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**Comptroller General
of the United States**

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

Decision

Matter of: Wild Building Contractors, Inc.

File: B-293829

Date: June 17, 2004

Terrance R. Ketchel, Esq., for the protester.

Carlton A. Arnold, Esq., and Allen Sebastian, Esq., U.S. Army Corps of Engineers, for the agency.

Angela A. Wu, Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's affirmative determination of the awardee's responsibility on the ground that the contracting officer may have failed to consider relevant responsibility information is denied where the record shows that the contracting officer was aware of and considered the information at issue as part of the responsibility determination.

DECISION

Wild Building Contractors, Inc. protests the award of a contract to Compton Construction Company, Inc. under invitation for bids (IFB) No. W912QR-04-B-00021, issued by the U.S. Army Corps of Engineers, for construction of a combat mission flight simulator facility at Fort Campbell, Kentucky. Wild challenges the agency's affirmative determination of Compton's responsibility.

We deny the protest.

The IFB here was issued on January 12, 2004, and called for the construction of a 32,000 square foot addition to an existing building at Fort Campbell to house a combat mission flight simulator facility. On its cover page, the IFB advised that this procurement was reserved for small business firms registered with the Small Business Administration's (SBA) historically underutilized business zone (HUBZone) program. The solicitation also advised that the applicable small business size standard for this procurement was \$28.5 million in annual receipts. IFB at 23.

By the February 17 bid opening date, the agency received nine bids. Compton's bid was low, at \$5,869,950; Wild's was second-low, at \$5,914,697. Agency Report (AR), Tab 5, at 2. In its bid Compton certified that it: (1) met the applicable small business size standard; (2) was a HUBZone small business concern included on the List of Qualified HUBZone Small Business Concerns maintained by SBA; and (3) was not submitting its bid as part of a joint venture. AR, Tab 4, at 23.

On February 24, the Corps of Engineers conducted a preaward survey of Compton to determine the firm's responsibility; the survey found that Compton was a responsible bidder, and recommended award of the contract to the company. AR, Tab 6, at 4. On March 4, Compton was notified of the award and asked to provide performance and payment bonds. By letter dated March 5, and received by Wild on March 10, the Corps notified Wild of its decision to accept Compton's low bid.

The next day, March 11, Wild challenged Compton's status as a HUBZone small business concern at SBA. One day later, March 12, Compton filed its protest with our Office. On March 19, SBA dismissed Compton's challenge to Wild's HUBZone status, as SBA requires that such challenges, when related to sealed-bid procurements, be filed no later than the close of business on the fifth business day after bid opening. See 13 C.F.R. § 126.801(d)(1) (2004).

In its protest to our Office, Wild argues that the Corps made an improper affirmative determination of responsibility with respect to Compton. The gravamen of Wild's complaint is that Compton's bid evidenced a lack of integrity by not disclosing what, in Wild's view, must be an improper teaming arrangement between Compton and a non-HUBZone concern, Howard W. Pence, Inc. (hereinafter the "Pence Company"), where the president of Compton (Norman Compton) has been an employee for 22 years, and remains an employee.

Wild's protest identified the following evidence, in addition to Mr. Compton's employment, which, in Wild's view, shows that Compton Construction failed to disclose a teaming arrangement with the Pence Company: (1) Compton Construction's fax number is the same as the fax number for the Pence Company; (2) Compton Construction's e-mail address is a Pence Company address—*i.e.*, hwpence@infi.net; (3) Compton Construction's listed telephone number is Mr. Compton's home telephone; (4) a Dun and Bradstreet Business Information Report on Compton Construction shows that the company has reported virtually no business activity since its founding in 1992; (5) an individual answering the office telephone at the Pence Company indicated to Wild's senior projects manager that Mr. Compton would likely be the superintendent for this project, and that Mike Pence, of the Pence Company,¹ would likely serve as the project manager; and (6) a

¹ Although we do not know—and the protester has not clearly identified—the relationship between Mike Pence and the other principals of Pence Company, the
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government representative advised Wild's senior projects manager that an individual by the name of Mike Pence was present at the signing of the contract.

Our Office generally will not consider a protest challenging an affirmative determination of responsibility, except under limited exceptions, because the determination that a particular contractor is capable of performing a contract is largely committed to the contracting officer's (CO) discretion. 4 C.F.R. § 21.5(c) (2004). We recently revised our Regulations in this regard to add as a specified exception protests "that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the [CO] unreasonably failed to consider available relevant information or otherwise violated statute or regulation." Id. We explained in the preamble to the revision that it was "intended to encompass protests where, for example, the protest includes specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. 67 Fed. Reg. 79,833, 79,834 (2002); see Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4.

As a preliminary matter, we note that Wild's protest springs from the same core facts as--and hence is almost identical to--Wild's untimely SBA challenge to Compton's eligibility for award as a HUBZone small business concern. Although Wild recognizes that our Office will not consider challenges to HUBZone eligibility, see Ashe Facility Servs., Inc., B-292218.3, B-292218.4, Mar. 31, 2004, 2004 CPD ¶ 80 at 17, it argues here that the same facts that supported its SBA challenge to Compton's HUBZone eligibility suggest a lack of integrity on Compton's part (stemming from an undisclosed affiliation with the Pence Company), which should have resulted in a determination that Compton lacks the requisite responsibility to serve as a government contractor.

We initially viewed these allegations--without the context of a developed record--as sufficient to satisfy our threshold requirement that a protest raise serious concerns that the CO may have failed to consider relevant responsibility information. As explained below, however, the fully developed record clearly demonstrates that the contracting officer in fact was aware of and gave reasonable consideration to the information at issue here as part of the responsibility determination.

The record shows that the Corps was aware of most of the evidence about the connection between these companies by the time it decided to award to Compton. For example, the cover of the Corps's preaward survey indicates that Mike Pence is Compton's point of contact. In addition the survey indicates that Mike Pence was a

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preaward survey identifies Mr. Pence as an officer of the Pence Company for over 25 years. AR, Tab 6, at 3.

co-founder and principal of Compton since its founding in 1992, and that for over 25 years he has been an officer of the Pence Company. Finally, the preaward survey recognized that principals of Compton were involved in other Corps construction projects, and the record shows that their involvement was while working for the Pence Company; in fact, the preaward survey drew favorable conclusions about the earlier involvement of Compton's principals in these projects. AR, Tab 6, at 4. The record also shows that the Corps verified that Compton was listed on SBA's website listing small businesses eligible to represent themselves as HUBZone concerns. Although the Corps might not have recognized that the telephone and fax numbers listed on the website were Mr. Compton's home telephone, and the fax machine at the Pence Company, the e-mail address identified on that website was, as indicated earlier, hwpence@infi.net.

In sum, while the record shows that Compton was, and is, closely affiliated with the Pence Company, we see no evidence that Compton was hiding its affiliation with the Pence Company, or that the Corps was unaware of that affiliation, or failed to give it reasonable consideration in the responsibility determination. See Universal Marine & Indus. Servs., Inc., B-292964, Dec. 23, 2003, 2004 CPD ¶ 7 at 4.

In a related argument, Wild asserts that Compton does not qualify as a HUBZone small business concern by virtue of its affiliation with the Pence Company, and that Compton's failure to disclose this allegedly disqualifying affiliation casts serious doubt on the firm's integrity. While Wild couches its argument in terms of a challenge to the agency's responsibility determination, in fact the crux of its argument is its assertion that Compton does not qualify as a HUBZone concern. As Wild itself recognizes, however, and as we noted above, a firm's status as a HUBZone concern is for determination by SBA, not our Office. Since Wild's allegation thus turns ultimately on resolving an issue we do not review, we will not consider this issue.²

² We note, however, that during the course of this protest, the Corps asked SBA to perform a program examination to determine whether Compton Construction met the applicable HUBZone requirements. An SBA program examination, while different from an SBA HUBZone protest (compare 13 C.F.R. Part 126, subpart H (HUBZone protests) with 13 C.F.R. § 126.401 (HUBZone program examinations)), considers "documentation related to the location and ownership of the concern, the employee percentage requirements, and the concern's attempts to maintain this percentage," and considers these issues as of the time of the firm's application for certification, and at the time of the examination. 13 C.F.R. § 126.401. By letter dated May 19, 2004, SBA advised the Corps that it had no basis to question Compton's eligibility as a HUBZone concern. In addition, the letter expressly advised the Corps that SBA "is aware of the relationship between Compton Construction and companies owned and operated by members of the Pence family." SBA Program Examination Letter to Corps of Engineers, May 19, 2004, at 1.

In addition to its initial allegation, Wild's comments on the agency report, and a subsequent filing, argue that the agency did not conduct an adequate review to determine that Compton had sufficient funding, facilities, or experience to be considered a responsible contractor. These simply are not the kind of issues our Office will review, even under the somewhat expanded scope of review set out in the revision to our Bid Protest Regulations.

For example, Wild argues that Compton's average monthly cash balance is not sufficient for performing a contract of this magnitude. On this issue, the Corps's preaward survey clearly identified two Compton bank accounts and identified the monthly average cash balance of each account. To answer Wild's allegation on this matter would require our Office to review the reasonableness of the CO's judgments about a matter that was clearly before the CO, as opposed to matters where there are serious concerns that the CO failed to consider information he should have considered. As we indicated in the Federal Register when we adopted this exception to our general rule against considering challenges to a CO's affirmative determination of responsibility, we think reviewing the reasonableness of a CO's affirmative determination in the same way that we review negative responsibility determinations--i.e., reviewing whether the determination had a reasonable basis--accords "too little weight to the [CO's] discretion in the area of affirmative responsibility determinations and also places a substantial unwarranted additional burden on contracting agencies." 67 Fed. Reg. at 79,834. Instead, we decided to review affirmative responsibility determination challenges only where the protest identifies evidence raising serious concerns that the CO unreasonably failed to consider available relevant information. 4 C.F.R. § 21.5(c). Absent unusual circumstances, we do not regard a protester's questions about the adequacy of a contractor's monthly cash balance--or the other issues Wild raises concerning Compton's facilities or experience--to meet this standard.

The protest is denied.

Anthony H. Gamboa
General Counsel