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**DECISION**



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

**FILE:** B-209859.2, B-209860.2 **DATE:** July 29, 1983

**MATTER OF:** Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc.--Recon- sideration

**DIGEST:**

1. Where the Small Business Administration (SBA) informally advises protesters, small business firms, that the agency's adverse responsibility determinations were not for review under SBA's Certificate of Competency (COC) procedures because the protesters' product was of foreign origin, rule that small business firms must pursue questions of responsibility under COC procedures is not for application and the protesters' challenge to the nonresponsibility determination will be considered by GAO.
2. Contracting officer's determination that a bidder is not financially responsible may include consideration of the bidder's voluntary filing for bankruptcy; outstanding claims of other agencies against the bidder; and the bidder's inability or unwillingness to fully disclose information relating to performance, particularly its corporate organization and contractual relationships. Further, in determining the financial responsibility of an affiliate of the bankrupt bidder, the contracting officer may consider possible liability for the bankrupt bidder's debts.
3. The contracting officer may permit a representative of the Department of Justice to participate in discussions with a bidder concerning its financial resources and capabilities, even though Justice's interest is adverse to bidder.

Wallace & Wallace, Inc. and Wallace & Wallace Fuel Oil, Inc. request reconsideration of our decision

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Wallace & Wallace, Inc.; Wallace & Wallace Fuel Oil, Inc., B-209859, B-209860, December 2, 1982, 82-2 CPD 501. The protesters challenged the contracting officer's determination that the two firms, hereafter "Wallace, Inc." and "Wallace Fuel," respectively, were not financially responsible. We dismissed the protest because the firms in question, being small businesses, were required to seek a Certificate of Competency (COC) when the Defense Fuel Supply Center (DFSC) determined that they were not financially responsible. Initially we were advised only that the two firms had not pursued the COC remedy. As we now understand the circumstances, it would have been a futile act for the firms to seek a COC. We therefore have now considered the protests. We conclude that DFSC's determination that the firms were not financially responsible has a reasonable basis and we deny the protests.

Ordinarily, when a procuring agency determines that a small business firm is not responsible and refers the matter to SBA for determination under COC procedures, that firm must pursue the COC application with SBA. Sphere Management Inc., B-200267.3, September 14, 1981, 81-2 CPD 213. In those circumstances, it would be inappropriate for us to consider a protest on the matter since it would amount to our substituting for the agency specifically authorized by statute to review such determinations, and we originally dismissed this protest on this basis.

According to the information now available, however, we understand that the protester's failure to seek a COC resulted from SBA's informal advice that a COC application would not be considered because the protesters proposed to furnish a foreign product, Venezuelan petroleum. (See 13 C.F.R. § 125.5(g) (1982)). We have taken the position that when the SBA does not issue a COC for eligibility reasons rather than for reasons related to responsibility, that SBA action "does not affirm the contracting officer's nonresponsibility determination." United Terex, Inc., B-206090, March 22, 1982, 82-1 CPD 268. Since it appears that the SBA did not consider the protesters to be eligible for COC consideration, we no longer view the protesters' failure to seek a COC as a bar to our review of the contracting officer's determination.

Turning to the merits of the protest, the record shows that on January 12, 1982 Wallace Fuel submitted the low offer for Navy special fuel oil under request for proposals No. DLA600-82-R-0100. Wallace Fuel's offer being otherwise acceptable, DFSC initiated a series of discussions concerning Wallace Fuel's financial capability. While these discussions were continuing, the Small Business Administration obtained a \$12 million default judgment against Wallace Fuel as a result of its failure to repay a prior SBA loan.

On May 15, Wallace, Inc. submitted the low bid on three types of ground fuels solicited under invitation for bids No. DLA600-82-B-0002. Because Wallace, Inc. appeared to be affiliated with Wallace Fuel, with common management and control (although the latter is disputed), DFSC incorporated its consideration of Wallace, Inc.'s financial condition into its review of Wallace Fuels' responsibility.

DFSC representatives met with the protesters over the next 5 months to discuss the financial problems of the two firms, including Wallace Fuel's \$12 million debt to SBA; its Debt Structure Agreement giving SBA the right to future Wallace Fuel earnings if not subordinated; the \$12 million default judgment subsequently obtained against Wallace Fuel by SBA; Wallace Fuel's voluntary filing for reorganization under Chapter 11 of the Bankruptcy Act; a separate \$6 million DFSC claim against Wallace Fuel; and the possibility that other commonly held firms could be held liable for Wallace Fuel's debts.

A number of alternative financing arrangements and methods of operation intended to overcome these problems were discussed, primarily involving financing through a letter of credit to be furnished by the protesters' supplier, Zagoven, with payment secured through assignment to a commercial bank. The use of an affiliate, Wallace & Wallace International Venezuela Corp. (hereafter "Wallace International"), to import the fuel, was also explored. However, the protesters failed to furnish much of the information DFSC requested concerning the various corporations, asserting that the documents were lost, and no agreement was ever reached as to the terms of financial arrangements acceptable to both parties or the conditions for using Wallace International to import fuel.

A Department of Justice representative attended a number of these meetings, seeking to secure Wallace Fuel's commitment to use a portion of the contract proceeds for payment of the debt owed SBA. Among other things, DFSC consulted with Justice's representative when assessing the financial exposure of the various firms under the bankruptcy proceedings.

Finally, after extensive discussions, the DFSC contracting officer concluded that he was unable to make a positive determination of responsibility with regard to either firm and he so advised the protesters by letter of October 29, 1982. Award was then made to other firms under both solicitations.

The protesters contend that DFSC's determination of nonresponsibility was improper, arguing that Wallace Fuel's voluntary filing for reorganization under Chapter 11 of the Bankruptcy Act affords greater assurance that the firm will complete its contractual obligations, not less, because of the protection against creditors accorded firms in bankruptcy. This being the case, the protesters argue, DFSC should not have taken Wallace Fuel's pre-existing debts into account. Further, because DFSC permitted representatives of the Department of Justice to participate in DFSC's deliberations concerning the financial status of Wallace Fuel and the other firms, the protesters believe that the procurement process was used improperly as a conduit for the Department of Justice to gain confidential information useful in enforcing debt collection from the bankrupt firm and its affiliates. Moreover, the protesters argue, because Wallace, Inc. and Wallace International are independent, pre-existing firms, created for legitimate business purposes, they are not involved in Wallace Fuel's bankruptcy and their financial standing should have been assessed without regard to Wallace Fuel's situation. Finally, the protesters contend that they were negotiating in good faith; that, while many corporate records were lost, they had disclosed all the information it had concerning the ownership and control of their firms; and that with further discussion the proposed commitments with their supplier and bank could easily have been completed to the Government's satisfaction.

The responsibility of a bidder refers to whether a prospective contractor is able to perform a particular contract for the Government. A bidder is not

eligible for the award of a Government contract unless the contracting officer affirmatively determines that the bidder is responsible. Defense Acquisition Regulation § 1-902(1976 ed.). So long as the contracting officer has a reasonable basis for determining a bidder to be nonresponsible, we will not question that determination. X-Tyal International Corp., B-190101, March 30, 1978, 78-1 CPD 248; see 45 Comp. Gen. 4 (1965). While the mere fact that a bidder files a petition in bankruptcy under Chapter 11 of the Bankruptcy Act does not require a finding of nonresponsibility, Domar Industries Co., Inc., B-202735, September 4, 1981, 81-2 CPD 199, bankruptcy may nevertheless be considered as a factor in determining that a particular bidder is nonresponsible. See Commercial Envelope Manufacturing Company, Inc., B-188060, January 24, 1977, 77-1 CPD 50. Moreover, where a bidder is unwilling or unable to furnish information necessary to support an affirmative determination of responsibility, the contracting officer need not delay his consideration of the matter. X-Tyal International Corp., supra. In such circumstances the bidder must suffer the consequence of its inability to establish its financial capabilities. See Security Assistance Forces & Equipment International, Inc., --Reconsideration, B-194876, July 28, 1980, 80-2 CPD 68.

We believe that the contracting officer had a reasonable basis for concluding that the protesters failed to affirmatively establish their responsibility. The record indicates that the contracting officer's judgment in this regard did not rest on the mere fact of Wallace Fuel's bankruptcy or the debts and judgment that appear to have precipitated its bankruptcy. Rather, while bankruptcy was a consideration<sup>1</sup>, the record also reflects a recognition that performance would be possible in those circumstances if independent financing was assured. To this end, DFSC held repeated discussions, carefully examining various alternatives for insuring that the firms

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<sup>1</sup>The contracting officer, in his discretion, could view Wallace Fuel's bankruptcy as something other than the favorable development that the protesters argue to the case.

would have adequate resources to perform the contracts. It was only after these extensive negotiations proved unfruitful that the contracting officer concluded that the procurement could not be further delayed, broke off discussions, and made award to others.

Also, we see nothing unreasonable with the contracting officer's taking into account the bankruptcy of Wallace Fuel when reviewing the financial condition of Wallace, Inc. The Department of Justice had advised DFSC of its opinion that the principal of Wallace Fuels had used a separate corporation, Wallace, Inc., to bid upon the ground fuels contract in order to circumvent the bankruptcy proceedings and that it might challenge this alleged circumvention of the Government's rights as creditor. While the contracting officer could not predict the outcome of such litigation, he could recognize its potential and insist upon an independent source of financing.

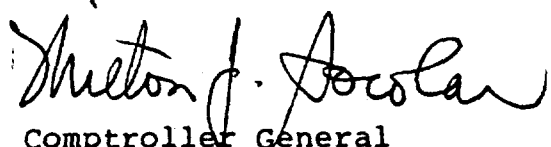
As to the contention that DFSC should not have allowed a representative of the Department of Justice to participate in the discussion of the protesters' financial status, we are unaware of any restriction, statutory, regulatory or otherwise, and none has been suggested, that would inhibit the Government from attempting to protect its interest as a creditor during the procurement process. Good business practice also suggests that the Government should act to protect its own interest in securing repayment of debts when awarding further contracts to what is arguably the same party. Moreover, it is not unreasonable for DFSC to take into account Justice's advice on Wallace Fuel's potential liabilities under the bankruptcy proceedings when assessing the company's financial status.

As to the assertion that DFSC should have continued its discussions of proposed financing arrangements and further explored the terms of the bank assignment if it was not satisfied with the terms proposed, the record indicates that DFSC had spent some 8 months discussing these issues, well past the anticipated award date for the 1-year fuel supply contracts in question. During this time, DFSC was never able to substantiate many of the protesters' assertions regarding these firms because the protesters claimed that pertinent corporate records

had been lost. In these circumstances, we do not believe that DFSC was required to further delay award in order to consider additional proposals. See X-Tyal International Corp., supra.

Finally, in our original decision we declined to consider the protesters' assertion that the actions complained of were racially motivated, pointing out that, as in the case of fraud or bad faith, a bare allegation is not enough. Although the protesters continue to assert bias, no evidence showing possible discrimination has been introduced. Consequently, we can find no merit to this aspect of the protest.

The protest is denied.

for   
Comptroller General  
of the United States