



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

B-178841

4-0195
November 15, 1973

Xidex Corporation
305 Soquel Way
Sunnyvale, California 94086

Attention: Mr. Lester L. Colhart, Jr.
President

Gentlemen:

Your letter of July 30, 1973, and prior correspondence from your attorney, protested the determination that your firm was not a responsible bidder under invitation for bids (IFB) No. FPIHP-D-29149-A-1-16-73, issued by the Federal Supply Service, General Services Administration (GSA), on December 18, 1972.

The IFB covered an indefinite amount of sensitized diazotype film for the period of July 1, 1973, or date of award, whichever is later, through June 30, 1974. A subsequent amendment to the solicitation, dated December 26, 1972, extended the date of bid opening from January 16 to January 19, 1973. In addition, the December 26 amendment expanded the requirements of the solicitation by adding thermal developing film. The method of award provided that award would be made under each development type and special item number for the sensitized diazotype film and on an item-by-item basis for the thermal developing film.

Seven bids were received by the closing date. Xidex was the low bidder on 95 items of sensitized diazotype film and 18 items of thermal developing film.

On February 27, 1973, the contracting officer submitted GSA Form 894, "Financial Responsibility - Inquiry and Reply," to the Credit and Finance Branch, Office of Finance, GSA, to determine whether Xidex had the financial credit and capability to perform the contract. The Finance and Credit Branch reported on March 14, 1973, that Xidex's financial status was unsatisfactory and that until such time as it could be established that the \$3,000,000 which Xidex hoped to raise by the sale of stock in May or June had, in fact, been raised, financial ability was not approved.

Since Xidex is a small business concern, the contracting officer submitted the matter to the Small Business Administration (SBA)

[Protest of Nonresponsibility Determination]

PUBLISHED DECISION
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San Francisco Regional Office for consideration for a certificate of competency (COC) on March 28, 1973. The SBA San Francisco Regional Office informed Xidex of the referral and of the action required to apply for a COC. Thereafter, Xidex filed an application for a COC together with supporting documentation.

On April 17, 1973, the SBA informally advised the contracting officer that it would decline to issue a COC if a decision had to be made at that time. However, SBA advised that if GSA would grant an extension until May 15, Xidex might be able to improve its financial situation so as to be eligible for a COC. GSA granted an extension and on May 11, 1973, the SBA San Francisco Regional Office COC Review Committee recommended issuance of a COC to Xidex. The Regional Director concurred in the recommendation for issuance of a COC and forwarded the file to the SBA Central Office (Washington).

The file was reviewed by the Central Office which determined that, based upon the record before the SBA, Xidex's application for a COC should be declined on financial grounds. Accordingly, by letter dated May 23, 1973, SBA notified GSA of this determination.

On May 25, a Xidex official notified the contracting officer by telephone that he was forwarding additional information regarding Xidex's financial competency to perform. This additional information, which included a proxy statement and an investment memorandum, was received by the contracting officer on May 30. After a review of this information, the contracting officer concluded that it gave no factual indication of any change in Xidex's financial status which would either warrant a second referral to SBA or provide a basis for a finding of responsibility. Consequently, he determined that Xidex failed to meet the minimum standards of a prospective contractor required by the Federal Procurement Regulations (FPR) section 1-1.1203 and therefore concluded that Xidex was not a responsible bidder. Contracts were awarded to the next low responsive and responsible bidders, Scott Graphics and Kalvar Corporation, on May 31, 1973.

In your attorney's protest letter of June 12, 1973, it was stated that as of that date, the reorganization and recapitalization of Xidex were proceeding as SBA and GSA had been advised. Furthermore, it was stated that firm binding subscriptions for new shares aggregating \$636,551 had been received. By telegram dated June 26, GSA was informed by the Bank of America that as of that date, there was a balance of \$703,963.19 in Xidex's equity account.

Xidex contends that the denial of the COC by the SBA Central Office improperly overruled the favorable finding of financial competency made

by the SBA San Francisco Regional Office. In that regard, the record shows that the question of Xidex's financial responsibility was submitted to SBA pursuant to FPR section 1-1.708-2. The SBA regulations, 13 CFR 124.8-16, provide that for procurements in excess of \$250,000, if the Regional Director recommends the issuance of a COC, the recommendation is reviewed by the Central Office which either issues or denies a COC. The latter office, in consideration of all the information in the record, declined to issue a COC. SBA has authority under 15 U.S.C. 637(b)(7) to issue or deny COCs, and our Office has no authority to either review SBA determinations or to inquire it to issue a COC. See B-177088, April 3, 1973; B-175970, July 18, 1972; B-176804, September 6, 1972; and B-178743, September 4, 1973.

In addition, Xidex maintains that by relying upon SBA's denial of a COC, GSA improperly disregarded the information concerning Xidex's progress of refinancing made available subsequent to May 23, 1973, the date on which the COC was denied. In this regard, Xidex contends that the determination of whether a bidder is qualified for award "must be made on the basis of its financial condition in June 1973, just prior to the beginning of the contract term, not on the basis of its financial condition three months prior thereto."

It appears that Xidex is contending that (1) the contracting officer's determination of nonresponsibility on May 30 placed undue reliance on the denial by SBA of the COC by failing to take into account relevant information furnished subsequent to date of the denial; and furthermore that (2) the determination of the question of Xidex's nonresponsibility should not have been made on May 30, but at a later point in time.

With respect to administrative findings of nonresponsibility, our Office has consistently held that the question of a prospective contractor's responsibility is a matter for determination by the contracting officer and that since such determination involves a considerable range of discretion, we will not substitute our judgment for that of the contracting officer unless it is shown by clear and convincing evidence that the finding of nonresponsibility was arbitrary, capricious, or not based upon substantial evidence. 45 Comp. Gen. 41 (1965); B-174897, June 1, 1972.

With regard to the first contention mentioned above, it should be noted that the contracting officer delayed determining the question of responsibility after the denial of the COC until he had received and reviewed the additional information, which included a proxy statement and an investment memorandum, submitted by Xidex. The contracting officer subsequently determined that this additional information gave no factual indication of any change in Xidex's financial situation which would

warrant either a second referral to SBA or provide an affirmative basis for a finding of responsibility in accordance with FPR 1-1.1204-1.

We have reviewed the information which was considered by the contracting officer in arriving at the determination of nonresponsibility of Xidex. We are unable to conclude that the determination was either arbitrary or not based upon substantial evidence. 51 Comp. Gen. 448, 491 (1972). While the Bank of America provided GSA information in the latter part of June which indicated that as of June 26 Xidex had a balance of \$703,963.19 in its equity account and was, therefore, financially responsible as of that date, we do not view such development as affecting the propriety of the decisions made prior thereto, since such decisions were necessarily made in the light of the information then of record. See B-165830, July 24, 1969; B-161339, September 25, 1967; and 51 Comp. Gen., supra.

With regard to Xidex's contention concerning the date on which the determination of responsibility was made, it should be noted that the award of the contracts in question were under a constraint of time. It is reported that GSA had been informed by high volume users such as the Social Security Agency, the Internal Revenue Service, and various elements of the Department of Defense that their normal programs would be severely hampered if awards were not made prior to July 1, 1973. In addition, the Federal Supply Schedules Production Plan indicated that the Federal Supply Schedules for the films should be forwarded for typing and printing on or before April 20, 1973, for timely distribution to various using agencies.

While FPR 1-1.1205-2 contemplates that action to obtain information regarding the responsibility of a prospective contractor shall be taken promptly after bid opening, a bidder's responsibility should be measured, as a general rule, with respect to the information of record at time of award rather than an earlier time. See 41 Comp. Gen. 302 (1961) and B-171095, May 6, 1971. With respect to a bidder's financial resources, FPR 1-1.1205-3 further requires that information pertaining thereto be obtained on as current a basis as feasible with relation to the date of contract award. Infrequently, we have indicated to an agency our view that, time permitting, further consideration of a determination of non-responsibility would be desirable because of a material change in a principal factor on which the determination was based. 49 Comp. Gen. 619 (1970). However, in our actions and decisions involving an issue of responsibility, we have consistently recognized that the projection of a bidder's ability to perform if awarded a contract must properly be left by our Office largely to the sound administrative discretion of the contracting offices involved, since they are in the best position to assess responsibility and must bear the brunt of any difficulties

experienced by reason of the contractor's lack of ability to perform in the time and manner required. 39 Comp. Gen. 705, 711 (1960). See 51 Comp. Gen. 448, 432 (1972). In the present instance, the contracting officer's determination of nonresponsibility which took into account all pertinent information received as of that date was made on May 30, 1973, one day prior to the award of the contracts. This determination was in keeping with the principle enumerated above, that responsibility should be measured at the time of award.

With regard to the date of award, we recognize that procurements should be processed in an orderly and efficient manner, and that there comes a time when an award must be made on the basis of the facts at hand. It is not the intention of our Office to unduly interfere with the timely processing of procurements by the agencies. Accordingly, it is the position of our Office that the awarding of the contracts on May 31, to take effect on July 1, was neither arbitrary nor capricious, but was an exercise of procurement judgment based on the circumstances then before the contracting officer.

For the reasons set forth above, the protest is denied.

Sincerely yours,

Paul G. Dembling

For the

Comptroller General
of the United States