



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Downtown Legal Copies

File: B-289432

Date: January 7, 2002

William E. Slade, Esq., Patton Boggs, for the protester.
Roy E. Potter, Esq., Government Printing Office, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

Contention that agency wrongly rejected protester's low bid for copying services after determining that it was not responsible is denied where the record as a whole shows that the agency's nonresponsibility determination was not unreasonable.

DECISION

Downtown Legal Copies (DLC) protests the determination that it is not a responsible bidder, and the resulting rejection of its low bid, by the Government Printing Office (GPO) under invitation for bids (IFB) No. 2085S, issued to procure color and black-and-white copying services for the Department of Agriculture, the Forest Service, and various other federal agencies with offices in the Juneau, Alaska area. DLC argues that the agency's nonresponsibility determination lacks a reasonable basis.

We deny the protest.

BACKGROUND

The IFB here contemplated the award of a fixed-price, indefinite-delivery, indefinite-quantity requirements contract for a period of 1 year, followed by four 1-year options. The successful bidder is to produce, at a facility within a 35-mile radius of Juneau, flat forms and books requiring black and color copying, an assortment of binding styles, packing, labeling, and delivery.

The IFB estimated an annual average of 64 form orders and 157 book orders, with most orders copied or printed on standard-sized (8½ by 11 inches or smaller) paper. In addition, the IFB identified 14 different types of stock to be used in the printing

orders covered by the contract. The IFB also provided a detailed breakdown of its estimates for form and book orders. For example, the IFB estimated that 39 of the 64 form orders would involve black-and-white copies, and 14 of those orders would be for 500 to 5,000 copies; similarly, the IFB advised that the average book order would be for 144 copies, with an average page count of 284 pages.¹ In addition, the IFB anticipated that most orders would be completed within 3 workdays, but required that bidders be prepared to provide same-day service on approximately 2 percent of the anticipated orders, limited to orders not requiring more than 10,000 impressions.

By the September 18, 2001, bid opening date, DLC submitted the low bid (\$217,618.95), with the next-low bid (\$253,316.50) submitted by the incumbent, Copy Express. After conducting a responsibility review that included a site visit to DLC's Juneau facility, GPO concluded that DLC was not a responsible bidder, and that award should be made to Copy Express. Specifically, GPO concluded that DLC had not shown the ability to produce the work required, adequate staffing, or evidence of "quality and/or production control." Determination and Findings (D&F), Sept. 28, 2001. By letter dated October 1, the contracting officer advised DLC of this determination, and this protest followed.

During the course of this protest, DLC challenged many of the factual assertions made and conclusions reached by GPO during this responsibility review. Many of these challenges took the form of direct rebuttal, by sworn declarations, of GPO's allegedly factual assertions about the review, which had been set forth in narrative form in the agency's report. In response to these challenges raised by the protester in its comments filing, GPO answered with sworn declarations from the contracting officer (CO), who found DLC to be nonresponsible, and from the contracting officer's representative (COR), who conducted the review and made the site visit upon which the CO relied. The content of these agency declarations was again contested by the protester with more declarations in its final filing.

To assist in reconciling these disparate accounts of the facts, our Office convened a hearing in this matter, and took testimony from the COR and two DLC witnesses. While not every dispute has been reconciled, several have been. As a result, we set forth below additional facts, ultimately not in dispute, which are needed to explain and resolve this protest.

DLC's bid listed its address as 175 South Franklin Street, Juneau, Alaska. DLC had been operating since 1995 in Anchorage, and prior to submitting its bid here, DLC had no presence in Juneau. To participate in this procurement, DLC "made

¹ Put differently, during the course of a hearing held on this protest an agency representative testified that in past years this contract has involved approximately 5.1 million impressions annually. Hearing Transcript (Tr.) at 40.

substantial investments at substantial cost to ensure its performance capability” Protest at 7. Among other things, the record shows that DLC’s administrative office in downtown Juneau, and its production facility, located 4 to 5 miles outside of downtown, were both leased after September 1, 2001. Tr. at 100-02. In addition, the record shows that the Juneau facility performed its very first copying job approximately 4 days prior to GPO’s site visit. Tr. at 127. In the words of DLC’s Juneau branch manager, “we hadn’t been open too long” Tr. at 116.

One day after bids were opened, on September 19, the COR requested that DLC provide an equipment list, financial information, references, and samples of products copied and bound by the company, in order to assist the agency with its responsibility determination. COR’s Affidavit at 1. DLC responded to the COR’s request for additional information, including samples, but apparently omitted an equipment list. In addition to the information requested, DLC provided a list of its key personnel, which identified a branch manager for the Juneau location, and claimed that the manager’s skills “have made the Juneau office a successful operation.” Agency Report (AR), Tab G. When the COR noticed that DLC had omitted its equipment list, the agency made a second request for the list. DLC responded immediately, apologizing for its oversight, in a letter sent by facsimile and dated September 24, that identified the equipment on hand at its Juneau location. AR, Tab I.

Upon receipt of the equipment list, the COR noticed that several of the samples provided could not have been produced on the equipment identified by DLC in its September 24 letter, and the COR telephoned DLC’s representative² to ask about this matter. During that call, the COR learned that all but one of the samples provided by DLC were not prepared at its Juneau facility, but in Anchorage. (Tr. at 15, 80-81.) For the binding operations for which DLC did not have equipment in Juneau—identified during this protest as perfect binding, hot tape binding, and saddle-stitching—DLC advised that it had an arrangement with a local Juneau printing company to perform these services. This exchange led to a request from GPO for more information. On September 25, DLC provided GPO with a letter of the same date from its source for these services, Alaska Litho Printers, which acknowledged that company’s “commitment to [DLC] to offer any prepress, press, and/or bindery services as a trade service.” AR, Tab J.

² DLC’s representative contacted for this information is the same individual who signed its bid; he is identified there, and on other company materials, as DLC’s “member manager.” For ease of reference, we will refer to this individual as DLC’s member manager, as distinguished from DLC’s branch manager for the Juneau facility. Both provided affidavits during the course of this protest, and both participated in the hearing.

On September 27, the COR traveled to Juneau to perform an on-site inspection of DLC's facility. Since the only address the COR had been given was the address on DLC's bid--at this point, the COR did not know that DLC had a separate production facility--the COR traveled to 175 South Franklin Street, in downtown Juneau. Upon his arrival, he was met by DLC's member manager at a small office, with few, if any, furnishings.³ From there, the two men traveled together to DLC's production facility, located in an office park approximately four or five miles from downtown Juneau.

Upon arrival at the production facility, the COR found a suitable site, outfitted with the claimed equipment in apparent good order, but noted that the facility was quiet, with no work in progress, and only one employee, DLC's branch manager. Tr. at 20-22, 86-88, 116. This led to a discussion, confirmed by all three witnesses, about the fact that DLC would both hire locally and transfer employees from its Anchorage operation in the event it received the contract. Tr. at 22-23, 29, 93-94, 121. After a short visit, which included a viewing by the COR of DLC's stock of paper and supplies but no discussion of its adequacy, Tr. at 40-41, 99, 123-125, the COR departed. The next day, September 28, using information provided by the COR, the CO determined, and a review panel concurred, that DLC was not a responsible bidder, because, in essence, DLC lacked the capacity to perform. As indicated above, this finding was communicated to DLC by letter dated October 1.

DISCUSSION

DLC argues that GPO's determination of nonresponsibility lacked a reasonable basis because it is not supported by the facts and applicable law, and because it violates GPO's own regulations. With respect to the facts, DLC argues that GPO never advised that it wanted samples produced at the company's Juneau facility, and any adverse inference arising from its forwarding of samples produced in Anchorage is unfair. DLC also disputes the COR's conclusions about its capacity, and the facts upon which those conclusions are based. Specifically, DLC argues that the COR was unreasonable in concluding that it would not have sufficient employees by the contract start date, that it had no prior work, that the company lacked the ability to comply with the contract's requirement to perform pick-up and delivery of work, and that the company lacked adequate paper stock and supplies.

In considering the applicable standard here, we note first that despite DLC's status as a small business concern, this nonresponsibility determination was not required to be referred to the Small Business Administration (SBA) for review under that agency's certificate of competency procedures, as GPO is not subject to the referral

³ On this point there is a slight, but ultimately immaterial, dispute. The COR says the small room was empty but for a telephone and DLC's member manager. Tr. at 18. DLC's member manager testified that there was also a small table and one chair. Tr. at 85.

requirements of the Small Business Act, 15 U.S.C. § 637(b)(7) (1994). Fry Communications, Inc., B-207605, Feb. 1, 1983, 83-1 CPD ¶ 109 at 2-5. When an agency's nonresponsibility determination is reviewed by our Office, and when there is no allegation of bad faith--and there is none here--we will not disturb the determination unless a protester can show that the agency had no reasonable basis for its determination; put simply, this is a matter where the CO is vested with broad discretion in exercising his or her business judgment. Document Printing Serv., Inc., B-256654, B-257051, July 8, 1994, 94-2 CPD ¶ 13 at 3. Our review of such a determination is limited to whether the determination was reasonable when it was made, given the information the agency had before it at the time. See Mail Boxes Etc., B-281487, Feb. 16, 1999, 99-1 CPD ¶ 37 at 3.

We begin our analysis with GPO's request to DLC for additional information, including samples, and the impressions that were reasonably created by the events that followed. First, while we recognize that DLC disputes GPO's claim that the agency's oral request to DLC for samples specified that the samples must have been produced at the Juneau facility, we need not resolve this dispute. Simply put, whether GPO did, or did not, specify that the samples provided had to have been produced in Juneau, in the context of a responsibility determination about DLC's Juneau facility, it was not reasonable to provide printing samples produced elsewhere. In our view, DLC should have understood that providing samples produced on machines in Anchorage would provide GPO little information about the capabilities of DLC's Juneau facility.⁴

Second, we think the way in which the origin of these samples came to light reasonably contributed to GPO's concern that DLC might be overstating its readiness. When DLC responded to the agency's request for additional information, it omitted its equipment list. While we have no reason to believe that this omission was anything other than inadvertent, it was only after GPO made a second request

⁴ We have no reason to believe that DLC was trying to mislead GPO by providing samples from Anchorage, and we found credible the testimony of DLC's member manager explaining why he did so. During the hearing, DLC's member manager testified that he received the telephone call requesting samples in his Anchorage office, and that he was trying to quickly address a request from a significant potential customer. Thus, he pulled sample materials off the rack in Anchorage. Tr. at 80-81. On the other hand, we note that a significant portion of DLC's copying machines were not yet installed at the time of GPO's request for samples; in fact, several machines were still on a barge en route from Anchorage to Juneau at this time. See Letter of Ikon Solutions to DLC, Sept. 21, 2001 (Initial Protest, Tab E); Declaration of CO at 2. Thus, it appears that DLC might have been unable to provide samples produced in Juneau at the time of the agency's request.

for the list, and received it, that GPO was able to discern that certain of the samples provided could not be produced on the equipment identified.⁵

Third, we add to this mix the information regarding DLC's branch manager in Juneau that was provided to GPO with the other information requested. Specifically, the description stated that the branch manager's skills "have made the Juneau office a successful operation." AR, Tab G. This claim was made to the CO on or around September 21. See Initial Protest, Tab D (e-mail from DLC's member manager promising the COR the requested materials, which included this claim, by September 21). During the hearing, however, DLC's Juneau branch manager testified that the first job performed at the Juneau site was not performed until on or about September 23, only 4 days prior to the September 27 site visit. See Tr. at 127. In our view, this inflated claim, while perhaps mere puffery, again reasonably caught the CO's attention (CO's Declaration at 4), and reasonably reinforced his increasing concern that DLC might be overstating its readiness to begin performance.

Finally, in the string of events that, while not dispositive, contributed to the conclusion here, the COR arrived for his site visit at the address DLC included on its bid, and found an empty, or nearly-empty, room. While, as DLC argues, there is no requirement in the solicitation for a downtown office, we think the condition of DLC's office reasonably contributed to GPO's concerns about DLC's readiness to perform this contract.

With respect to the events at the site visit, as noted above, there is no dispute that the COR found DLC's production facility to be a suitable site and outfitted with the claimed equipment in apparent good order. There is also no dispute that the COR found a quiet facility, with no work in progress, and only one employee present, DLC's branch manager. This situation apparently led to a discussion, confirmed by all three witnesses during the hearing, about the fact that DLC would hire locally, and would transfer employees from its Anchorage operation, in the event it received the contract. Tr. at 22-23, 29, 93-94, 121. Beyond these matters there is little agreement.

Our pre-hearing conference call, and hearing letter, outlined the four areas of disagreement between the agency and DLC about what was asked and what was seen during the COR's visit to DLC's production facility. At the conclusion of our hearing, three of these areas were still in dispute. These were: (1) the information exchanged between the COR and representatives of DLC about other work performed by the company at the Juneau facility; (2) whether the COR inquired

⁵ In addition, as noted above, additional machines were being installed between the time that GPO first asked for the list, and the time that DLC provided it. See Letter of Ikon Office Solutions to DLC, supra. Thus, DLC benefited from the delay caused by its omission.

about, and if so, what information was exchanged about, the ability of DLC to pick up and deliver work; and (3) the information exchanged about DLC's employees. On the other hand, the fourth area of disagreement explored at the hearing--i.e., the availability of supplies (including paper) during the COR's site visit--can be resolved by our Office based on a review of the declarations, as amplified by the declarants at the hearing.

In responding to the agency report, DLC's member manager submitted a declaration disputing GPO's conclusion that the Juneau facility lacked adequate supplies to perform this contract. Specifically, he stated that "we had all the supplies necessary on-hand at our Juneau production site to perform the GPO contract, including plenty of ink, toner, and 120 cases of paper (600,000) sheets." Declaration of DLC's Member Manager, Nov. 16, 2001, at 3. In response, the COR submitted a declaration describing what he saw during his September 27 site visit. On this point he states as follows:

Without reservation, I deny [DLC's Member Manager's] claim that DLC had 120 cases of paper at the production location when I visited with him, including the storage area I specifically asked to see. I made a subsequent visit for an on-site inspection in connection with another contract which was later awarded to DLC. At that visit, I saw more supplies, including a large quantity of paper. In fact, there could have been 120 cases of paper there then, but not on September 27, 2001. This second visit occurred approximately 6 weeks later.

Declaration of COR at 5. The protester's final filing included a declaration from DLC's branch manager in Juneau that was consistent with the COR's view of the amount of stock on hand. Specifically, the branch manager stated, "My recollection is that we had 25 cases of paper there when [the COR] visited. Each case contains 5000 pages. We received an additional 120 cases of paper the following week." Declaration of DLC's Branch Manager at 1.

During the hearing, each of the witnesses was asked about the supplies on hand, and again, the testimony provided by the COR and DLC's branch manager was largely consistent. Compare Tr. at 57-61 (COR describes his "ballpark" estimate that there were 20 cases of paper) with Tr. at 123-24 (branch manager estimates there were 25 cases of paper). In addition, these two witnesses also gave consistent testimony about the kinds of paper on hand--that DLC had on hand mostly regular white bond paper, with a much smaller assortment of other papers that might be used to perform this contract. Accordingly, we find that there were between 20 and 25 cases of paper on hand at DLC's Juneau facility on September 27.

We explored during the hearing whether the COR thought 25 cases of paper would be adequate to perform this contract, and he testified that it would not. Tr. at 41-42. In reaching this conclusion, the COR admitted that DLC might have had enough paper to perform the contract for a week, given the agency's past experience that

this contract requires 5.1 million impressions per year, or almost 100,000 impressions weekly, provided all of the copying requests were for white paper. Id. at 40-42. On the other hand, he pointed out that the contract here requires the use of 15 different types of stock (IFB at 7) and that DLC did not have range of stock it would need to successfully perform. Tr. at 41-42.⁶ In addition, the COR acknowledged that there were other retail sources for white paper in the Juneau area, but expressed concern about the availability of some of the other types of paper, especially in the winter months when access to Juneau might be reduced due to ice and/or fog. Tr. at 58-61.

We recognize that the record here indicates that DLC generally has adequate facilities and equipment and that GPO in fact awarded a different (albeit smaller) contract to DLC 6 weeks after the nonresponsibility determination here. Our role, however, is not to make a de novo responsibility determination or to “second guess” GPO’s determination in light of subsequent events, but to determine whether GPO reasonably found DLC nonresponsible based on the information provided by DLC in response to GPO’s inquiries and at the site visit. We think the record here shows that the nonresponsibility determination was not unreasonable. Specifically, it is clear that DLC did not at that time have an established operation in Juneau, but instead was “ramping up” its capabilities, and that a site visit even 3 days earlier might have shown that DLC did not even have adequate equipment installed. We also note that this site visit occurred on Thursday, September 27, with performance to begin 4 days later on Monday, October 1, and that the COR found a quiet facility, with only one employee, and with supplies the COR reasonably viewed as inadequate. In addition, we note that at the time of this visit, several events had already created a reasonable concern at GPO that DLC was overstating the readiness of its new facility in Juneau. Thus, given the record here, including the pleadings, declarations, and testimony during the hearing, we cannot conclude that the agency acted unreasonably in finding that DLC was not prepared to perform this contract on October 1.

The protest is denied.

Anthony H. Gamboa
General Counsel

⁶ We note for the record that the COR testified that this contract calls for 15 different types of paper. We count only 14 types, IFB at 7, and assume that the de minimis difference between his testimony and the terms of the IFB would not change his conclusion that DLC did not have sufficient stock to perform this contract.