

**DECISION**



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

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**FILE:** B-182241

**DATE:** February 24, 1975

**MATTER OF:** Acme Reporting Company  
Capital Court Reporters

**DIGEST:**

Protest by small business concerns against rejection of their bids on grounds that firms were nonresponsible because they lacked necessary personnel and means to provide required security is sustained because, contrary to administrative position, determination of nonresponsibility for such reasons related to capacity and therefore required a referral to Small Business Administration (SBA) under FPR § 1-1.708.2. Furthermore, if SBA issues Certificate of Competency to rejected low bidder, or second low bidder, it is recommended that award to third low bidder be terminated for convenience of Government.

Invitation for bids (IFB) No. DJ-A-75-5, for reporting services of Grand Jury testimony and related proceedings, was issued by the Department of Justice (Justice) on August 2, 1974. The solicitation contained the following provisions relevant to the protest:

"COMPETENCY OF BIDDERS:

Offers will be considered only from such offerors who, upon request and in the opinion of the Department of Justice, can show evidence of ability, experience, equipment, and facilities to render satisfactory service. To be considered for an award, the bidder must be regularly engaged in the service specified. The facility and equipment of the offeror will be subject to inspection and approval by the Department of Justice. The bid may be rejected if, in the opinion of the inspector, such facilities and/or equipment are inadequate for proper performance of the services covered by this solicitation. \* \* \*

"SECURITY REQUIREMENTS:

It shall be the responsibility of the United States Attorney's Office to conduct the necessary investigations and grant security clearances required for performance of this contract.

\* \* \* \* \*

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In the event the United States Attorney is unable to obtain or furnish a security clearance for the Contractor

by the beginning date of a proceeding, the Government reserves the right to obtain the required services from another source.

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"(b) Facility Security Requirements ---

The Contractor shall safeguard all elements of the contract classified 'Confidential', or higher, and shall provide and maintain a system of security controls within his own organization in accordance with the requirements of the Department of Defense Industrial Security Manual for Safeguarding Classified Information. (April, 1970 edition), and any amendments to said manual, notice of which is furnished to the Contractor by the Contracting Officer. \* \* \*

(The April 1970 manual has been superseded by a manual bearing the same title dated April 1974, which became effective April 1, 1974. The new manual reflects changes necessitated by the issuance of Executive Order 11652, "Classification and Declassification of National Security Information and Material.")

Four bids were opened on August 22, 1974. Bids were expressed as a percentage of prices set forth in a price schedule, and the bid of Acme Reporting Company (Acme) was low, followed by the bid of Capital Court Reporters (Capital), Ace-Federal Reporters (Ace-Federal), and Metropolitan Reporting Services. Pursuant to a determination and findings (D & F) dated September 11, 1974, the contracting officer found that the bids of both Acme and Capital "must be rejected for lack of capacity to perform services of the magnitude and security protection required by the United States Attorney." In the opinion of the contracting officer the number of full time reporters believed to be employees of the protesters was not sufficient to handle the estimated work load covered by the solicitation. With regard to Capital, the contracting officer also concluded that its equipment for transcribing material and the amount of office space it controls is inadequate for the volume of work anticipated under the contract. Further, Capital's security arrangements were found to be lacking at the time of inspection. With regard to Acme, Justice acknowledged that Acme possesses a secret security clearance granted by the Department of Defense (DOD) and that its Mosler safe conforms to DOD requirements for safeguarding classified information. However, it is Justice's opinion that Acme's "security storage facilities are not large enough

to handle the anticipated volume of Grand Jury material," and "a lack of attention to security requirements" was found by a Justice representative during a visit to Acme facilities referred to below. Although performance under the contract was not to begin until October 1, 1974, award was made to the third low bidder Ace-Federal on September 13, 1974, and by letters of the same date both Acme and Capital were notified of the rejection of their bids. Ace-Federal was notified of the award by letter dated September 20, 1974.

In their letters to our Office, both Acme and Capital protested against the rejection of their respective bids on the basis that the contracting officer's determination of lack of capacity to perform the magnitude of services required and provide the security protection called for in the solicitation was erroneous. Specific rebuttal to the deficiencies cited by United States Attorney for the District of Columbia was provided. These alleged deficiencies, which were based upon on-site inspections conducted on August 29 and 30, 1974, formed the basis for the contracting officer's determination. Further, Acme contends that as a small business concern the question of its responsibility should have been referred to the Small Business Administration (SBA) for possible issuance of a Certificate of Competency (COC) pursuant to Federal Procurement Regulations (FPR) § 1-1.708-2(a) (1964 ed.).

With regard to the latter point, it is Justice's view that deficiencies concerning "security" are excepted from the COC procedure by FPR § 1-1.708-2(a)(4), which provides that the referral procedure need not be followed where the nonresponsibility determination is for a reason other than capacity or credit.

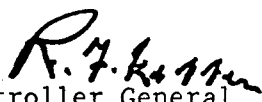
Recognizing that questions of responsibility are matters primarily for determination by the procurement agencies, we have upheld nonresponsibility determinations when the evidence of record reasonably provided a basis for such determinations. 51 Comp. Gen. 703, 709 (1972). However, with regard to a nonresponsibility determination based upon lack of capacity or credit of a small business concern, the contracting officer is required to submit the matter to the SBA before rejecting the bid, unless nonreferral is justified by one of the stated exceptions. FPR § 1-1.708-2. Justice correctly points out that one such exception is provided by subparagraph (4) where the nonresponsibility determination is for a reason other than capacity or credit. Examples of factors indicative of nonresponsibility which do not relate to capacity or credit referred to in subparagraph (5) are lack of integrity, business ethics, or persistent failure to apply necessary tenacity or perseverance to do an acceptable job. Furthermore, subparagraph (5) requires that a determination that a small business concern is nonresponsible for

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reasons other than deficiencies in capacity or credit must be supported by substantial evidence documented in the contract file, approved by the head of the procuring activity or his designee, and that a copy of the documentation supporting the determination shall be transmitted to SBA.

In the instant case, the evidence supporting Justice's determination concerning Acme's security deficiencies relates primarily to its equipment, facilities, and apparent lack of security procedures. The record contains no support for Justice's conclusionary statement, made after this issue was raised in the course of the protest, that these factors are not related to capacity but are within the noncapacity examples referred to in subparagraph (5). In addition, Justice did not comply with the requirement for transmitting a copy of the documentation to SBA.

In these circumstances, it is our conclusion that rejection of Acme's low bid without referral to SBA was improper. Therefore, we are advising Justice of our opinion that the question of Acme's capacity to provide the personnel and necessary security arrangements must now be submitted to SBA for consideration under the COC procedures. We are also recommending that the question of Capital's capacity be simultaneously submitted to the SBA so that in the event that the SBA is unable to issue a COC to Acme, Capital's eligibility may be determined. If the SBA issues a COC as to the subject services to either Acme or Capital, we are recommending that the remaining portion of Ace-Federal's contract be terminated for the convenience of the Government pursuant to such provisions of the contract and award for such terminated portion be made to the lower bidder receiving the COC.

  
Deputy Comptroller General  
of the United States