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

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B-193630

... not to be available to public reading ...

MAR 13 1979

[Determination of Nonresponsibility is Discretionary Judgment of Agency]

The Honorable Dave Durenberger
United States Senate

Dear Senator Durenberger:

You have forwarded for our consideration certain correspondence relevant to the protest by Onan Corporation, which we decided on January 11, 1979, our reference B-193630. In that decision, we dismissed Onan's protest without consideration on the merits.

The correspondence which you forwarded here expresses concern over our refusal to review agency determinations of responsibility. It conjectures that it is easier for an agency to make affirmative determinations of responsibility, award on the basis of low price and then bail out contractors, than it is for an agency to make an initial determination of nonresponsibility. We disagree.

With few exceptions, we no longer review protests involving a procuring agency's determination of responsibility because it is largely a discretionary business judgment. A procuring agency must suffer any delays and difficulties stemming from a contractor's nonresponsibility, and there is no real purpose in its awarding contracts without some basis for concluding that a firm is able to perform. In our opinion, a bail out creates more difficulties and delays than an initial nonresponsibility determination. Additionally, the courts have held that a party alleging an agency's abuse of discretion through arbitrary determinations must meet a high standard of proof by showing that the alleged arbitrary action did in fact exist. Reco Industries v. United States, 428 F.2d 1233, 1240 (Ct.

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Cl. 1970). Moreover, the court has observed that criteria for determining bidder responsibility "are not readily susceptible to reasoned judicial review." Keco Industries v. United States, 492 F.2d 1200, 1205 (Ct. Cl. 1974). As a practical matter, one who protests the responsibility of a competitor is not in a position to meet this high standard of proof because only the Government agency involved, with its access to plant facilities and records, has adequate knowledge to judge a prospective contractor's performance capabilities.

Onan's "buy in" allegation provides no legal issue for our review. Although the applicable procurement regulations discourage "buying in", Government acceptance of an otherwise acceptable below cost bid is not illegal. RKPM Products Corporation, B-190313, August 7, 1978, 78-2 CPD 94. We note, however, that Defense Acquisition Regulation § 1-311 (1976 ed.) does caution contracting officers to assure that amounts excluded in the "buy in" contract are not recouped through change orders or follow-on contracts.

We do not view our treatment of these issues as an abdication of our responsibilities as suggested by the protester's attorney, because our experience has demonstrated that there is little, if any, purpose for reviewing the merits of these issues.

We trust this response serves the purpose of your inquiry. The correspondence forwarded with your letter is returned.

Sincerely yours,

D. S. KEMER

Comptroller General
of the United States

Enclosure