

**DECISION**



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

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FILE: B-179026

DATE: January 25, 1974

MATTER OF: Harper Enterprises

**DIGEST:** Where bidder denied a certificate of competency by Small Business Administration (SBA) while bidder had just 2 days prior to denial entered into a joint venture agreement to obtain necessary resources to perform, and where contracting officer's attempted rereferral to SBA not accepted since SBA questioned responsiveness of bid vis-a-vis joint venture and SBA also indicated that no new evidence had been produced; notwithstanding fact that SBA stated bidder could possibly perform if joint venture allowed, contracting officer should not have ignored joint venture agreement in determining responsibility of bidder and joint venture agreement should be reassessed to determine responsibility of bidder.

Award for continuing services to incumbent contractor during pendency of protest was not inappropriate since it did not deprive protesting bidder of contract in that agency has indicated it will terminate awarded contract for convenience of Government and make award to protesting bidder if protest is sustained.

Invitation for bids (IFB) No. DAHC23-73-B-0048 was issued by the Military Traffic Management and Terminal Service on May 25, 1973. The subject IFB sought to procure janitorial services to be performed at the Oakland Army Base, Oakland, California, and Fort Mason in San Francisco, California.

Award of the schedule "B" (Fort Mason) portion of the IFB has been awarded to the Dependable Janitorial Service (Dependable) pursuant to a schedule severability provision in the solicitation and Harper does not question this award. However, Harper does question the agency's actions with regard to schedule "A" (Oakland Army Base). Schedule "A" of the IFB was awarded to the second low bidder (Dependable) prior to our issuance of a decision since the Army made a determination per ASPR 2-407.8(b)(3)(iii) in that prompt award would be advantageous to the Government.

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Harper, the apparent low bidder on schedule "A," submitted a bid which gave rise to a contention by Dependable that Harper's responsibility

was questionable. While the contracting officer states that Harper's bid was 10 percent lower than Dependable's--the next low bidder--it was only 3 percent below the Government estimate. Further, his subsequent item-by-item review and evaluation of Harper's prices did not cause him to view Harper's prices as unreasonably low.

Nonetheless, the matter of Harper's responsibility was submitted to the Small Business Administration (SBA) for its determination regarding the issuance of a certificate of competency (COC).

In a letter dated July 27, 1973, the SBA's regional office stated that:

"Based on a comprehensive analysis of all available information this Agency has declined to issue a Certificate of Competency in this instance."

However, prior to this date, on July 25, 1973, Harper had entered into an arrangement with Tri-City Building Services, Inc., whereby Tri-City would make available to Harper a revolving line of capital credit and would further backstop Harper on performance of the contract.

The agreement is explained further by a letter dated September 7, 1973, from the Bank of America which states that:

"Should Mr. Harper be awarded the contract for the above solicitation numbered project, he will enter into a joint venture with Tri-City Building Service, Inc. who have a revolving working capital line of credit with us. At the present time there is \$24,000 available under this line, however, this amount will fluctuate up and down as funds are used and repaid through their various on-going contracts. It is my understanding from Mr. Brown of Tri-City Building Service that the maximum amount they will need at any time on this job will be around \$19,000."

This development was brought to the attention of the contracting officer who, on September 13, 1973, apparently referred the matter to SBA.

On September 17, 1973, SBA rejected the attempted referral since (1) it questioned the impact of the joint venture upon Harper's responsiveness and (2) it stated that SBA would not accept the referral unless new information was developed by the Army relative to Harper's financial condition.

Additionally, however, SBA stated that:

"A review of your [the contracting officer's] referral, and supporting papers, reveals that Harper Enterprises could possibly perform on the contract provided a joint venture is allowable and that Harper's bid is still considered responsive. \* \* \*"

Harper was thereafter reaffirmed as being nonresponsible based on the COC denial and the joint venture information was not considered by the contracting officer.

Our Office has consistently held that we cannot question an agency's determination regarding the responsibility or nonresponsibility of a bidder absent evidence to prove that the determination either was based upon error, fraud, favoritism or bad faith or was not founded upon a reasonable basis. 46 Comp. Gen. 371 (1966); B-161770, November 21, 1967; see, also, 38 Comp. Gen. 131 (1958).

It is the Army's position, as stated in its September 26 supplemental report, that:

"To establish a joint venture subsequent to bid opening is patently unfair to the other bidders and any award thereto is legally defective. Accordingly, the responsibility of Harper Enterprises as a bidder must be determined absent the joint venture. Since the SBA declined to issue a COC it is considered that the initial determination of nonresponsibility obtains."

In B-171095, May 4, 1971, we considered a similar situation. There, after bid opening, the bidder entered into an agreement with another party. The agreement, as later amended, provided that the other party would assume responsibility for timely completion of the contract and be financially responsible to all suppliers and subcontractors. Additionally, the other party obtained a \$50,000 line of credit for its use in the performance of the proposed contract. Our decision, in that instance, did not question the award to the bidder made after the agency had examined the joint venture agreement and had concluded that it demonstrated the bidder's ability to obtain adequate financial resources as required during performance of the contract per paragraph 1-903.1 of the Armed Services Procurement Regulation (ASPR).

It is clear from B-171095, supra, that the mere fact that a bidder enters into an agreement (whether or not termed a joint venture) subsequent to bid opening, for the purpose of obtaining required resources, is not a basis, in and of itself, to reject the bid. Unless the terms

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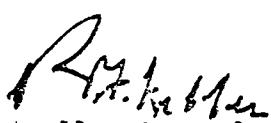
of the agreement are such that the bidding entity no longer exists, and the bid is effectively transferred to a nonbidding entity, a bid submitted prior to the agreement, without more, is for consideration. See 51 Comp. Gen. 145 (1971); B-154351, June 16, 1964.

Accordingly, the joint venture agreement should not have been ignored in determining the responsibility of the low bidder and in light of the foregoing should be reassessed to determine the responsibility of the low bidder. If the low bidder is found to be responsible as a result of such reassessment, the award should be made to the bidder and appropriate steps should be taken to terminate for the convenience of the Government the contract awarded to Dependable.

Harper also questions the agency's determination to award the contract to Dependable prior to a decision from our Office. The award was made to Dependable because the Army stated that such an award would be advantageous to the Government (ASPR 2-407.8(b)(3)(iii)). In that connection, it appears that the services were of a continuing nature and that the agency could not afford to be without them during the pendency of the protest. Therefore, the agency was faced with either extending the existing contract with Dependable or making an award to it under the new IFB during the pendency of the protest. The agency has advised informally that it chose the latter action because it was prepared to terminate Dependable's contract for the convenience of the Government if Harper's protest was upheld.

In the circumstances, the award during the pendency of the protest does not appear to have been inappropriate and did not deprive Harper of a contract in that the agency has indicated that it is prepared to take appropriate termination action and make award to Harper if it is found to be responsible.

Deputy

  
Comptroller General  
of the United States