

DECISION



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

61552

FILE: B-186426

DATE: September 27, 1976

MATTER OF: Zinger Construction Co., Inc.

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DIGEST:

Where SBA declines to appeal contracting officer's determination of nonresponsibility as to bidder's tenacity, perseverance or integrity, GAO will not review the contracting officer's determination in the absence of a compelling reason to justify such review, such as a showing of bad faith or fraud by procuring officials.

The U.S. Army Engineer District, New York, issued invitation for bids DACA51-76-B-0039 for water quality monitoring facilities at Picatinny Arsenal, Dover, New Jersey. The bids were publicly opened on March 24, 1976. The three lowest responsive bidders were:

Zinger Construction Co., Inc. (Zinger)	\$278,228
Stellar Manufacturing Co.	290,405
Birch-Mont, Inc.	295,000

During his pre-award survey, the contracting officer made a determination pursuant to ASPR § 1-903.1(iii) (1975 ed.) that Zinger, a small business concern and apparent low bidder, lacked the tenacity and perseverance to perform the contract. The contracting officer's determination was based on unsatisfactory performance ratings given Zinger for work performed for the Corps District on other contracts.

In accordance with ASPR § 1-705.4(c)(vi) (1975 ed.) the Corps informed the Regional Manager of the Small Business Administration (SBA) and the Army Small Business Advisor of the contracting officer's nonresponsibility determination. The Assistant Regional Director of the Small Business Administration subsequently notified the District Engineer that SBA would not appeal the nonresponsibility determination pertaining to Zinger.

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The District Engineer concurred with the nonresponsibility determination and, in accordance with ASPR § 1-705.4(c)(vi) (1975 ed.), requested through the Division Engineer to the Chief of Engineers that the determination be approved. The Deputy Chief of Engineers approved the determination.

In sum, the agency seems to have complied with the procedural requirements pertaining to the issuance of a nonresponsibility determination affecting a small business concern.

On April 27, 1976, Zinger sent a mailgram to the contracting officer and to our Office protesting award to any bidder other than itself, alleging in part that such nonresponsibility determination was not justified under the circumstances of this case.

Our decision here is controlled by our prior opinions involving Kahn's Bakery, Inc., B-185025, August 2, 1976, 76-2 CPD 106; Turner & Fraley, Inc., et al., B-183308, April 30, 1975, 75-1 CPD 271; and Building Maintenance Specialists, Inc., et al., 54 Comp. Gen. 703 (1975), 75-1 CPD 122 (B-181986, February 28, 1975).

In each of the above cases, the contracting officer made a determination of nonresponsibility based on the bidder's lack of tenacity, perseverance or integrity and, in each case, the SBA did not appeal the contracting officer's determination. We held in substance in the referenced cases that SBA procedures provide bidders with a meaningful and expeditious procedure for appealing to the head of the procuring agency the contracting officer's determination that the bidder lacked perseverance, integrity or tenacity. Consequently, we concluded that where the SBA declines to appeal the contracting officer's determination, this Office will not undertake a review of the determination 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. After carefully reviewing the administrative record, we find no such reason here.

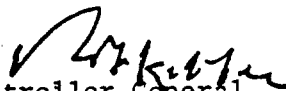
We have fully considered the arguments of Zinger's counsel in his letter of July 8, 1976, where it is alleged that (1) SBA declined to appeal the contracting officer's determination of nonresponsibility because it was felt that any appeal would be futile and (2) SBA procedures concerning the review of nonresponsibility determinations were not followed.

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We cannot, however, reverse our position here simply on the basis of such allegations. ASPR § 1-705.4(c)(vi) (1975 ed.) vests broad discretionary authority in the SBA to appeal or not to appeal nonresponsibility determinations. Where such broad discretionary authority is vested in an agency, this Office, like the courts, will grant the greatest deference to the agency's decision. See, New York Funeral Services, 53 Comp. Gen. 143 (1973), and cases cited therein.

Consequently, the protest is denied.

Deputy


Comptroller General
of the United States