of 5 hours per night and 6 hours on Saturday. The team which conducted the survey prior to the award of contract -92600 concluded that Columbia was capable of performing if it would get back to its normal work force (125 factory personnel) and would employ additional workers as needed (the report recommended a 40-man second shift). However, during our visit to Columbia, we learned that in contrast to the work force of 125 factory personnel committed for the performance of contract -92600, Columbia employed an average of only 87 factory workers during the first quarter of fiscal year 1974, 96 workers in the second, 92 in the third, and 90 in the last quarter with only minimal overtime. In other words, Columbia's poor perform-formance under its previous GSA contract stemmed in part from the fact that its factory work force was below that which it committed for performance of the contract and that which was understood as necessary for the affirmative recommendation regarding production capability made by the previous GSA pre-award survey.

Secondly, while Columbia claims that its delays in delivery were caused in part by the unavailability of materials, the record and our own investigation indicates that in at least one instance, a supplier had refused to make any further shipments until Columbia paid its past due bills.

Within three months of the award of contract -92600, Columbia was in a delinquent status. Gauged by the number of line item entries on orders received there was a steadily increasing percentage of delinquency ranging from 26 percent in September 1973 to 69 percent in January 1974, at which time Columbia was delinquent in delivery of 371,000 binders. We see no basis for attributing these delinquencies to "harassment" by GSA personnel because as of February 1974, all of Columbia's production was accepted by the Government.

From our examination of source documents, we observed that quantities of 1,800, 9,648, 23,208 and 47,520 binders were rejected during the months of March through June 1974, respectively. In view of Columbia's allegation that GSA instituted stricter inspection procedures for the purpose of harassing it and delaying its performance so as to assure its disqualification for the instant contract, we asked GSA why there had been no rejections of Columbia's products under contract -92600 until March 1974.

We were advised that the inspection procedure originally provided only for a GSA sampling and laboratory testing of the raw materials and a limited visual inspection of the finished product to check for workmanship and compliance with specifications. However, when GSA could no longer assume that Columbia maintained adequate quality control to assure that the finished binders were all made from accepted lots of raw material, GSA altered its procedures whereby the end items themselves were inspected and were not cleared for delivery until the receipt of laboratory test reports. While this change in inspection procedure would have an impact on Columbia's performance and may have contributed to increasing delinquencies in meeting delivery requirements, the records indicate that the change was not fully implemented until sometime in July 1974, well after the unfavorable GSA and SBA surveys and thus did not contribute to the contracting officer's determination of nonresponsibility.

It appears to us that contract -92600 was in difficulty virtually from the outset for reasons which cannot be attributed to "harassment" by Government inspectors. Columbia's work force never reached the level deemed necessary by the preaward survey team for successful performance of the contract, and Columbia did not consistently work

an extra shift as it had promised. In a letter dated May 16, 1974, written in response to a request that it show cause why its contract should not be terminated for default, Columbia stated to the procuring activity that its delinquency had been brought about by unforeseeable price increases and shortages of raw materials. Because of these conditions, Columbia continued, it could not afford to pay a second shift or overtime. Nowhere in the letter, which was transmitted a month after GSA's pre-award survey and after the rejection of its supplies had begun, does Columbia mention as a cause of its delinquency GSA's inspection procedures or any other improper action on the part of GSA employees.

We have also found no evidence of record and our own investigation does not in any way support Columbia's contention that the contracting officer was predisposed to award the contract to Norwood.

Finally, the evidence of record does not substantiate Columbia's allegation that GSA quality control personnel exerted undue influence on the SBA officials performing the review of its plant and facilities which resulted in a recommendation that a COC not be issued. The fact that GSA personnel were present at Columbia at the time of the SBA survey and conversed with SBA officials, does not establish that the SBA findings were not independent and impartial. In order to controvert GSA's and SBA's position that there was no improper or irregular action by any individuals in the processing of Columbia's COC application, the protester must present clear and convincing evidence of any wrongdoing. Mere unsupported suspicions, based on the presence of certain GSA employees at Columbia's factory and a short conversation with SBA officials is not enough to cast doubt on the reasonableness or validity of the SBA determination to deny Columbia a COC. In the absence of any probative evidence, we are unable to conclude that GSA improperly influenced the findings and recommendation of the SBA.

Columbia's protest is therefore denied.

R.F. Keller

Deputy Comptroller General
of the United States