Proc II

DECISION

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

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FILE: B-193899 DATE: February 27, 1979

MATTER OF: Howard Electric Company

[Allegation of Improper Disqualification From Participating as Subcontractor]

DIGEST:

1. Grantee's refusal to permit award of subcontract to particular firm is tantamount to negative determination of responsibility with respect to that firm, which under circumstances is not de facto debarment without due process of law or improper prequalification or other undue restriction on competition.

2. Under Federal law, firm may be found nonresponsible even though dispute concerning allegedly improper performance of prior contract for similar work has not been resolved.

3. Firms acting as joint venturers are answerable for acts done by their coventurers, or other agents, and may be found nonresponsible because of deficient performance by joint venture in prior procurement.

Howard Electric Company (Howard) complains that it was improperly disqualified from participating as a subcontractor to the Weaver Construction Company (Weaver). Weaver is prime contractor to the Colorado State Department of Highways (Colorado), a grantee under Federal Highway Administration (Development of Competitor) grant 1 70-3 (83). The grant supports work on the Eisenhower Memorial Tunnel.

According to Howard, 1) the prime contract requires Colorado's approval of all subcontracts; 2) Weaver intended to subcontract with Howard; 3) Colorado refused to approve award of a subcontract to Howard; and 4) the basis for Colorado's action is an unresolved dispute relating to delay on another contract on which the prime contractor, a joint venture consisting of Howard and another firm, was assessed liquidated damages.

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Howard urges that Colorado acted arbitrarily and capriciously in advising Weaver that no subcontract could be awarded to Howard because of its performance on that prior contract. The complainant views Colorado's act as contrary to "the Federal norm of competitive bidding" and as a de facto debarment without due process of law. Moreover, Howard complains, Colorado violated 23 C.F.R. § 635.108 (1978) by improperly imposing prequalification procedures and Office of Management and Budget (OMB) Circular A-102 (Attachment O) by unduly restricting competition at the subcontract level.

We find no merit to the complaint. Neither the "Federal norm", the regulations cited by Howard, nor anything else of which we are aware was violated by the grantee's actions in this case. As stated by Howard, the grantee had a contractual right to concur or not concur with any decision to subcontract, and the negative decision was based on the performance problems encountered under a prior contract. In effect, it would appear that the grantee's decision was tantamount to a negative determination of responsibility with respect to Howard. Under Federal law, such a determination may be made on the basis of what the Government sees as the contractor's prior inadequate performance even if the contractor disputes the Government's position and the dispute is unresolved. See, e.g., United Office Machines, 56 Comp. Gen. 411 (1977), 77-1 CPD 195; Halo Optical Products, Inc., B-178573, B-179099, May 17, 1974, 74-1 CPD 263. Moreover, while de facto debarment could result from repeated negative responsibility determinations, see 43 Comp. Gen. 140 (1963), or even from a single negative determination if it is part of a long-term disqualification attempt, see Myers & Meyers, Inc., v. United States Postal Service, 527 F.2d 1252 (2nd Cir. 1975), all that is alleged here is a one-time disqualification, which under the circumstances appears to have a reasonable basis and does not constitute a denial of due process. See 51 Comp. Gen. 551 (1972).

23 C.F.R. 635.108 prohibits the approval of a requirement or procedure for the "prequalification,

qualification or licensing of contractors * * * which, in the judgment of the [Federal Highway] administrator, may operate to restrict competition" or prohibit the submission by or consideration of a bid from "any responsible contractor." OMB Circular A-102 imposes a general requirement for competition. We fail to see how the grantee's actions in this case contravene either requirement. A good faith nonresponsibility determination does not, in and of itself, unduly restrict competition and does not involve the approval of a prequalification procedure.

Finally, Howard believes it should not be prevented from contracting on the basis of what the joint venture may have done. However, the common law rule is well settled that persons acting as a joint venture are answerable for acts done by their co-venturers or other agents. 68 C.J.S. Partnership § 183 (1950); Restatement of Agency (2d) § 20 (1957). In this regard, we point out that Federal law permits debarment of all known affiliates of a debarred concern or individual where circumstances warrant. 51 Comp. Gen. 65 (1971).

The complaint is summarily denied.

Deputy Comptroller General
of the United States