

DOCUMENT RESUME

03337 - [A2433565]

[Company Determined to Be Nonresponsible on the Basis of Past Unsatisfactory Performance]- B-189242. August 29, 1977. 2 pp. + enclosure (1 pp.).

Decision re: Carl Weissman & Sons, Inc.; by Milton Socolar (for Paul G. Dembling, General Counsel).

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (05B).

Organization Concerned: Century Hardware Corp.; Department of the Air Force: Malmstrom AFB, MT.

Authority: A.S.P.R. 1-705.4(c)(vi). A.S.P.R. 1-903.1. 54 Comp. Gen. 66. B-181986 (1975). B-186426 (1976).

Company protested agency determination that it was nonresponsible and that the competitor awarded the contract was responsible. Determinations of nonresponsibility based on alleged lack of integrity, tenacity or perseverance are not reviewed, except when bad faith or fraud is alleged. Affirmative determinations of responsibility are not reviewed absent alleged fraud or failure to apply definitive responsibility criteria.

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DECISION



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

FILE: B-189242

DATE: August 29, 1977

MATTER OF: Carl Weissman & Sons, Inc.

DIGEST:

1. GAO will not consider protest against affirmative determination of responsibility absent allegation of fraud on contracting officer's part or failure to apply definitive responsibility criteria contained in solicitation, neither of which is present in this case.
2. GAO will not review determination of nonresponsibility based on lack of integrity, tenacity or perseverance where CBA declines to contest that determination pursuant to regulation, absent showing of bad faith or fraud on part of procuring officials, which has not been alleged or shown here.

The Department of the Air Force, Strategic Air Command, Malmstrom Air Force Base, Montana (Air Force), issued invitation for bids (IFB) F24604-77-09013 on January 5, 1977, for management of its Contractor Operated Civil Engineer Supply Store (COCESS). The incumbent, Carl Weissman & Sons, Inc., was the low bidder, and the Century Hardware Corporation (Century) was the second low bidder.

The contracting officer determined that Weissman was non-responsible on the basis of past unsatisfactory performance due to a lack of tenacity and perseverance pursuant to Armed Services Procurement Regulation (ASPR) § 1-903.1(iii) (1975 ed.), and an unsatisfactory record of integrity pursuant to ASPR § 1-903.1(iv). This determination was based on problems encountered in Weissman's performance of its current contract at Malmstrom, and also at other Air Force installations. The Air Force provided the Small Business Administration (SBA) Region VIII with a copy of the determination of nonresponsibility and supporting documents, as required by ASPR § 1-903.1(i) (1976 ed.). The SBA stated that based on its review of the determination, it would not appeal on Weissman's behalf.

The contracting officer determined that Century was the low, responsive, responsible bidder and awarded it the contract.

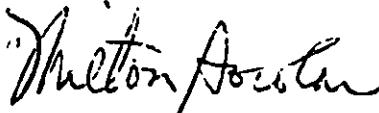
Weissman protests both the determination that it was nonresponsible, and that Century was responsible. Weissman admits that there have been problems under its current contract, but maintains that sufficient efforts to cure these problems have been made. Weissman basically argues that the Air Force has encountered similar problems with Century's performance, and that the determination that Century is responsible and Weissman nonresponsible is discriminatory.

With regard to the latter point, our Office will not consider protests against affirmative determinations of responsibility absent allegations of fraud on the part of the contracting officer, or failure of procuring officials to apply definitive responsibility criteria contained in the solicitation. Central Metal Products, Inc., 54 Comp. Gen. 66 (1974), 74-2 CPD 64. Weissman has stated in its letter of July 22, 1977, that it was not alleging fraud. Also, there was no allegation of failure to apply definitive responsibility criteria. Therefore, we will not review this contention.

With regard to the negative determination concerning the protester, as a general rule, our Office will not review determinations of nonresponsibility based on alleged lack of integrity, tenacity or perseverance where SEA declines to contest that determination pursuant to regulations, unless there is a compelling reason to justify review, such as a showing of bad faith or fraud on the part of procurement officials. Zinger Construction Company, B-186426, September 27, 1976, 76-2 CPD 288; Building Maintenance Specialists, Inc., B-181986, February 28, 1975, 75-1 CPD 122.

Weissman has stated that the determination of tenacity and perseverance is a matter of opinion, that the contracting officer has not exercised sound, prudent judgment, and has presented its interpretation of the record. It has not, however, alleged or shown that the determination of nonresponsibility was the result of bad faith or fraud. Therefore, we will not review the determination.

Accordingly, the protest is dismissed.

for 
Paul G. Denbling
General Counsel



UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

W. Witherspoon
Proc. I

OFFICE OF GENERAL COUNSEL

IN REPLY
REFER TO

B-189262

AUG 29 1977

The Honorable John Melcher
United States Senate

Dear Senator Melcher:

We refer to your letter of August 3, 1977, expressing interest in the protest by Carl Weisman & Sons, Inc., under invitation for bids F24604-77-09013, issued by the Department of the Air Force, Strategic Air Command, Malmstrom Air Force Base, Montana. Please find enclosed a copy of our decision of today, dismissing the protest.

Sincerely yours,

MILTON SOCOLAR

For: Paul G. Dowling
General Counsel

Enclosure