

DECISION



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

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FILE: B-185305

DATE: July 20, 1976

MATTER OF: Colonial Baking Company

DIGEST:

Determination by contracting officer that low bidder was nonresponsible for lack of integrity because of nolo contendere plea in anti-trust case was justified. In making nonresponsibility determination, contracting agency is not required to weigh evidence upon which anti-trust conviction was based to determine degree of violation.

Invitation for bids (IFB) No. DSA135-76-B-K035 was issued by the Defense Supply Agency, Defense Personnel Support Center, Defense Subsistence Region, New Orleans, Louisiana for bread requirements of Keesler Air Force Base, Mississippi. Two responses were received prior to bid opening. The Colonial Baking Company (Colonial) was found to be low bidder. However, the contracting officer determined that Colonial was nonresponsible for lack of business integrity and awarded the contract to the other bidder.

The contracting officer noted that an investigation by the Department of Justice resulted in bills of information being filed against various bakeries and individuals including Colonial and Colonial's president. The bill alleged a combination and conspiracy to fix, raise, and maintain prices in the "Baton Rouge Market." On September 26, 1975, Colonial and its president pleaded nolo contendere to the charges of violation of 15 U.S.C. Section 1 (The Sherman Act) and were fined \$10,000 and \$2,500, respectively.

Colonial contends that the circumstances under which it and its President pleaded nolo contendere to the charges did not justify a finding of nonresponsibility. It argues that even though the bills of information filed against Colonial and the other baking companies in Louisiana charged a conspiracy in violation of the Sherman Anti-Trust Act to fix prices, eliminate

discounts and to rig bids, there was no evidence whatsoever that Colonial ever engaged in any such practices in the Baton Rouge Market other than the elimination of discounts in Pearl River County, Mississippi. The plea of nolo contendere was prompted, according to Colonial, only with respect to the discontinuance of discounts and not with respect to the other two alleged elements of the offense. To substantiate its contentions, Colonial submitted to this Office a copy of their letter of November 4, 1975, to the Defense Subsistence Region, New Orleans setting forth the complete background of the case. Also submitted were copies of the indictments; the trial testimony of Colonial's sales manager; Colonial's report to the probation officer; trial testimony of the Vice President and Sales Manager of Wolf's Baking Company; and a copy of Colonial's motion to withdraw its nolo contendere plea and its brief in support thereof. Colonial's motion to withdraw its plea was denied by the court. Colonial believes that the documents submitted show that the determination that Colonial lacked integrity was erroneous and should be overturned by this Office.


As further grounds for protest, Colonial contends that it has been punished for whatever violations of the anti-trust laws it may have committed, and that disqualification as a bidder would constitute additional punishment. Colonial also contends that the contracting officer's actions cannot be justified by the Armed Services Procurement Regulation (ASPR) or by government policy.

Before award of a contract, the contracting officer must make an affirmative determination that the prospective contractor is responsible. ASPR 1-904.1 (1975 ed.). If the information available to the contracting officer "does not indicate clearly that the prospective contractor is responsible," a determination of nonresponsibility is required. ASPR 1-902 (1975 ed.). In order for a prospective contractor to be determined responsible, he must have a satisfactory record of integrity. ASPR 1-903.1 (iv) (1975 ed.). This Office has consistently taken the position that the question as to whether evidence of a bidder's lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the administrative officers concerned, and such determination will not be questioned by us in the absence of a clear showing of the lack of a reasonable basis therefor. 48 Comp. Gen. 769, 773 (1969), 51 Comp. Gen. 703, 709 (1972). P.T. and L. Construction Co., Inc., 55 Comp. Gen. 343, 345 (1975), 75-2 CPD 208.

We have held that a bidder's integrity may properly be determined administratively by applying the causes and conditions for the suspension of bidders enumerated in ASPR 1-605.1. 39 Comp. Gen. 868, 872 (1960). Since the commission of an offense indicating a lack of business honesty, which seriously and directly affects responsibility as a Government contractor is enumerated in ASPR 1-605.1 as a cause for the suspension of bidders, it necessarily follows that a plea of nolo contendere to a bill of information alleging a conspiracy to fix, raise, and maintain prices constitutes a reasonable basis for holding that Colonial is not responsible. In our opinion the contracting agency is not required to weigh the evidence upon which a judgment of conviction was entered. Both the applicability of the anti-trust statute as well as the guilt or innocence of Colonial are for consideration by the courts in criminal proceedings. See B-152840, February 20, 1964. As the contracting officer noted, the fact remains that Colonial did enter a nolo contendere plea to the bill of information alleging a conspiracy to fix, raise and maintain prices. Such a plea has the same legal effect as a plea of guilty. Black's Law Dictionary 1198 (4th ed. 1951).

In addition, we do not view the contracting officer's decision not to award to the low bidder because it lacks a satisfactory record of integrity as a punishment. Rather, the decision was in fulfillment of the requirement of ASPR 1-903.1(iv) (1975 ed.) regarding, the necessity for a satisfactory record of integrity. Finally, we note that the circumstances under which Colonial and its president pleaded nolo contendere to the charges will be considered by the contracting officer in making the report required by ASPR 1-608 (1975 ed.) which will result in a determination whether or not Colonial should be debarred or suspended from bidding on government contracts.

For the foregoing reasons, Colonial's protest is denied.


Deputy Comptroller General
of the United States