

DECISION



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

50599

FILE: B-181986

DATE: February 20, 1975

MATTER OF: Building Maintenance Specialists, Inc.

95290

DIGEST:

Where SBA declines to appeal contracting officer's determination of nonresponsibility as to bidder's tenacity, perseverance or integrity, GAO will no longer undertake to review the contracting officer's determination in the absence of a compelling reason to justify such a review, such as a showing of fraud or bad faith by procuring officials. 49 Comp. Gen. 600 (1970) modified.

Building Maintenance Specialists, Inc., a small business concern, was the third low bidder under invitation for bids (IFB) No. DACW38-74-B-0109, issued by the Tulsa District Corps of Engineers, for cleaning services at Millwood Lake, Arkansas. Upon the disqualification of the first and second low bidders, Building Maintenance was considered for award but was subsequently rejected as nonresponsible pursuant to Armed Services Procurement Regulation (ASPR) 1-903.1(iii) (1974 ed.), for its past unsatisfactory performance.

The contracting officer's preaward survey of Building Maintenance revealed two recent instances of unsatisfactory performance. The Chief of the Vicksburg District Corps of Engineers advised that the firm's performance was deficient under contract No. DACW38-73-C-0345, awarded June 22, 1973, for cleanup and mowing services at DeGray Lake, Arkadelphia, Arkansas. Mowing services were not fully performed and the firm's garbage compactor truck was abandoned on the premises filled with its contents. As a result, removal of the truck and performance of other contract work was executed by Government personnel. Also, on May 20, 1974, Building Maintenance was terminated for default since it failed to initiate performance under Louisville District Corps of Engineers contract No. DACW27-74-C-0130, awarded on March 28, 1974, for cleaning and mowing services at the Rough River Lake, Kentucky.

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In its rebuttal to the administrative report, the protester argues that it is not at fault for its prior nonperformance. Essentially, the reasons stated in support of this position are that (1) the Government's notice regarding its unacceptable contract performance was inadequate; (2) there was a disagreement over specification requirements; (3) mowing equipment was unavailable because of a steel shortage; and (4) the Government denied the firm access to the job site. The protester believes it was the victim of racial discrimination.

The contracting officer concluded that the past unsatisfactory performance of Building Maintenance was due to its failure to apply the necessary tenacity or perseverance to do an acceptable job. In accordance with ASPR 1-705.4(c)(vi) (1974 ed.) the appropriate Small Business Administration (SBA) Regional Office and the Army Small Business Advisor were furnished documentation relevant to the contracting officer's determination that the firm was not responsible for reasons other than deficiencies in capacity and credit. In this connection, the above regulation provides that SBA may, within five days, give notice to the contracting officer of an intent to appeal the matter and within ten days of such notice SBA is required to provide the head of the procuring activity, or his designee, information and recommendations which would materially bear on any approval action.

SBA's COC Standard Operating Procedure (SOP) 60 04 (1972), Paragraph 11, provides, in part, that in processing tenacity, perseverance and integrity cases, SBA personnel should:

- "(1) Review the information submitted by the procuring activity.
- "(2) Discuss the company's performance record with the cognizant Defense Contract Administration Service (DCAS) office. Obtain such documentation as is available.
- "(3) Obtain the company's view of reasons for delinquencies together with documentation. It should be made clear to the company that SBA may agree with the procuring activity and not pursue the case. Further, if any appeal is made there is no guarantee of contract award.
- "(4) Discuss the company's performance with resident inspectors or other Government personnel familiar with the concern's operations.

"(5) Check as many customers of the company as necessary to help form an opinion as to responsibility.

"(6) If feasible, obtain a Commercial Credit report."

In the instant case the SBA Midwestern Regional Office advised the procuring activity that Building Maintenance failed to provide it with any data or information to support a possible appeal. As a result of this failure, SBA declined to appeal the contracting officer's determination of nonresponsibility and it considers the matter closed. On the record before us, we find no basis to question the administrative determination.

In reaching this conclusion, we are persuaded by the fact that the matter of Building Maintenance's responsibility was referred to the SBA for a possible appeal and that the SBA declined to appeal the contracting officer's determination. We believe that the SBA provides bidders with a meaningful and expeditious procedure by which a dispute concerning a bidder's alleged lack of tenacity, perseverance or integrity may be appealed to the head of the procuring agency. Where the SBA finds no basis to appeal the contracting officer's determination, that determination of nonresponsibility generally should be regarded as persuasive.

We have taken a similar position with respect to contracting officer determinations in the area of bidder capacity or credit. See B-176804, September 6, 1972; Society Brand Hat Company, B-180649, June 24, 1974 and Unitron Engineering Company, B-181350, August 20, 1974. As a general rule no useful purpose is served by our review of a contracting officer's determination that a bidder lacks capacity or credit once SBA has declined to issue a certificate of competency to the bidder.

We are aware that in 49 Comp. Gen. 600, 603 (1970) this Office stated that it did not construe SBA's review of the contracting officer's negative determination as to a bidder's tenacity or perseverance as a substitute for our review of the contracting officer's determination even where SBA failed to appeal that determination. In that case the regulations permitted SBA to review a contracting officer's determination that a matter of responsibility involved the bidder's perseverance or integrity rather than its capacity or credit. However, apart from determining whether the contracting officer's determination of nonresponsibility constituted avoidance of the certificate of competency procedure, SBA's standard operating procedures at that time did not call for a review of the adequacy of the

tenacity, perseverance or integrity determination. Since 1972 SBA has formally adopted the above quoted standard operating procedures, and we believe these procedures provide an effective process for reviewing agency determinations of tenacity, perseverance and integrity. Our prior decision is modified accordingly.

Henceforth, we will not undertake to review a contracting officer's determination of nonresponsibility based on a small business bidder's lack of tenacity, perseverance or integrity where SBA declines to go forward with an appeal, unless there is a compelling reason to justify our review of the determination, such as a showing of fraud or bad faith on the part of the administrative officials involved. While in the instant case the protester has alleged that racial discrimination influenced the determination, no evidence has been presented to support this allegation and it appears to be based upon speculation by the protester.

Accordingly, the protest is denied.

R. F. K...
Deputy Comptroller General
of the United States