



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Goshen Excavators

File: B-279093.2

Date: April 20, 1998

Geoffrey Drury, Esq., Nania & Drury, for the protester.
Andre Bohdan Prypchan, Esq., Department of the Army, for the agency.
Christine F. Davis, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly declined to reverse a nonresponsibility determination based on new information presented by the protester after the Small Business Administration declined to issue a certificate of competency, where the agency reasonably viewed as unpersuasive the protester's objections to a negative past performance reference and reasonably discounted a positive reference for a contract that was not similar to the instant contract.

DECISION

Goshen Excavators protests its rejection as nonresponsible by the United States Army Corps of Engineers, Chicago District, under request for quotations (RFQ) No. DACW23-97-Q-0136, for seawall protection construction work at the Great Lakes Naval Training Center, Fort Sheridan, Illinois.

We deny the protest.

The agency received three quotes on September 24, 1997. Since Goshen's lowest-priced quote of \$87,600 was in line for selection, the contract specialist conducted a preaward survey to assess Goshen's responsibility. On October 30, the contract specialist recommended that Goshen be found nonresponsible based upon negative information obtained from four contract references, including the Corps's Rock Island Illinois District, which issued an unsatisfactory performance evaluation of Goshen's performance under a 1994 contract.¹ The information from these references indicated that Goshen did not pay subcontractors on time, did not

¹Before completing his preaward survey, the contract specialist allegedly advised Goshen that he anticipated making an affirmative responsibility recommendation. Even if the contract specialist made this remark, the record is clear that the contract specialist viewed Goshen as nonresponsible at the conclusion of the preaward survey.

adequately supervise and manage the contract work, did not complete the work as scheduled, did not comply with government reporting requirements, and did not respond to telephone calls.

The contracting officer accepted the recommendation that Goshen was nonresponsible. The contracting officer found particularly significant the Rock Island District's criticism of Goshen's control of, and timely payment to, subcontractors. Because this contract and the Rock Island contract shared certain features--that is, Goshen, a Connecticut business, was located far from the Illinois job site and had proposed to subcontract a substantial amount of the contract work--the contracting officer viewed Goshen's past problems with subcontractors as posing a serious performance risk, such that he could not determine Goshen to be responsible.

Because Goshen is a small business concern, the contracting officer referred the negative determination to the Small Business Administration (SBA) under the certificate of competency (COC) procedures. The contracting officer gave the SBA his responsibility determination, the preaward survey report, the negative performance evaluation from the Rock Island District, and Goshen's list of contract references.² On November 25, SBA declined to issue a COC.

After Goshen was denied a COC, the firm persuaded the contracting officer to reconsider his nonresponsibility determination in light of additional past performance information supplied by Goshen. First, Goshen disputed the negative performance evaluation by the Rock Island District and advised that it was seeking to overturn that evaluation, which had been rendered without the protester having an opportunity to comment. In reevaluating Goshen's responsibility, the contracting officer confirmed that the Rock Island District had not afforded Goshen an opportunity to comment on the negative performance evaluation and was withdrawing the evaluation until it investigated Goshen's objections. Nevertheless, because the Rock Island District had not issued a new evaluation or indicated any intent to issue a satisfactory evaluation, the contracting officer concluded that there was no basis to overturn his negative responsibility determination.

Second, Goshen argued that the Corps, during its preaward survey, should have contacted a car wash owner who hired Goshen to assist in the construction of his facility. In reevaluating Goshen's responsibility, the Corps contacted the car wash owner, who confirmed that Goshen's work was satisfactory, but the reference did not resolve the Corps's doubts about Goshen's ability to perform the instant contract, which the Corps viewed as distinguishable from the car wash contract.

²Contrary to the protester's suggestions, the contracting officer did not withhold any information from SBA during the COC process; in particular, SBA possessed a complete list of the protester's contract references.

The agency observed that the car wash contract was not a government contract and did not entail government quality control and submittal requirements--requirements that Goshen had not responsibly discharged according to some government contract references. Furthermore, the car wash contract was a local contract and did not alleviate the agency's concern that Goshen lacked the ability to oversee contract work at remote performance sites, as in the instant case.

The contracting officer concluded that the additional information did not justify overturning his original determination that Goshen was nonresponsible. On February 3, the agency made award to the firm submitting the next low-priced quote. This protest followed.

SBA has conclusive authority to determine a small business firm's responsibility by issuing or refusing to issue a COC, and we generally will not review the SBA's failure to issue a COC, absent a showing of possible bad faith on the part of government officials or a failure to consider vital information bearing on the firm's responsibility. 4 C.F.R. § 21.5(b)(2) (1997); Eagle Bob Tail Tractors, Inc., B-232346.2, Jan. 4, 1989, 89-1 CPD ¶ 5 at 3. However, where new information bearing on a small business concern's responsibility comes to light for the first time after denial of a COC, but before award, the contracting officer may reconsider his original nonresponsibility determination. Mid-America Eng'g and Mfg., B-247146, Apr. 30, 1992, 92-1 CPD ¶ 414 at 2. On the other hand, where, after the SBA's denial of a COC, no new information is presented to lead the contracting officer to determine that the concern is responsible, the contracting officer should proceed with award to another appropriately selected and responsible firm. Id.

In cases where the contracting officer considers new information pertaining to the responsibility of a firm which had been denied a COC, our review is limited to whether the contracting officer reasonably reassessed the new information. Eagle Bob Tail Tractors, Inc., supra. Since responsibility determinations are generally within the discretion of the agency, which must bear the brunt of any difficulties in obtaining the required performance, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or the lack of any reasonable basis for the determination. Automated Datatron Inc., 68 Comp. Gen. 89, 91 (1989), 88-2 CPD ¶ 481 at 2-3.

The protester first argues that the contracting officer should have discredited the negative performance evaluation issued by the Rock Island District, since the negative evaluation had been withdrawn to allow the protester an opportunity to comment. Goshen argues that it apprised the contracting officer of numerous alleged errors in the negative performance evaluation, which should have persuaded the contracting officer that the Rock Island District would ultimately issue a satisfactory performance evaluation.

Although Goshen is of the opinion that the Rock Island District will issue a satisfactory performance evaluation, we find, based upon our review of the record, that the contracting officer's approach was reasonable. Goshen admitted to the contracting officer that its subcontractors on the Rock Island contract complained about late payments, which apparently made the subcontractors reluctant to perform and caused performance delays.³ Goshen also made cursory objections to many of the other unsatisfactory ratings issued by the Rock Island District, arguing, for example, that the unsatisfactory rating of Goshen's professional conduct was simply the agency's "opinion."

A prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. Federal Acquisition Regulation § 9.104-3(b). A nonresponsibility determination may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default or the contractor disputes the agency's interpretation of the facts or has appealed an agency's adverse determination. See Pittman Mechanical Contractors, Inc.--Recon., 70 Comp. Gen. 535, 538 (1991), 91-1 CPD ¶ 525 at 4-5; Firm Otto Einhaupl, B-241553 et al., Feb. 20, 1991, 91-1 CPD ¶ 192 at 5. In our view, the contracting officer had sufficient evidence from which to conclude that Goshen's performance of the Rock Island contract was unsatisfactory, notwithstanding the protester's appeal of the negative performance evaluation and its attempts to minimize its culpability for the undisputed problems experienced in performing the contract.

Goshen also argues that the contracting officer should have reversed its nonresponsibility determination based upon the positive reference given by the car wash owner. However, Goshen offers no persuasive objection to the agency's judgment that the car wash contract, which was not a government contract and which was performed locally, provided little assurance of Goshen's ability to meet government reporting requirements and to meet deadlines and supervise subcontractors at a remote site. We think that the contracting officer reasonably found that this positive reference was offset by the negative comments it received pertaining to Goshen's responsibility.

Goshen finally protests that the agency should have reconsidered a negative reference given by the Corps's New England District, which Goshen characterizes as

³Goshen blamed this situation on a "stalemate" created by the agency, which allegedly stalled final payment until performance was complete, and the subcontractors, which allegedly stalled performance until payments were received. Goshen said that it would endeavor to use more "peaceable" subcontractors on this contract.

inaccurate in certain respects and incompatible with that District's decision to award Goshen subsequent contracts. However, the agency did not receive Goshen's letter containing these allegations before it again rejected Goshen as nonresponsible. Thus, the agency had no obligation to further investigate this negative reference. See Eastern Gas & Cylinder Servs., Inc., B-237926.2 et al., Feb. 5, 1991, 91-1 CPD ¶ 116 at 4-5.

In sum, the contracting officer reasonably determined that Goshen had not presented sufficient information to warrant reversing the prior nonresponsibility determination.⁴

The protest is denied.

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⁴As the contracting officer gave SBA the entire file pertaining to his initial determination that Goshen was nonresponsible and there is no evidence of bad faith, we will not consider the protester's allegations pertaining to the initial nonresponsibility determination. See Joannell Labs., Inc., B-242415.16, Mar. 5, 1993, 93-1 CPD ¶ 207 at 4.