

**DECISION**



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

60495

FILE: B-184856

DATE: February 10, 1976

MATTER OF: M.C. & E Service & Support Co., Inc.

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~~99342~~  
99130

**DIGEST:**

Contracting officer's determination that bidder is nonresponsible because of lack of perseverance and tenacity based on bidder's poor performance on recent contracts is sustained notwithstanding Small Business Administration's (SBA) appeal of that determination which was denied by head of agency. Fact that SBA disagrees with determination does not invalidate determination where documented evidence in record was sufficient to support determination.

The protester, the low bidder under invitation for bids No. DSC 76-18, issued by the Department of the Interior's Bureau of Land Management (BLM), Denver, Colorado, has protested the contracting officer's determination of its nonresponsibility because of past unsatisfactory performance under two prior contracts due to lack of perseverance and tenacity, and the consequential award to the second low bidder.

The protest is predicated primarily upon the protester's disagreement with some of the findings upon which the nonresponsibility determination was based, the contention that certain deficiencies were not its fault, and the assertion that of the six contracts performed with the subject agency, all but two have been performed to the satisfaction of agency personnel. With regard to the two contracts at issue, the protester contends that it undertook remedial action on the reported deficiencies so that a default termination was not imposed.

The contracting officer states that the determination not to award a contract to the protester was made pursuant to Federal Procurement Regulations (FPR) § 1-1.1203-1(c)(1964 ed. amend. 95), which provides that past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility. The basis for the determination in the instant case was provided by the contractor's performance under janitorial contracts at the BLM's Fairbanks, Alaska office for fiscal years 1974 and 1975, contract

numbers 52500-CT4-48 and 52500-CT5-14 respectively. The contracting officer has furnished the following narrative summary of the project logs and instructions to the contractor for each of those contracts:

"\* \* \* Under Contract No. 52500-CT4-48 covering \* \* \* fiscal year \* \* \* 1974, \* \* \* eight (8) Instructions to Contractor (BLM form 9100-1c) were issued and over 20 telephone calls were made to the contractor pointing out deficiencies and/or requiring corrective action. These deficiencies included leaving the front door unlocked, improper cleaning of floors, walls, doors, rest rooms, and carpets; not watering plants, not replacing burned out fluorescent tubes; leaving chairs upended; and not properly stocking towels and toilet paper.

"Under Contract No. 52500-CT5-14 covering \* \* \* fiscal year \* \* \* 1975, \* \* \* a total of twenty-one (21) written Instructions to Contractor were issued citing contract deficiencies. Numerous meetings, telephone calls, and inspection tours were made with the contractor in a continuing effort to bring the janitorial work to an acceptable level of performance. Many of the deficiencies were similar to those noted under the previous years' contract, but also included other areas such as erratic snow and ice removal from walkways and steps and the use of child labor in the performance of custodial duties."

As a result of the deficiencies observed in the contractor's performance of the fiscal year 1975 contract, a 10-day "cure notice" was issued. Although the contractor apparently improved his performance sufficiently to avoid a termination for default, additional deficiencies were observed during the remainder of the contract. The record shows that the contractor and the agency disagreed, in the majority of instances, as to the existence of the deficiencies.

The contracting officer concluded:

"From the review made of the two previous contracts held by M. C. & E. Service and Support Company, Inc., it was apparent that the firm lacked the necessary perseverance, integrity and tenacity to perform an acceptable job without an inordinate amount of Government supervision. Significant administrative costs were

incurred by the Government in working with the contractor to assure that the minimum requirements of the contract would be met. Further, the inadequate service of the contractor imposed unnecessary hardship and hazards to BLM employees and visitors as well as presenting an unsatisfactory appearance to the general public."

As required by FPR § 1-1.708-2(a)(5)(i)(1964 ed. amend. 71), a copy of the determination of nonresponsibility (for other than deficiencies in capacity or credit) involving this small business concern and the supporting file were transmitted to the Small Business Administration (SBA) for possible appeal. In the instant case the SBA did appeal the contracting officer's determination. In such instances, FPR § 1-1.708-2(a)(5)(v)(1964 ed. amend. 119) provides that if the contracting officer does not agree with the SBA position, he shall then forward the determination to the head of the procuring activity or his designee for resolution, with an explicit indication of his views and the contrary SBA position. The decision of such higher authority shall be final.

In compliance with the foregoing, the contracting officer forwarded the record and stated the reasons for his disagreement with SBA's appeal. In a memorandum dated August 22, 1975, the Acting Chief, Branch of Procurement, concurred with the contracting officer's determination of nonresponsibility, and the protester was so notified by letter of August 25, 1975, subsequent to which the protester filed a timely protest with this Office.

The SBA argued in its appeal that its investigation indicated that all deficiencies were corrected and that in the service contract realm, the contract value does not support "gold plated" treatment by a contractor. It was requested that consideration be given to the protester's satisfactory performance on the other four contracts, and it was noted that no default had been experienced under the two contracts at issue.

In forwarding SBA's appeal, the contracting officer stated that he had not changed his position after review of the appeal. While conceding that it was impossible to write a specification to state precisely the degree of proficiency to be required for the services being furnished, he stated that there was, within the industry, a level of proficiency that is considered professional and which constitutes a generally acceptable level of performance. It was his opinion that BLM had not been receiving this level from the protester for the prior 2 years, notwithstanding that BLM had "bent-over-backwards" for the protester and given it sufficient opportunity to bring its performance standards up to an acceptable level.

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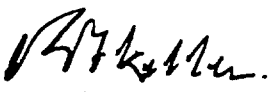
He also disagreed with SBA's assertion that all deficiencies had been corrected, pointing out that in various instances, repeated requests, both oral and written, were required to rectify deficiencies such as empty toilet tissue and towel dispensers, unremoved ice and snow from walkways, unremoved debris, unswept floors and stairways, and insufficient dusting. Our review of the project logs and instructions to the contractor corroborates the foregoing.

FPR § 1-1.708-2(a)(5)(1964 ed. amend. 71) requires that a determination by a contracting officer that a small business concern is nonresponsible due to lack of tenacity and perseverance in the performance of previous contracts must be supported by substantial evidence documented in the files.

Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity, and is therefore necessarily a matter of judgment involving a considerable degree of discretion, we will not object to a contracting officer's determination of lack of perseverance and tenacity when the substantial evidence of the record reasonably provides a basis for such determination, Kennedy Van and Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334. We have also recognized that the cumulative effect of various minor deficiencies which, when taken together, unduly increase the administrative burden from the Government's standpoint, may support a finding of nonresponsibility based on lack of tenacity and perseverance. 49 Comp. Gen. 139 (1969).

From our review of the entire record, including SBA's appeal, we are unable to conclude that the evidence in the record would not support the determination of nonresponsibility in the instant case. While reasonable persons might disagree by interpreting identical factual matters relative to perseverance and tenacity differently, our Office will not substitute its judgment for that of contracting officials absent a flagrant or unreasonable abuse of discretion. See Consolidated Airborne Systems, Inc., B-183293, December 16, 1975, 55 Comp. Gen. \_\_\_\_, 75-2 CPD 395.

Since the record in the instant case elaborately documents the numerous reported deficiencies, we find that it fails to indicate any such abuse of discretion. In view thereof, the protest must be denied.

  
Deputy Comptroller General  
of the United States