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DECISION

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

FILE: B-187193 DATE: March 16, 1977

MATTER OF: United Office Machines

DIGEST:

1. While ordinarily GAO will not review determinations of nonresponsibility based on lack of tenacity and perseverance where SBA declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed.

2. Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on events which occurred more than 3 years prior to determination when there is an adequate record of more recent experience because FPR § 1-1.1203-1 provides that such unsatisfactory performance must be related to serious deficiencies in current or recent contracts.

3. Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on (1) overcharge of $22.80, and (2) legitimate question of contract interpretation because FPR § 1-1.1203-1 provides that such unsatisfactory performance must be related to serious deficiencies.

4. Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may properly be based on agency audit report even though (1) underlying data is not reviewed by contracting officer or protester, and (2) default of prior contracts based on those conclusions is presently under appeal.

United Office Machines (UOM), the low bidder on certain items under invitations for bids (IFB's) Nos. GS-6FWR-7003 and GS-6FWR-7006, issued by the General Services Administration (GSA) for repair and maintenance of office machines during the period October 1, 1976, through September 30, 1977, protests the contracting officer's determination that it lacked tenacity and perseverance because UOM was defaulted by GSA on two prior contracts for similar services and, therefore, was nonresponsible. The contracting officer, pursuant to Federal Procurement Regulations (FPR)

§ 1-1.703-2(a)(5) (1964 ed. amend. 71), notified the appropriate region of the Small Business Administration (SBA) of the determination. SBA timely notified the contracting officer that an appeal would be taken. In the interim, UOM filed a protest with our Office and upon notice of the protest, SBA suspended its action pending our decision. Subsequently, awards were made to firms other than UOM.

In the future, the SBA should not suspend an intended contest of the contracting officer's determination when a protest is filed here because, as a general rule, we will not review determinations of nonresponsibility based on alleged lack of integrity, tenacity or perseverance where SBA declines to contest that determination pursuant to applicable regulation unless there is a compelling reason to justify review, such as a showing of bad faith or fraud on the part of procurement officials. Ekistics Design Group, Inc., B-187168, January 12, 1977. Since SBA indicated an interest in appealing the contracting officer's determination, although no appeal was taken, we will consider UOM's protest on the merits and consider it as we would where the SBA contested the contracting officer's determination, but the contracting officer's determination was followed by the contracting agency.

Recognizing that the determination of a prospective contractor's responsibility is primarily the function of the procuring activity and is necessarily a matter of judgment involving a considerable degree of discretion, this Office will not disturb a determination of nonresponsibility based on lack of tenacity and perseverance when the record provides a reasonable basis for such determination. Kennedy Van & Storage Company, Inc., B-180973, June 19, 1974, 74-1 CPD 334; A. C. Ball Company, B-187130, January 27, 1977.

Here, GSA's determination of nonresponsibility is based on the general minimum standards for responsible prospective contractors outlined in FPR § 1-1.1203-1 (1964 ed. amend. 95) as follows:

> "Except as otherwise provided in this § 1-1.1203, a prospective contractor must:
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> * * * * *
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> "(c) Have a satisfactory record of performance. Contractors who are or have been seriously deficient in current or recent contract performance, when the number of contracts

> and the extent of deficiency of each are considered, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, shall be presumed to be unable to meet this requirement. Past unsatisfactory performance will ordinarily be sufficient to justify a finding of nonresponsibility * * *." (Emphasis added.)

The primary basis for GSA's determination that UOM's past performance was unsatisfactory was GSA's termination of UOM's last two contracts for default. In addition, GSA has provided our Office with a comprehensive report, including about nine specific events, to support the determination of UOM's nonresponsibility and UOM has responded in detail to GSA's conclusions. The first three events relied on by GSA concern matters occurring in 1970 and 1973, a period more than 3 years before the nonresponsibility determination was made.

A determination of nonresponsibility based on past unsatisfactory performance must, under the terms of FPR § 1-1.1203-1, be related to serious deficiencies in "current or recent" contracts. We do not believe that such events relate to "current or recent contracts" when there is an adequate record of more recent experience. Compare Universal American Enterprises, Inc., B-185430, November 1, 1976, 76-2 CPD 373 (decision considered record of "recent" performance--1-year period ending approximately 3 months prior to contemplated award; and "current" performance--3 months prior to contemplated award); Consolidated Airborne Systems, Inc., 55 Comp. Gen. 571 (1975), 75-2 CPD 395, affirmed, B-183293, June 3, 1976, 76-1 CPD 356 (decision considered record of "recent" performance--contracts completed within 1 year of the determination of nonresponsibility). Since the events did not relate to "recent or current" contracts, the contracting officer should not have relied upon them as a basis for the nonresponsibility determination.

The next two events relied on by GSA concern an overcharge for parts in the amount of $22.80 and a legitimate question of contract interpretation. In response, UOM refers to a letter dated November 6, 1975, in which the GSA Regional Administrator relates the question of contract interpretation and states that the two contracts in question were independent and a minimum service call fee could properly be charged under each contract for a single visit; however, the minimum service call fee under a single contract could only be charged once per visit even though more than one piece of office equipment was repaired. The

Regional Administrator concludes that "[UOM's] contracts are not presently in jeopardy, nor will they be, provided the contractor honors the terms and conditions of the contracts." We concur with the view of the Regional Administrator that a legitimate question of contract interpretation would not reasonably place UOM's contracts in jeopardy. Moreover, the $22.80 overcharge on parts, immediately admitted and corrected, cannot be considered as a basis for a finding of nonresponsibility. Accordingly, we do not believe that the above events are "serious" deficiencies reasonably permitting a determination of nonresponsibility.

Of the remaining events relied on by GSA, only one--consistent failure to meet time of delivery contractual requirements--provides a reasonable basis for a determination of lack of tenacity and perseverance. On this point, UOM argues that the deficiency occurred prior to the November 6, 1975, letter from the Regional Administrator indicating UOM's contracts were not in jeopardy. We find no support for UOM's argument because that letter concerned a pricing dispute and not late deliveries.

Secondly, UOM argues that GSA has refused to provide a list of the alleged late deliveries and absent such information UOM cannot effectively respond. This argument, in our view, is irrelevant to the question before us. We are reviewing the contracting officer's determination of nonresponsibility to ascertain whether it was reasonably based. The record shows that a report on the audit of UOM contracts dated March 17, 1976, from GSA's Office of Audits provided the basis for the contracting officer's belief that UOM consistently failed to meet time of delivery contractual requirements. Whether the data requested by UOM will ultimately be found to properly support the conclusion stated in the audit report is an issue for resolution by another forum on the appeal of the default terminations.

We find that the contracting officer's reliance on information contained in the GSA audit report was not unreasonable. Western Ordnance, Inc., B-182038, December 23, 1974, 74-2 CPD 370 (contracting officer's determination of nonresponsibility based on negative preaward survey was not unreasonable); Howard Ferriell & Sons, Inc., B-184692, March 31, 1976, 76-1 CPD 211 (determination of nonresponsibility because of lack of tenacity and perseverance based on prior default termination was proper even though termination was under appeal).

Accordingly, UOM's protest is denied.

Acting Comptroller General
of the United States