

DECISION

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

FILE: B-184692

DATE: March 31, 1976

MATTER OF: Howard Ferriell & Sons, Inc.

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98431**DIGEST:**

1. Determination of nonresponsibility because of lack of tenacity and perseverance based on prior default termination is proper notwithstanding prior termination is presently under appeal.
2. Urgency determination to award contract prior to period for appeal by SBA of nonresponsibility determination under ASPR § 1-903.1(iii) based on lack of tenacity and perseverance is not objectionable, notwithstanding contracting officer, in notice of award letter to rejected low bidder, cited ASPR § 1-705.4(c)(iv) as authority for such action because concluding sentence of ASPR § 1-705.4(c)(vi), the regulation applicable to § 1-903.1(iii) determinations, states that in urgency situation, § 1-705.4(c)(iv) procedures will apply.
3. Record before GAO adequately supports urgency determination by contracting officer to make award prior to possible appeal by SBA of nonresponsibility determination.
4. Fact that protester was not furnished preaward notice of the rejection of its bid provides no basis for protest since there is no ASPR requirement that such notice be given.

Howard Ferriell & Sons, Inc. (Ferriell), has protested to our Office the rejection of its bids under invitations for bids (IFB) Nos. DABT19-75-B-0069 and -0072, issued by Department of the Army, Fort Leavenworth, Kansas. IFB No. -0069 was for interior painting and IFB No. -0072 was for exterior painting of family housing units at Fort Leavenworth. Ferriell's low bids under both solicitations were rejected because of findings of nonresponsibility based on unsatisfactory prior contract performance. Ferriell has challenged these findings on numerous grounds.

Initially, Ferriell contends that the nonresponsibility determinations were based on the fact that it was defaulted on July 18, 1975, on one prior contract, which default it is presently appealing to the Armed Services Board of Contract Appeals (ASBCA)

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based on the allegation that the default was caused by Government action. Therefore, Ferriell argues that this default should not have been considered in the responsibility determination, while ignoring 5 years of prior satisfactory work performed by Ferriell at Fort Leavenworth.

Our Office has held that a termination for default is a proper matter for consideration in determining bidder responsibility notwithstanding a pending appeal from such termination. 43 Comp. Gen. 323 (1963) and B-178135, August 28, 1973.

Before award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. ASPR § 1-904.1 (1975 ed.). If the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible," a determination of nonresponsibility is required. ASPR § 1-902 (1975 ed.). ASPR § 1-903.1(iii) (1975 ed.) requires that a contractor must have a satisfactory record of performance. In this regard, past unsatisfactory performance, due to failure to apply necessary tenacity and perseverance to do an acceptable job is sufficient to justify a finding of nonresponsibility. However, when the prospective contractor is a small business and a determination of nonresponsibility is based on factors which do not relate to capacity or credit, the provisions of ASPR § 1-705.4(c)(vi) (1975 ed.) are applicable.

ASPR § 1-705.4(c)(vi) (1975 ed.) requires that a determination by a contracting officer that a small business concern is not responsible due to a lack of tenacity and perseverance in the performance of previous contracts, "must be supported by substantial evidence documented in the contract files." Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity, and is necessarily a matter of judgment involving a considerable degree of discretion, we will not object to a contracting officer's determination of lack of tenacity and perseverance when the evidence of record reasonably provides a basis for such determination. Kennedy Van & Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334. However, where a determination is made based upon an alleged lack of tenacity and perseverance and the evidence does not either relate to these factors, or does not adequately

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establish a basis for the determination, our Office will not uphold such determinations. 49 Comp. Gen. 600 (1970); 39 Comp. Gen. 868 (1960).

The evidence in support of the determination must be germane to the inquiry. A mere assumption or an unsupported statement by a contracting officer that a prospective contractor's past unsatisfactory performance resulted from a lack of tenacity and perseverance is insufficient for purposes of meeting the evidentiary test required. 49 *id.* 600; 43 Comp. Gen. 298 (1963). We have also recognized that the cumulative effect of various minor deficiencies which, when taken together, unduly increase the burden of administration from the Government's standpoint, can support a finding of nonresponsibility based, in appropriate circumstances, on lack of tenacity and perseverance. 49 Comp. Gen. 139 (1969). What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was reasonably necessary to resolve its problems. B-170224(2), October 8, 1970. We are concerned not with whether a firm has or can acquire the capability to perform, but whether a firm that is deemed to possess adequate capacity applies it in sufficient measure to insure satisfactory completion of the contract. 51 Comp. Gen. 288 (1971).

From our review of the record, we cannot say that the determination that Ferriell lacked tenacity and perseverance was arbitrary, capricious or lacked a reasonable basis. When the nonresponsibility determination was made with regard to IFB No. -0072, Ferriell was performing two contracts under which 10-day cure letters had been issued and when the determination was made under IFB No. -0069, one of the 10-day cure letters had resulted in a default termination. In this connection, we note that while the protester contends that any deficiencies in its performance were the fault of the Government, the record provides a reasonable basis for the contracting officer's conclusion that Ferriell's failure to make timely progress and to do an acceptable job on the two prior contracts resulted from its inadequate supervision and utilization of the painters in its employ rather than from factors related to capacity as enumerated in ASPR § 1-903.2(a) (1975 ed.). In these circumstances, there is no basis for our Office to object to the determinations.

Secondly, Ferriell argues that the contracting officer failed to follow the appropriate procedures contained in the Armed Services Procurement Regulation (ASPR) in finding it nonresponsible and, therefore, Ferriell was denied the opportunity to have the determination reviewed by the Small Business Administration (SBA).

The contracting officer found Ferriell to be nonresponsible on the basis of a "lack of tenacity and perseverance" under ASPR § 1-903.1(iii). Following the nonresponsibility determination, the contracting officer made a determination of urgency and awarded the two contracts in question to the next low bidder. In the urgency determination, the contracting officer cited ASPR § 1-705.4(c)(iv) as authority for not submitting the question of Ferriell's responsibility to the SBA for its possible appeal of the finding. Ferriell contends that ASPR § 1-705.4(c)(iv) is only applicable to a finding of nonresponsibility under ASPR § 1-903.1(ii).

On July 1, 1975, the contracting officer found Ferriell to be nonresponsible for IFB No. -0072 and forwarded the matter to the Louisville, Kentucky SBA District Office. On July 10, 1975, the contracting officer learned that the file should have been sent to the SBA Regional Office in Atlanta, Georgia. He contacted the Atlanta Office and discovered that under the SBA procedures it would be 20 days before award could be made. On July 22, 1975, he made the determination that award must be made without delay and on July 23, 1975, TRADOC concurred in the finding. On July 31, 1975, award was made to the second low bidder.

A similar series of events occurred in connection with IFB No. -0069 except that the matter was referred directly to the SBA Regional Office in Atlanta.

While Ferriell contends that the contracting officer should not have applied ASPR § 1-705.4(c)(iv), we note that the concluding sentence of ASPR § 1-705.4(c)(vi) states that if award must be made without delay, the procedures in ASPR § 1-705.4(c)(iv) shall apply. Therefore, our Office has no objection to the handling of this matter by the contracting officer.

Next, Ferriell argues that there was no urgency involved in the procurement and that the determination of urgency was employed merely to deny Ferriell its right to have the matter considered by the SBA.

Under IFB No. -0069, the solicitation for interior painting, the contracting officer determined that since most vacancies occurred during the summer months, the contract had to be awarded as soon as possible or the units would have to be painted while occupied or

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not be painted for 3 years (the usual tour of duty) when the units would be vacant again. Ferriell argues that the solicitation allowed for painting in either occupied or unoccupied units and therefore, there was no urgency attendant with the award. A review of the IFB shows that it was estimated that 20 percent of the work under the contract would be performed in occupied units. The bidders were permitted to add a percentage factor to their bids for working in occupied units. Accordingly, while work could be performed in occupied units, it was less expensive for the Government to have the work performed while the units were unoccupied. Based on the above, we have no reason to object to the urgency determination under IFB No. -0069.

The determination of urgency under IFB No. -0072, the solicitation for exterior painting, was grounded on the fact that the majority of the work should be performed before winter set in because if the award was delayed, the work would have to be postponed or the quality of the work would suffer because of the cold, wet winter weather. We find this also to be a reasonable determination.

Finally, Ferriell protests that its right to an effective remedy, namely a protest to our Office prior to award of a contract, was abrogated by the fact it was not advised of the nonresponsibility determination until after award was made to the second low bidder, two weeks after the nonresponsibility determination was made. In this regard, ASPR § 2-408.1 (1975 ed.) requires prompt notification to unsuccessful bidders that their bids have not been accepted. There is no requirement in ASPR that bidders be notified in advance of award as to the rejection of their bids. Gary Construction Company, Incorporated, B-181751, December 17, 1974, 74-2 CPD 357.

Accordingly, for the above reasons, the protest is denied.

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