

DECISION



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

FILE: B-185025

DATE: August 2 1976

MATTER OF: Kahn's Bakery, Inc.

61253

98771

DIGEST:

Contracting officer's determination of nonresponsibility for lack of integrity based on plea of nolo contendere to charges of anti-trust violations, which SBA declines to appeal, will not be reviewed absent showing of bad faith or fraud on part of contracting officials notwithstanding affirmative determinations of responsibility by another contracting officer in similar situation because of inability to satisfy requirement from another source.

Kahn's Bakery, Inc. has protested the award of contract No. DSA13-76-B-K018 by the Defense Supply Agency, Defense Personnel Support Center (DPSC), Defense Subsistence Region, New Orleans, Louisiana to Holsum Baking Company for the supply of bakery goods to Fort Bliss, Texas.

The procurement was a formally advertised small business set-aside. Kahn's Bakery was the low bidder on several of the advertised bakery items. However, the contracting officer found Kahn nonresponsible under Armed Services Procurement Regulation (ASPR) 1-903.1(iv) for lack of integrity because the firm had entered a plea of nolo contendere to an indictment in the U.S. District Court, Western District of Texas, El Paso Division, charging it with conspiracy in restraint of trade and commerce. The indictment charged in part, that defendants conspired "to submit collusive and rigged bids to Government agencies * * *."

After this determination had been concurred in by Headquarters, DPSC, the cognizant Small Business Administration (SBA) office was advised of the determination. Following advice from SBA that it would not appeal the determination of nonresponsibility, the contract for the items in question was awarded to the second low bidder, Holsum Baking Company.

This Office has held that the SBA provides bidders with a meaningful and expeditious procedure by which a dispute concerning a bidder's alleged lack of perseverance, integrity,

or tenacity (sometimes referred to as tenacity or perseverance) may be appealed to the head of the procuring agency. Where the SBA finds no basis to appeal, the contracting officer's determination of nonresponsibility generally should be regarded as persuasive. Therefore, we will not undertake to review such a determination by the contracting officer unless there is a compelling reason to justify such action, such as a showing of bad faith or fraud on the part of the administrative officials involved. Turner & Fraley, Inc., et. al., B-183308, April 30, 1975, 75-1 CPD 271; Building Maintenance Specialists, Inc., 54 Comp. Gen. 703 (1975), 75-1 CPD 122.

However, Kahn's alleges that there has been bad faith shown on the part of the procuring activity. Kahn's points out that the Oakland Regional Office of the Defense Supply Agency (DSA) has continued to contract with bakery companies in Arizona which have been convicted of similar anti-trust violations. DSA has explained that those bakeries were determined to be responsible "because there was no other source of supply in the State of Arizona and, therefore, no practical alternative to doing business with the involved bakeries." Kahn's alleges that the result of following such a policy is to permit contracting with firms that have so egregiously violated the anti-trust laws that there is absolutely no competition in the market, while refusing to contract with firms such as Kahn's who have been convicted of anti-trust violations but where competition has not been prevented.

Whether evidence of a bidder's lack of integrity is sufficient to warrant a finding of nonresponsibility in a particular procurement is a matter primarily for determination by the contracting officer involved. 51 Comp. Gen. 703, 709 (1972). A plea of nolo contendere to a criminal indictment in a similar situation has been held to justify a nonresponsibility determination, Colonial Baking Company, B-185305, July 20, 1976, 76-2 CPD _____. Therefore, we conclude that the responsibility determination was reasonable. The inconsistent action in Arizona also appears to have a reasonable basis. In any case, an improper action in the Arizona situation would not justify an improper action here.

Kahn's also questions "whether or not the contracting authority in New Orleans advised the SBA and the head of the procuring activity of DSA with full and complete candor * * *" of all the pertinent facts. Kahn's alleges that the grand jury

B-185025

testimony of two procurement officers was favorable to Kahn's. Kahn's was not able to communicate this information to SBA since it was secret grand jury testimony. However, the facts behind the testimony were known to DSA and could have been divulged by DSA. Kahn's alleges that DSA did not furnish these facts to SBA.

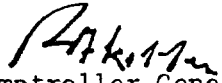
We believe that DSA has supplied SBA with sufficient evidence to support its determination of nonresponsibility as required by ASPR 1-705.4(c)(vi). Although we are not permitted to reveal the grand jury testimony in question, we have studied the record and have concluded that the testimony would not have provided a substantial basis for a different SBA decision.

In a subsequent procurement at another Air Force base, SBA did appeal a determination that Kahn's was nonresponsible for lack of integrity. Kahn's argues that this is evidence that SBA was not properly informed of all the facts in the case at hand. However, SBA's different approach is consistent with our own view that a single conviction cannot be used continuously to justify a nonresponsibility determination since that would amount to a debarment without compliance with the required procedure. 43 Comp. Gen. 140 (1963).

Kahn's further alleges that the finding of nonresponsibility on the basis of a plea of nolo contendere to an anti-trust indictment is contrary to the policy of ASPR 1-604 which states that debarment is for the purpose of protecting the interest of the Government and not for punishment. Kahn's states that since Kahn's will be punished in the criminal lawsuit and any damages suffered by the Government will be awarded to the Government in the pending civil suit, the finding of nonresponsibility is merely another method of punishment. Since debarment is not at issue in this protest, ASPR 1-604 does not apply. However, we note that a decision not to award a contract to the low bidder because it lacks a satisfactory record of integrity is not a punishment but is the fulfillment of the requirement of ASPR § 1-903.1(vi). See Colonial Baking Company, supra.

Accordingly, the protest is denied.

Deputy


Comptroller General
of the United States