

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of ALLIED CONTRACTORS, )  
INC. )  
 ) Docket No. MSBCA 1191  
Under Toll Facilities )  
Administration (TFA) )  
Contract No. BRB 9-806 )

August 16, 1984

Responsibility - Prior Performance History - It was appropriate for a Toll Facilities Administration (TFA) procurement officer to consider performance history in assessing bidder responsibility where his consideration was limited to current or recent projects.

Responsibility - Recent or Prior Default Termination - A default termination on a prior contract does not constitute a per se basis for a subsequent finding of nonresponsibility. In reviewing a prior termination for default, an agency must consider the circumstances of a contractor's failure to perform properly and in a timely manner and determine whether the same problems reasonably may be expected to similarly affect its performance on the contract to be awarded.

Responsibility - Right to Rely On Default Termination Pending Appeal Thereof - A procurement officer may rely upon a default termination and the written procurement officer's decision thereof in considering bidder responsibility on subsequent procurements until such time as that determination is reversed by a higher authority.

Responsibility - A procurement officer has broad discretion in determining whether a bidder is responsible. Such determinations will not be overturned unless shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulations.

Responsibility - A TFA procurement officer's nonresponsibility determination was sustained where it was demonstrated that the bidder recently had been defaulted on a similar, adjacent project where it was unable to perform work at a pace which would have assured timely completion on the new contract to be awarded.

De Facto Debarment - A finding of nonresponsibility here did not constitute a de facto debarment since the evidence did not demonstrate an attempt by procurement officials to disqualify Appellant as a bidder on future State contracts.

**APPEARANCES FOR APPELLANT:**

William M. Huddles, Esq.  
J. Richard Margulies, Esq.  
Braude, Margulies, Sacks  
& Rephan, Chartered  
Towson, MD

**APPEARANCES FOR RESPONDENT:**

Louis J. Kozlakowski, Jr.  
Steven J. Kmiecziak  
Assistant Attorneys General  
Baltimore, MD

**OPINION BY CHAIRMAN BAKER**

This appeal arises out of a May 28, 1984 TFA procurement officer's final decision that Appellant was not a responsible bidder and that its bid on the captioned procurement, accordingly, had to be rejected. Appellant argues that this decision was arbitrary and that its low, responsive bid should have been accepted. TFA, however, contends that its procurement officer's decision had a reasonable basis in view of Appellant's recent unsatisfactory performance on a similar project under its supervision.

**Findings of Fact**

**Evolution of Protest**

1. In November 1983, TFA issued an invitation for bids (IFB) for the widening and rehabilitation of a structure denominated as the Patapsco Flats Bridge. This structure is located on the west approach to the Baltimore Harbor Tunnel in Baltimore and Anne Arundel Counties. The IFB Special Provisions generally described the project as follows:

1. Widening of both sides of the existing bridge deck and super-structure.
2. Replacing the existing concrete parapets and medians with "New Jersey" type [barriers].
3. Replacement of the existing wearing surface with latex modified concrete.
4. Replacing existing roadway joints with waterproof joints.
5. Other miscellaneous work.

**Special Provisions, SSP 1-1.**

2. Bids were opened on the "Patapsco Flats" project on February 14, 1984. Although fourteen bids were tendered, only the two lowest are pertinent here. These were:

Appellant	\$5,766,911.00
McLean Contracting Company	\$6,112,764.47

3. Appellant also had been the low, responsive bidder on a TFA project involving the widening of the Canton Viaduct, a structure similarly comprising a portion of the Harbor Tunnel Thruway. This project was located approximately two miles northeast of the Patapsco Flats Bridge, on the opposite side of the Patapsco River. Appellant was determined to be a responsible bidder under this procurement and received an award. Notice to proceed on this contract was issued by TFA on or about July 1, 1983.<sup>1</sup>

4. On March 22, 1984, Mr. Michael Snyder, the TFA procurement officer on both the Canton Viaduct and Patapsco Flats projects and TFA's Director of Engineering, issued a final decision terminating the Canton Viaduct project for default. (Exh. A-3). The default termination was based upon Appellant's alleged failure to prosecute the work in such a manner so as to assure timely completion.

5. Appellant subsequently appealed the termination action to this Board where it now is pending. Resolution of this matter is not expected until the summer of 1985.

6. By letter dated April 16, 1984, Mr. Snyder rejected Appellant's bid on the Patapsco Flats project on the basis that Appellant was not a responsible bidder. Specific reasons for this determination were not set forth.

7. Appellant protested this action by letter dated April 23, 1984. Appellant further requested a statement of the reasons supporting Mr. Snyder's determination.

8. In a May 28, 1984 final decision, Mr. Snyder apprised Appellant, in pertinent part, as follows:

The determination of Allied's [ Appellant's ] non-responsibility was justified. Allied's lack of timely performance on Contract Number BRB 9-747 - Widening of the Canton Viaduct - resulted in the TFA issuing to Allied a Termination for Default notice on March 22, 1984. The referenced contract is very similar to Contract Number BRB 9-747. The construction work involved on both contracts is very similar if not virtually identical and undertaken under similar circumstances. Allied did not perform Contract Number BRB 9-747 in a timely fashion as required by the contract specifications, and therefore does not have the record of satisfactory performance to justify a determination that it will satisfactorily perform this contract in accordance with its terms.

9. A timely appeal was filed on June 12, 1984.

---

<sup>1</sup>Exhibit A-3 indicates that 240 calendar days had been charged to the job as of February 25, 1984. Accordingly, the notice to proceed would have been issued on July 1, 1983.

### Appellant's Prior Performance History

10. Appellant primarily specializes in bridge and road construction. Over the years, it has completed in excess of 85 projects for various owners including the State of Maryland. Appellant's Mr. Alfred J. Simpson<sup>2</sup> testified that prior to the default termination initiated by TFA, his company never had been terminated for default or assessed liquidated damages for late performance.

11. Before rejecting Appellant's bid on the Patapsco Flats project, TFA's Mr. Snyder requested information from the State Highway Administration (SHA) as to Appellant's performance history on its contracts. Mr. Snyder testified that he received a list of 20 such projects, most of which involved road patching and construction of inlet grates. However, two bridge projects were included on the SHA list and were determined to be relevant to Mr. Snyder's assessment of Appellant's ability to perform the Patapsco Flats work. These projects involved State owned bridges over Ebenezer Road and along the Baltimore Beltway where it crosses the Baltimore-Washington Parkway.

12. The Ebenezer Road project was completed in 1983. Although the original contract performance time was 600 calendar days, completion was delayed by more than 100 days. Appellant, however, has not been assessed liquidated damages and has a number of claims pending before the SHA Chief Engineer on this project.

13. The Baltimore Beltway bridge work was completed in 1978. Although this project contractually was required to be completed within 200 days, it entailed a performance period of between 300 and 400 days. Notwithstanding the fact that the project has been complete for six years, claims still are pending before the SHA Chief Engineer. Liquidated damages have not been assessed.

### Comparison of Canton Viaduct and Patapsco Flats Projects

14. Both the Canton Viaduct and Patapsco Flats projects involved a widening and rehabilitation of bridge type structures located on the Baltimore Harbor Tunnel Thruway. Each project was required to be performed in multiple stages so as to permit traffic to be maintained over the structures during the construction work.

15. The Canton Viaduct involved the widening and renovation of 4731 feet of structures and roadway together with approximately 700 feet of rampway. The Patapsco Flats project involved structures and roadways totalling 3516 feet. Notwithstanding this disparity in work volume, the Patapsco Flats contract specified a performance period of 600 calendar days, 100 days more than was specified for the Canton Viaduct. Appellant's bid prices for the projects approximated \$10 million for the Canton Viaduct and \$5.8 million for Patapsco Flats.

---

<sup>2</sup>Mr. Simpson is a vice president and project manager for Appellant and has been employed by the company for 13 years.

16. From the standpoint of traffic maintenance, Appellant's Mr. Simpson estimated that traffic flow at the Patapsco Flats bridge is 30% less than at the Canton Viaduct. Additionally, the grade of the roadway at the Canton Viaduct was said to create difficulties for ascending trucks, thus impeding traffic flow during construction periods and increasing maintenance of traffic difficulties. While TFA's Mr. Snyder did not dispute the gradient problem, he testified that the average daily traffic over the two spans did not differ by more than 15 to 20%. Further, during the nonpeak traffic hours when contractors are working, traffic counts over the two bridges do not vary by more than five to ten percent.

17. The Canton Viaduct is situated approximately 30 feet above ground and passes over existing roads and railroad property. By contrast, the Patapsco Flats bridge is only 15 feet high and spans streams and wetlands. The importance of these distinctions is twofold. First, structure height affects the type and size of equipment required and, hence, costs. Further, the placement of concrete and steel is more time consuming and less efficient at higher elevations. A 15 foot difference in height between the structures was said by Appellant's Mr. Simpson to be very significant in this regard. Second, the existence of roads and railroad property beneath a bridge necessitates traffic maintenance and careful coordination with the railroads. This is contrasted with stream and wetlands operations where traffic interference would not be a factor.

TFA's Mr. Snyder, however, testified that work in the wetlands areas, under the Patapsco Flats Bridge, would be inefficient in that either mud mats would have to be utilized to support equipment below the bridge or work would have to be performed using the existing bridge structure as the equipment platform. Under either arrangement, work only could be performed on one side of the bridge at a time given the size of equipment necessary and the limited work area available. The Canton Viaduct location, on the other hand, accommodated up to five cranes at ground level, thus permitting work to be performed simultaneously on both sides of the structure.

18. The greatest differences between the two projects can be seen in the substructure comparison. The Canton Viaduct has continuous foundations whereas each span of the Patapsco Flats Bridge is supported separately. Accordingly, portions of the Canton Viaduct substructure, totalling 1000 cubic yards of concrete, had to be demolished so as to permit the structure to be widened properly. Further, rock bolts were required to connect new substructure to that which supported the remainder of the viaduct. The Patapsco Flats Bridge, on the other hand, did not require demolition as each pier constituted an independent support.

At least six different types of pier construction involving the placement of 2,300 cubic yards of concrete were required to complete the Canton Viaduct expansion. Repetitive operations, under such circumstances, were not achievable. The Patapsco Flats bridge, however, had a uniform substructure. Expansion piers consisted of four driven piles, a concrete footing and a column. A total of only 800 cubic yards of concrete was necessary to erect these piers and repetitive operations were possible.

19. The framing plans for the two projects also were different. The Canton Viaduct widening involved the placement of double beams and plate girders. These members are much heavier than the single beams required to

frame the Patapsco Flats widening. Accordingly, an 80 to 100 ton rental crane, rather than contractor owned equipment, was necessary at the Canton Viaduct.

20. Superstructure construction for the two projects was similar in many respects. Both projects required maintenance of traffic over two, 11 foot lanes. Additionally, the existing medians and blacktop were to be removed, the underfill scarified, new latex modified concrete surfaces poured, and median barriers replaced. Expansion joints likewise were to be similar.

21. The Canton Viaduct project was described in 97 contract drawings whereas TFA issued only 19 contract drawings on Patapsco Flats.

#### Contract Payments as Measure of Progress

22. In performing the Canton Viaduct project, Appellant and its surety were paid \$2,602,719.00 over the 266 days Appellant was on the job. This constituted an average earnings per day of \$9,784.66. Timely completion of the project would have necessitated an average daily earnings of \$20,000 over the 500 day performance period.

23. A portion of the final payment made to Appellant and its surety on the Canton Viaduct project was for work which was not payable as yet under the terms of the defaulted contract. For example, payment for each concrete pile contractually was not to be made until the steel jackets were driven, reinforcing cages placed and the concrete poured. However, because the termination left certain piles partially finished, some pro rata basis for payment had to be agreed to in order to credit Appellant for work in place but not completed. This is what the final pay estimate, in part, was intended to do.

24. TFA's Mr. Snyder testified that in making his nonresponsibility determination, he considered Appellant's earnings per day average on the Canton Viaduct and concluded that it was insufficient to assure timely completion on the Patapsco Flats job. In making this analysis, Mr. Snyder considered only the next to last pay estimate and initially deducted what he determined to be nonproductive pay items from Appellant's earnings in order to arrive at a truer measure of progress. In this regard, mobilization (\$279,000), construction stakeout (\$25,000), temporary medians (\$185,000), temporary concrete barriers (\$159,000), and other preliminary items such as arrow boards, engineers offices, temporary traffic signs, etc., all were considered nonproductive. Further, an \$817,000 payment made to Appellant for fabricated steel which had not been installed likewise was deducted. The net result of this process was a reduction of the actual earnings per day to approximately \$3000, well below the \$9600 per day average considered necessary to assure timely completion of Patapsco Flats.

Mr. Snyder further testified that a second analysis was made again using the next to last pay period to determine Appellant's progress without excluding so-called nonproductive work. The average earnings per day under this calculation was \$8800.<sup>3</sup> This again was far below the \$9600 per day average necessary to assure timely completion on the Patapsco Flats project.

### Decision

A responsible bidder is one ". . . who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability which shall assure good faith performance." COMAR 21.01.02.59. An indication of bidder capability and reliability is found in prior performance history. Hence, it is appropriate for State procurement officers to review performance history in assessing a bidder's responsibility, so long as this consideration is limited to current or recent projects. Maywood Cab Company, Inc., B-187550, April 27, 1977, 77-1 CPD ¶288; United Office Machines, B-187193, March 16, 1977, 77-1 CPD ¶195.4

A default termination on a prior contract does not constitute a per se basis for a subsequent finding of nonresponsibility. 37 Comp. Gen. 756 (1958); S.A.F.E. Export Corporation, B-209492, August 2, 1983, 83-2 CPD ¶153. A prior termination for default, however, may be a proper matter for consideration in determining bidder responsibility. Howard Ferriell & Sons, Inc., B-184692, March 31, 1976, 76-1 CPD ¶211. In reviewing a prior termination for default, an agency must consider the circumstances of a contractor's failure to perform properly and in a timely manner and determine whether the same problems reasonably may be expected to similarly affect the contract to be awarded. 43 Comp. Gen. 323 (1963). A procurement officer may rely upon a prior default termination and the written procurement officer's determination thereof in considering bidder responsibility on subsequent procurements until such time as that determination is reversed by

---

<sup>3</sup>Pay estimate 9 was for the period ending February 25, 1984 (day 240 under the contract). Since total earnings through this date were \$2,189,601.80, earnings per day were \$9123.34 and not \$8800 as determined by the TFA procurement officer. This still was below the \$9600 per day average necessary to complete the Patapsco Flats project in a timely manner.

<sup>4</sup>In Maywood Cab Company, the government's contracting [procurement] officer relied solely on Maywood's prior default of nine months earlier in rejecting a subsequent bid. Maywood's difficulties were correctable and, in fact, had been corrected in the interim and the contracting officer's non-responsibility determination thus was improper. Similarly, in United Office Machines, default terminations on two prior contracts, three years prior to the nonresponsibility determination, were not considered relevant to the issue of responsibility.

a higher authority. S.A.F.E. Export Corporation, B-208744, April 22, 1983, 83-1 CPD ¶437, recon. denied, B-208744.2, July 14, 1983, 83-2 CPD ¶90; Howard Electric Company, B-193899, February 27, 1979, 79-1 CPD ¶137; 43 Comp. Gen. 323 (1963).

A procurement officer has broad discretion in determining whether a bidder is responsible. Custom Management Corp., et al., MSBCA 1086/1090, October 22, 1980 at pp. 6-7. Determinations of this type will not be disturbed by this Board unless they are shown to be clearly unreasonable, an abuse of discretion, or contrary to law or regulations. Solon Automated Services, Inc., MSBCA 1046, January 20, 1982, p. 22, rev. on other grounds, Solon Automated Services, Inc. v. University of Maryland, et al., Misc. Law Nos. 82-M-38 and 82-M-42 (Cir. Ct. Baltimore Co., October 13, 1982).

The foregoing notwithstanding, Appellant alleges initially that this Board must look to see whether the TFA procurement officer's determination of nonresponsibility was supported by substantial documentary evidence disclosing the basis for the determination. See Kennedy Van & Storage Co., B-180973, June 19, 1974, 74-1 CPD ¶334; Marine Engineers Beneficial Association, B-181265, Nov. 27, 1974, 74-2 CPD ¶298. Each of the cases cited in support of this proposition, however, concern Federal small business set-aside procurements. Under applicable Federal regulations, an agency contracting officer must document nonresponsibility determinations pertaining to small businesses and support them with substantial evidence. See, e.g., ASPR §1-705.4, July 14, 1982, Gov't Cont. Rep. (CCH) ¶32,194.20. This rigorous standard is essential to assure that the Federal government's socioeconomic policy encouraging the development of small businesses is implemented fully. A similar regulatory requirement does not exist either for firms failing to qualify as small businesses in the Federal system or for firms doing business with the State of Maryland. Accordingly, the standard of review applicable here is less rigorous and requires only that we ascertain whether the TFA procurement officer's determination had a reasonable basis. Compare S.W. Electronics and Manufacturing Corp., B-181423, December 17, 1974, 74-2 CPD ¶356; 37 Comp. Gen. 756 (1958); 39 Comp. Gen. 705 (1960).

Turning to the specific facts of this appeal, the TFA procurement officer relied upon his recent default termination of Appellant on another contract and Appellant's late performance on two earlier SHA contracts in concluding that Appellant was not a responsible bidder. With regard to the latter two contracts, we conclude that it was unreasonable to so rely without further inquiry as to the nature of the delays and the reasons therefore. The evidence of record establishes that SHA has not sought liquidated damages on either contract to date and that adjustments to contract amounts and performance time currently are being considered. Under such circumstances, the TFA procurement officer had no basis upon which to make a judgment as to whether Appellant contributed to or caused the delays experienced and whether the factors resulting in Appellant's dilatory performance still existed and posed a threat to the TFA project being considered for award.

The recent default termination of a TFA contract, however, was a matter about which the TFA procurement officer had intimate knowledge. The TFA procurement officer made the final decision to terminate the former contract and did so at the precise time that he was considering Appellant's responsibility as a bidder under the captioned procurement. The



issue, therefore, is whether Appellant's performance on the defaulted contract reasonably could be said to demonstrate a strong likelihood of untimely performance on the captioned procurement.

Appellant contends that at the time it was terminated for default on the Canton Viaduct project, it was earning nearly \$9800 per day. Regardless of whether its problems on the Canton Viaduct project were excusable, Appellant argues that it was demonstrating an ability to perform at a level greater than the \$9600 per day necessary to assure timely performance on the Patapsco Flats project. When one considers also that the Patapsco Flats project was much easier for a contractor to perform, Appellant maintains that it obviously was a responsible bidder.

The TFA procurement officer did consider earnings per day on the Canton Viaduct project as a measure of the progress which he could expect from Appellant on the Patapsco Flats project. Calculations were made in two separate ways. Initially, the TFA procurement officer utilized the next to last pay estimate (#9) while seeking to eliminate what he considered to be nonproductive pay items. This analysis was thought to be more reflective of the actual work effort being expended. Eliminating all category one preliminary items<sup>5</sup> and the fabrication of structural steel (item 419) from consideration, the TFA procurement officer concluded that Appellant was performing productive work on the Canton Viaduct at a rate of \$2,820.00 per day.<sup>6</sup> The TFA procurement officer then sought to compare this figure to the \$9600 per day in earnings necessary to assure timely completion of the Patapsco Flats project. At a minimum, however, we find that the procurement officer likewise should have deducted these so-called nonproductive pay items from the total amount bid by Appellant on the Patapsco Flats project to compute a comparable figure for required productive work per day. If we perform this task on behalf of the TFA procurement officer, we find that the

<sup>5</sup>These items (#101-118) respectively were the Engineers Office No. 1, Maintenance of Traffic (MOT), removal of existing median for MOT, crusher run for MOT, arrow board, temporary traffic signs, removal of painted stripe marking, temporary pavement striping tape, removal of temporary striping, temporary concrete barrier for MOT, resetting concrete barrier, 55 gallon drums, type 3 barricades, sand containers, construction stakeout, mobilization and temporary median joints. These were all categorized by TFA as preliminary items of work.

<sup>6</sup> a.	Earnings Through 2/25/84	\$2,189,601.80 (See Exh. A-6)
b.	less pay items 101-118 (Exh. A-6)	(695,754.95)
c.	less pay item 419 (fabricated structural steel)	(817,047.00)
	Total Earnings/Productive Work	\$ 676,799.85
d.	Earnings/day based on 240 days	\$2,820.00

corresponding number would be \$6,646.72 per day,<sup>7</sup> or more than \$3800 per day in excess of what Appellant was earning on the Canton Viaduct under this analysis.

As the TFA procurement officer properly recognized, the measurement of progress on an average earnings per day basis is not always practical. For example, mobilization and the Engineers Office, under both contracts here, were items which largely would be paid for in the first month or two of contract performance.<sup>8</sup> The large dollar amounts involved under these pay items substantially would increase the contractor's average earnings per day early in the job and distort this figure as a measure of progress. These two items further support all work performed during the contract performance period. Contract Special Provision, SSP 2-1.01. Accordingly, the full cost of these items, if they are to be considered as a measure of progress, more properly should be spread evenly over the 500 day performance period provided for in the Canton Viaduct project.

Like mobilization, maintenance of traffic was a lump sum pay item. Although the need for traffic maintenance continues throughout the contract performance period, most of the payments for this item are made early in the job. Maintenance of traffic, therefore, similarly would tend to distort the earnings per day so as to indicate greater progress early in the job than that which actually is being achieved.

Totally ignoring the preliminary work items in the analysis of progress, however, both was unreasonable and unfair to Appellant. These items, after all, were essential to the successful completion of the work. Some method

<sup>7</sup> 1. Contract bid amount	\$5,766,911.00
2. less bid items 101 to 112 (Tab A Agency Report)	1,228,822.00
3. less bid item 417 (structural steel)	<u>550,000.00</u>
Total	\$3,988,029.00
4. Earnings/days based on 600 days	\$6,646.72

<sup>8</sup>Contract Special Provision SSP 2-1.04 provided for mobilization payment as follows:

Basis of payment will be 50 percent of the lump sum bid price payable on the first monthly estimate subsequent to the Contractor's moving in of all necessary facilities, as indicated under "Description" above, that would enable him to satisfactorily begin work on the preliminary contract item. The remaining 50 percent will be prorated [sic] over the remaining monthly estimates. Payment as directed above will be full compensation for all labor, materials, equipment, tools and incidentals necessary to complete the item. . . .

of allocating the lump sum payments over time should have been utilized so as to credit Appellant for the necessary work it performed without skewing the average earnings figures.

We cannot say, however, that the TFA procurement officer's second analysis was unreasonable. In this regard, we note that the final pay estimate (#10) was inappropriate for use as a measure of progress since it contained payments made to Appellant's surety which had not been earned under the terms of the Canton Viaduct contract. These payments would not have been made absent the default termination. Pay estimate 9, on the other hand, was a recent measure of Appellant's job progress and included only those amounts for which Appellant had qualified for payment under the terms of the contract. The TFA procurement officer's second analysis likewise made no deduction for preliminary pay items or other so-called nonproductive work. For reasons previously discussed, this approach thus permitted Appellant's progress to be judged in the most favorable light.

Appellant nevertheless argues that there were other factors favorable to its cause which never were considered or understood by the TFA procurement officer. Principally, Appellant points to its long record of successful performance and the relative ease with which the Patapsco Flats project could have been performed in comparison to the Canton Viaduct. While another procurement officer reasonably may have concluded, under these circumstances, that the projects were dissimilar and that Appellant was capable of performing the Patapsco Flats project in an expeditious manner, the TFA procurement officer here did not. The fact that another reasonable conclusion is possible, of course, does not invalidate a procurement officer's nonresponsibility determination. See GAVCO Corporation — Request For Reconsideration, Comp. Gen. Dec. B-207846.2, September 20, 1982, 82-2 CPD ¶242.

Given the fact that the TFA procurement officer, 25 days prior to his nonresponsibility determination, had terminated Appellant for default on an adjacent project after Appellant could not satisfy him as to the excusability of the delays being encountered, and further given the dollar analysis which was made confirming Appellant's present inability to perform at a level necessary to assure timely performance on the Patapsco Flats project, we conclude that a reasonable basis existed for the TFA procurement officer's decision that the factors precipitating the earlier default not only were still existent but would preclude timely performance on the Patapsco Flats project. Under such circumstances, the nonresponsibility determination must be upheld.

Finally, Appellant alleges that the majority of its prior work has been of a similar nature under contracts with SHA and TFA. We are told that it is reasonable to assume that these agencies now will continue to utilize the default termination on the Canton Viaduct project as a basis for non-responsibility determinations on other work which Appellant bids, thus effecting a de facto debarment. In the absence of procedural safeguards of the kind set forth under COMAR 21.08.04 et seq., the action of TFA's procurement officer is said to be both unconstitutional and invalid.

In Howard Electric Company, B-193899, February 27, 1979, 79-1 CPD ¶137, the Comptroller General considered a similar set of facts and stated, at page 2, as follows:

. . . while de facto debarment could result from repeated negative responsibility determinations, see 43 Comp. Gen. 140 (1963), or even from a single negative determination if it is part of a long-term disqualification attempt, see Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (2nd Cir. 1975), all that is alleged here is a one-time disqualification, which under the circumstances appears to have a reasonable basis and does not constitute a denial of due process. See 51 Comp. Gen. 551 (1972).

Here, we likewise find that the evidence does not demonstrate an attempt by procurement officials to disqualify Appellant as a bidder on future State contracts. In fact, Appellant received a contract award on an SHA contract for pavement patching subsequent to the termination for default. As in Howard Electric Company, therefore, all that has been alleged is a one-time disqualification which, for reasons previously discussed, appears to be reasonable. Although Appellant naturally is concerned by the potential effect of the default termination on its ability to compete on future procurements, the State will have to demonstrate in such procurements that the reasons for the default termination reasonably may be said to continue to exist and pose a threat to the successful completion of any contract to be awarded. If the State cannot meet this burden, a nonresponsibility determination may not issue.

For all of the preceding reasons, the appeal is denied.