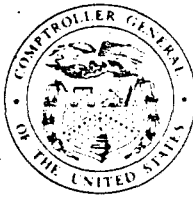


DECISION



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

FILE: B-186211

DATE: August 26, 1976

MATTER OF: R & T Construction Co., Inc.

DIGEST:

Determination that low bidder was nonresponsive based on poor performance under prior contracts is not subject to objection because determination of responsibility primarily rests with contracting agency and record does not show an abuse of such discretion. Cumulative effect of performance deficiencies noted in record unduly increased burden of administration from agency's standpoint.

Invitations for bids (IFBs) Nos. DHCD-DA-2112 and DHCD-DA-2114 were issued by the Department of Housing and Community Development (DHCD) of the District of Columbia Government for demolition and site clearance work in the Shaw School Urban Renewal Area of Washington, D.C. The R & T Construction Company, Inc. (R & T) was found to be low bidder. However, the contracting officer, after determining that R & T's performance on prior contracts had been unsatisfactory and that R & T therefore was not a responsible prospective contractor, awarded the contracts to the second low bidders.

The contracting officer's determination was based upon R & T's poor performance under contracts awarded by DHCD for the razing of buildings similar to those to be razed under the subject contracts. The poor performance included failure to perform in a timely manner making it difficult for DHCD to determine in advance when the work would be finished so that other redevelopment activities could be expeditiously undertaken; the unorthodox method of operation of the contractor that created serious safety problems; and R & T's inability to work responsibly with members of DHCD particularly in its unresponsiveness to instructions, directions, and requests of DHCD staff charged with administering such work.

After the contracts were awarded, R & T protested on the grounds that DHCD has an inherent bias against it which is reflected in the arbitrary and capricious actions of DHCD personnel. R & T admits that it was late in performing two contracts.

However, it asserts that its late performance was due to change orders issued by DHCD and that liquidated damages were assessed to cover the situation. Furthermore, R & T alleges that other contractors for DHCD have been late and have not been disqualified from further bidding. R & T states that it has never had an accident involving personal injury, and that other contractors who have had such accidents have been determined responsible bidders. R & T also gives examples of property damage caused by other contractors. R & T asserts that it was unfairly treated in that DHCD did not pay for work that was completed in a timely manner and that it was denied documents that would show granting of time extensions to other demolition contractors and accident reports of other contractors.

The District of Columbia Government was guided by the principle set forth in the Federal Procurement Regulations (FPR) that before a low bid may be accepted, the contracting officer must make an affirmative determination as to the responsibility of the prospective contractor. FPR § 1-1.1204-1 (1964 ed. amend. 95). A prospective contractor must have a satisfactory record of performance. "Contractors who are or have been seriously deficient in current or recent contract performance, when the number of contracts and the extent of deficiency of each are considered, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, shall be presumed to be unable to meet this requirement. Past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility." FPR § 1-1.203-1(c) (1964 ed. amend. 95). If the information available to the contracting officer does not indicate clearly that a prospective contractor is responsible a determination of nonresponsibility shall be made. FPR § 1-1.202(d) (1964 ed. amend. 95).


Our Office has consistently held that the question whether a prospective contractor is to be considered responsible should be a matter primarily for determination by the contracting officer involved since he is in the best position to assess responsibility and must bear the brunt of any difficulties experienced in obtaining required performance. Such determination should be accorded finality absent a clear showing of bad faith or lack of a reasonable basis therefor. See Hydromatics International Corporation, B-181240, September 4, 1974, 74-2 CPD 142, 49 Comp. Gen. 139, 145 (1969), and 39 Comp. Gen. 705, 711 (1960).

Our examination of the record does not support R & T's allegation that the actions of DHCD were arbitrary and capricious. The assessment of liquidated damages did not correct R & T's untimely performance,

and as indicated above performance on past contracts is an important factor in determining responsibility. Other demolition contractors have been late in their contract performance at some time and assessed liquidated damages. However, DHCD's view of the facts as a whole led to the determination that these other contractors were responsible. Also, the record in the case does not substantiate R & T's claim that vouchers for payment were not processed in a timely manner or that DHCD was uncooperative in providing R & T with requested documents. DHCD states that it recognizes that accidents may occur in the performance of demolition work, and by contract requirements and by surveillance of the contractor's performance seeks to decrease the incidence of accidents. We are advised that while none of the personal injury accidents and a minority of the accidents involving property damage caused by other contractors mentioned by R & T involved contract violations, all sixteen of the accidents experienced by R & T involved contract violations. The record indicates that R & T repeatedly failed to take timely corrective action to remedy safety problems when they were brought to R & T's attention by DHCD.

The results of R & T's performance under contracts awarded by DHCD which are detailed in the record indicate that there was a reasonable basis for the agency to conclude that the contractor's capacity to provide timely performance, for meeting the specifications of the contract, and for having due regard for the safety of the public are seriously deficient. While some of the performance deficiencies noted in the record may have been minor when considered individually, the cumulative effect was to unduly increase the burden of administration from DHCD's standpoint. See Kennedy Van and Storage Co., Inc., B-180973, June 19, 1974, 74-1 CPD 334. Therefore, there being no showing that the contracting officer's determination was reached in bad faith, it will not be questioned by our Office.

Accordingly, the protest is denied.


Acting Comptroller General
of the United States