



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Service Deli, Inc.

File: B-276251

Date: March 14, 1997

David P. Metzger, Esq., and Timothy J. Bloomfield, Esq., Holland & Knight, for the protester.

Richard D. Lieberman, Esq., Sullivan & Worcester LLP, for Tony's Fine Foods, an intervenor.

Janet D. Kaminski, Esq., and Rexford T. Bragaw III, Esq., Defense Commissary Agency, for the agency.

Andrew T. Pogany, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Determination by contracting officer that offeror, should it be in line for award, would be nonresponsible for lack of integrity because of criminal conviction in connection with obtaining, attempting to obtain, or performing a public contract is reasonable and therefore offeror is not an interested party to protest evaluation of proposals since it would not receive award in any event.

DECISION

Service Deli, Inc. protests the award of a contract to Tony's Fine Foods under request for proposals (RFP) No. DECA02-96-R-0017, issued by the Defense Commissary Agency for personnel, supervision, food products and supplies required to operate commissary deli/bakeries in three Southwest Region clusters. Service Deli, whose proposal was ranked fourth of five after final evaluation, contends that the agency miscalculated Tony's and its own technical, past performance and price proposals and that its proposal should have been evaluated and ranked as most advantageous and as superior from a technical, experience, and price standpoint to the proposal of the successful offeror.

We dismiss the protest.

The contract was awarded to Tony's on February 6, 1997. The agency has requested that our Office dismiss the protest because "[o]n January 29, 1997 [approximately one week before the award] the United States District Court of the Southern District of California convicted the [protester corporation] of violating 18 U.S.C. § 1001 by making a false statement to the Defense Commissary Agency."

The agency has also submitted a letter from the Department of Justice, Antitrust Division, dated February 25, 1997 confirming the criminal conviction of Service Deli by a jury in the Southern District of California on January 29 (Criminal Case No. 96-1792 LCN). The agency argues that a "criminal conviction involving fraud or false statement connected with a contract is [a] per se basis for a nonresponsibility determination." The agency has also submitted a written statement by the contracting officer stating that even if Service Deli's proposal had been considered to be most advantageous based on technical, past performance, and price, he would have found the firm to be nonresponsible based on the criminal conviction of the corporation.¹ Consequently, the agency concludes that Service Deli is not an interested party to pursue this protest because the firm has no chance of receiving the award under any circumstances.

Service Deli argues that the contracting officer's statement does not constitute an actual nonresponsibility determination but is merely speculative. The protester also argues that it "believes" the contracting officer (who executed the statement on February 25, 1997) is no longer employed by the agency. The protester also states that the criminal conviction was based on false statements made by its former president 3½ years ago and that this individual left the company more than 3 years ago. The protester insists that its present management has "honesty and integrity."

No purchase or award may be made unless the contracting officer makes an affirmative determination of responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer is required to make a determination of nonresponsibility. Federal Acquisition Regulation (FAR) § 9.103 (FAC 90-43). To be determined responsible, the firm must have a "satisfactory record of integrity and business ethics." FAR § 9.104-1(d). The question as to whether evidence of an offeror's lack of integrity is sufficient to warrant a finding in a particular case that the offeror is not responsible is a matter primarily for determination by agency officials, and such determination will not be questioned by our Office in the absence of a showing of a lack of a reasonable basis for that determination. Colonial Baking Co., B-185305, July 20, 1976, 76-2 CPD ¶ 59, and cases cited therein.

Whether an offeror has a satisfactory record of integrity may properly be determined on the basis of the causes and conditions for the suspension of offerors enumerated in the procurement regulations. Id. FAR § 9.407-2(a)(1) (FAC 90-37) enumerates "[c]ommission of fraud or a criminal offense in connection" with obtaining, attempting to obtain, or performing a public contract as a cause for suspension. Such a criminal offense also constitutes a cause for debarment. FAR § 9.406-2(a)(1) (FAC 90-41). Thus, a criminal conviction in connection with a public

¹None of the parties contends that Service Deli is a small business.

contract is a basis for determining a firm to be nonresponsible. While the protester argues that the criminal act occurred 3 years ago and therefore should not be controlling as to its responsibility now, the corporation was convicted in January 1997. Since it is the conviction that establishes under the law that the criminal offense was committed by the party convicted, it is only logical that the conviction is an appropriate matter for the contracting officer to consider in determining responsibility. The fact that the time period between the commission of the corporate criminal act and the resulting conviction is considerably lengthy does not preclude the contracting officer from determining the convicted party nonresponsible; any other rule would effectively preclude nonresponsibility determinations by contracting agencies where the criminal judicial process, consistent with due process requirements, is lengthy and litigious.

The agency has formally represented to our Office that it would find Service Deli to be a nonresponsible firm, and under the circumstances we would view such a determination as reasonable. Accordingly we find that Service Deli does not have a direct economic interest in this procurement should its protest be sustained, as required by our Bid Protest Regulations, § 21.0(a), 61 Fed. Reg. 39039, 39042 (1996) (to be codified at 4 C.F.R. § 21.0(a)).

The protest is dismissed.

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