



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Action Building Systems, Inc.
File: B-235583; B-235584
Date: September 19, 1989

DIGEST

Protest that a contracting officer's determination of nonresponsibility based on unsatisfactory performance on current contracts was made fraudulently or in bad faith is denied where the protester does not challenge negative agency report concerning its performance which provides an independent basis to find the firm nonresponsible.

DECISION

Action Building Systems, Inc., protests the rejection of its bids under invitation for bid (IFB) Nos. GS-09P-89-KSC-0019 and GS-09P-89-KSC-0099, issued by the General Services Administration (GSA). The protester contends that the agency acted fraudulently or in bad faith in finding Action to be nonresponsible based on unsatisfactory performance under its current contracts.

We deny the protest.

On March 9, 1989, the protester submitted the lowest of three bids received under the first IFB, for providing janitorial and related services to include grounds maintenance at the U.S. Border Station in Calexico, California. On April 5, the protester submitted the lowest of five bids received under the second solicitation, for janitorial and related services at three locations in Tucson, Arizona.

After receiving reports from the contracting officer's representatives (CORs) at Calexico and at the agency's San Diego field office that the protester's performance was unsatisfactory on its current building maintenance contracts, the agency determined the protester to be nonresponsible. The contracting officer referred that determination to the Small Business Administration (SBA) for consideration under SBA's certificate of competency (COC) procedures. Based upon its internal operating procedures, which declare a firm ineligible for COC consideration where

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principals have been convicted of certain offenses, the SBA refused to consider the protester's application for a COC.^{1/} This protest followed.

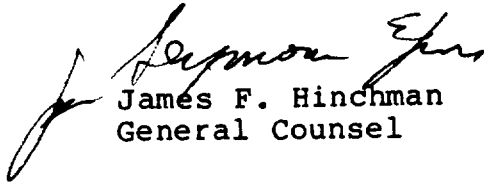
The protester essentially argues that one individual, the COR at GSA's San Diego field office, who supplied information on Action's current performance, was involved in a deliberate and willful scheme to deny Action the award of the two contracts. Concerning its current building maintenance contracts, Action believes that considering the age of the buildings and the difficulty of the tasks involved, the deductions for inadequate performance on its contracts were not excessive; the protester states that on several occasions, the COR in San Diego stated that Action was doing a good job on its contracts. Action faults the agency for not considering its successful performance under other contracts and for relying solely upon the adverse information provided by the COR at the San Diego field office. The protester believes that this COR's statements and actions in administering the protester's contracts are inconsistent with the information that the COR provided to the contracting officer. Action considers this inconsistency, along with a statement by the COR that the protester would "never get this contract again," to be evidence of fraud or bad faith.

To make a "showing" of fraud or bad faith, we require the protester to present facts that reasonably indicate that the government actions complained of were improperly motivated. See Vanguard Indus., Inc., B-233490.2, Dec. 21, 1988, 88-2 CPD ¶ 615. Here, regardless of the protester's allegations of bias against the one individual, the COR in San Diego, the record shows that the contracting officer, in making his determination of nonresponsibility, relied upon other sources as well. For example, Action does not challenge the negative recommendation of the COR at Calexico, which contained independent grounds for the contracting officer to

^{1/} Specifically, these offenses include those listed in Federal Acquisition Regulation §§ 9.406-2(a) and 9.407-2(a) (FAC 84-43). The president of Action had received a sentence of 3 years probation for violating California water pollution statutes; after reviewing information regarding the charges, the SBA regional office determined that under its standard operating procedures, Action was ineligible for COC consideration. The protester admits that the SBA acted in good faith in finding the firm ineligible for a COC.

find Action to be nonresponsible. Therefore, the protester has failed to present facts that reasonably indicate the contracting officer's determination was improper or unreasonable.

The protest is denied.



James F. Hinchman
General Counsel