

DECISION

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

FILE: B-219434

DATE: September 26, 1985

MATTER OF: NJCT Corporation

DIGEST:

1. Protester fails to meet its burden of demonstrating that nonresponsibility determination lacked a reasonable basis or was made in bad faith where the contracting officer based the determination on what he reasonably perceived to be protester's history of significant problems in meeting the delivery obligations under prior contracts.
2. Since a prime contractor is responsible for all the work performed under its contract with the government, even that performed by a subcontractor, a delinquency under a prior contract for which the contractor utilized the services of one subcontractor may properly be considered by the contracting officer in determining the responsibility of the contractor even though the contractor proposes to utilize a different subcontractor in performing the proposed contract.
3. The fact that a contractor has been found responsible in other procurements does not demonstrate that a nonresponsibility determination lacked a reasonable basis or was made in bad faith. This is true even where one of the prior affirmative determinations of responsibility was made, without a preaward survey, by the same contracting officer who, after a preaward survey, found the protester to be nonresponsible here.
4. Protester alleging that contracting officials acted in bad faith to eliminate the protester from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys does not meet its burden of showing by virtually irrefutable proof that the officials had a specific and malicious

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intent to injure the protester where the protested procurement was not set aside for small business concerns and a preaward survey was requested because of the protester's unfavorable procurement history.

NJCT Corporation (NJCT) protests the Defense Logistics Agency's (DLA) award of a contract to Globe Slicing Machine Co. (Globe), under invitation for bids No. DLA400-85-B-6233 for the supply of meat slicing machines. NJCT contends that DLA improperly determined that NJCT was not a responsible prospective contractor. We deny the protest.

DLA received two bids in response to the solicitation. NJCT submitted the low bid, offering to supply meat slicers manufactured by Lan Electric, Limited (Lan), in the United Kingdom.

At the request of contracting officials, the cognizant Defense Contract Administration Services Management Area (DCASMA) conducted a preaward survey of NJCT's responsibility as a prospective contractor under this solicitation. DCASMA concluded that the firm's performance record, "although improved during the past year," was nevertheless unacceptable. In particular, the survey indicated that of the 16 bilateral contracts completed by NJCT during the preceding 6 months, 5 were in a delinquent status as the result of vendor-caused delay. In addition, the survey indicated that NJCT was delinquent on 5 of the 21 bilateral contracts under which it was currently performing and attributed 4 of the delinquencies to vendor-caused delay. Finally, the survey indicated that NJCT had been delinquent on 3 of 5 contracts for "RELATED PREVIOUS PRODUCTION (Government)," including one contract for a meat slicing machine manufactured by Lan. DCASMA therefore recommended that, "based solely on the firm's performance record," no award be made to NJCT under the solicitation.

Based upon the negative preaward survey and upon a "working knowledge of a history of delinquencies on contracts performed by NJCT," knowledge acquired through consultation with other contracting officials, examination of government records and personal knowledge, the contracting officer found NJCT to be nonresponsible. Since NJCT, although certifying itself to be a small business concern, offered to supply a product not produced or manufactured in the United States, DLA did not refer the matter to the

Small Business Administration for possible issuance of a certificate of competency. 13 C.F.R. §§ 121.5(b)(2)(iv), and 125.5(c) (1985); Federal Acquisition Regulation § 19.102-3, 48 C.F.R. § 19.102-3 (1984).

NJCT challenges DLA's determination that it was nonresponsible, contending that it was based upon erroneous and incomplete information and made in bad faith.

The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. Accordingly, our Office will not question a contracting officer's nonresponsibility determination unless the protester, who bears the burden of proof, demonstrates bad faith by the agency or the lack of any reasonable basis for the determination. See Lithographic Publications, Inc., B-217263, Mar. 27, 1985, 85-1 C.P.D. ¶ 357.

NJCT argues that the preaward survey does not accurately reflect the firm's performance record. Regarding the three contracts for "RELATED PREVIOUS PRODUCTION" identified in the survey as having been delinquent, NJCT alleges (1) that the delinquency under contract No. DLA400-84-M-BA99, for the supply of a Lan meat slicer, was caused by the agency's failure to allow sufficient time for the approval and distribution of the required commercial manuals and by a change in the place of inspection and in the shipping point, (2) that NJCT in fact met the revised, delayed delivery schedule adopted under contract No. DLA400-84-C-0123 when the item description was changed, and (3) that the delinquency under contract No. DLA400-84-C-1535 was caused by DLA's rejection of a component during a quality review.

We note, however, that in the apparently contemporaneous government records documenting these delinquencies, the delinquency under contract No. -BA99 was attributed to "vendor production scheduling problems (Lan Electric)." In addition, DLA reports that NJCT was on notice as to the required delivery schedule for the commercial manuals since the schedule was set forth in the unilateral purchase order accepted by the firm. DLA also questions whether changing the place of inspection and the shipping points could have caused the delinquency since production allegedly was not completed until after the

scheduled delivery date. Likewise, the delay in performance of contract No. -0123 is attributed in the apparently contemporaneous government records to "scheduling deficiencies and lack of timely vendor follow-up." DLA reports that the change in the specifications cited by NJCT as necessitating a delayed delivery schedule was in fact requested by the contractor. As for the delinquency under contract No. -1535, government records confirm NJCT's admission that perceived deficiencies in production caused the delay.

Moreover, we also note that NJCT, while generally observing that "50-75% of contract delays have government caused contributory reasons," has not offered any specific evidence directly refuting DCASMA's conclusions that vendor-caused delay resulted in NJCT being delinquent on 31 percent of the bilateral contracts it completed during the preceding 6 months and 19 percent of the bilateral contracts it was currently performing. Further, even if we consider NJCT's general observation to be an allegation that the government contributed to 50-75 percent of the delinquencies under NJCT's contracts with the government, this does not explain the remaining 25-50 percent of the delinquencies nor exclude the possibility that the firm also contributed to some of the delinquencies for which government action was a contributory cause.

We note that NJCT, which attributes its prior delinquencies to reliance on subcontractors other than Lan, argues that such delinquencies therefore are irrelevant here since NJCT is offering meat slicers manufactured by Lan. Since, however, a prime contractor is responsible for all the work performed under its contract with the government, even that performed by a subcontractor, see Arvol D. Hays Construction Company, ASBCA No. 25,122, 84-3 BCA ¶ 17,661; San Francisco Bay Marine Research Center, ENG BCA No. 4,787, 84-2 BCA ¶ 17,502; Dick Olson Constructors, Inc., ASBCA No. 19,843, 76-1 BCA ¶ 11,812; Lombard Corporation, ASBCA Nos. 18,206, 18,207, 75-1 BCA ¶ 11,209, we believe that a delinquency under a prior contract for which the contractor utilized the services of one subcontractor may properly be considered by the contracting officer in determining the responsibility of the contractor even though the contractor proposes to utilize a different subcontractor in performing the proposed contract. In any case, we also note that one of the contracts on which NJCT was considered delinquent was the contract pursuant to

which NJCT supplied a meat slicer manufactured by Lan, the proposed subcontractor here.

Accordingly, we conclude that NJCT has not demonstrated that the contracting officer lacked a reasonable basis for finding that the firm had experienced significant problems in meeting its delivery obligations under prior contracts. See Lithographic Publications, Inc., B-217263, supra, 85-1 C.P.D. ¶ 357 at 3; C.W. Girard, C.M., 64 Comp. Gen. 175 (1984), 84-2 C.P.D. ¶ 704; Arrowhead Linen Service, B-194496, Jan. 17, 1980, 80-1 C.P.D. ¶ 54; Howard Electric Company, 58 Comp. Gen. 303 (1979), 79-1 C.P.D. ¶ 137 (nonresponsibility determination may be made on the basis of what the government reasonably perceives to be the proposed contractor's prior inadequate performance even if the contractor disputes the government's interpretation).

We recognize that NJCT believes that the contracting officer failed to take into account other information relevant to the firm's responsibility. Thus, NJCT points out that the preaward survey apparently was limited to a consideration of bilateral contracts.

DLA, however, reports that the contracting officer considered the firm's performance record as it relates to both unilateral and bilateral contracts. Moreover, we note that not only has NJCT failed to provide our Office with any comprehensive figures indicating that the firm's performance record as it relates to unilateral contracts was substantially better than its performance record as it relates to bilateral contracts, but, in addition, NJCT's performance on the contract specifically identified here as unilateral, i.e., unilateral purchase order No. -BA99 for the supply of the Lan meat slicer, was considered by DLA to have been delinquent.

NJCT points out that DLA has recently awarded other contracts to the firm, including one award made by the contracting officer here several months prior to this procurement.

The fact that NJCT has recently been found responsible in other procurements does not, however, indicate the unreasonableness of the determination here, which was based upon a clear history of significant problems in performing prior contracts. Responsibility determinations are based upon the circumstances of each

procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental and the fact that different conclusions may be reached as to a firm's responsibility does not demonstrate unreasonableness or bad faith. See S.A.F.E. Export Corporation, B-208744, Apr. 22, 1983, 83-1 C.P.D. ¶ 437; Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 C.P.D. ¶ 246; GAVCO Corporation--Request for Reconsideration, B-207846.2, Sept. 20, 1982, 82-2 C.P.D. ¶ 242. This is true even where the same contracting officer has made an earlier affirmative determination of responsibility. See S.A.F.E. Export Corporation--Request for Reconsideration, B-209491.2, B-209492.2, Oct. 4, 1983, 83-2 C.P.D. ¶ 413. Moreover, we note that DLA informs us that the contracting officer here made the earlier affirmative determination of responsibility without benefit of a preaward survey due to the small amount of the procurement.

NJCT further points out that the preaward survey indicated that NJCT's performance had "improved during the past year." We note, however, that the same survey also recommended against award to NJCT based upon the firm's overall recent performance record. Given the significant problems apparent in that record, we believe that there was sufficient evidence for the contracting officer to conclude that, despite some unspecified "improvement," there remained a substantial risk that NJCT would be unable to meet the required delivery schedule. Cf. S.A.F.E. Export Corporation, B-208744, supra, 83-1 C.P.D. ¶ 437 at 4 (sufficient evidence to reasonably anticipate deficiencies even though other evidence favorable to prospective contractor).

NJCT alleges that contracting officials, acting in bad faith, have undertaken a concerted effort to eliminate NJCT from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys on NJCT. By way of example, NJCT notes that a preaward survey was conducted here on NJCT but not on the awardee.

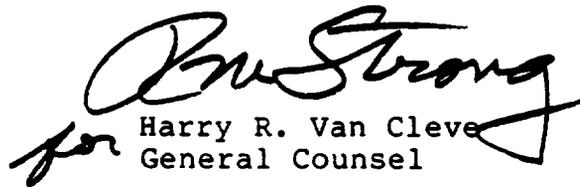
A protester bears a heavy burden of proof when alleging bad faith on the part of government officials. It must show by virtually irrefutable proof, not mere inference or supposition, that these officials had a specific and malicious intent to injure the protester. See Ebonex, Inc., B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495.

NJCT has not made the required showing. Not only was this procurement not set aside for small business concerns, but, in any case, NJCT certified itself to be a small business concern and presumably could have offered a product manufactured or produced by a small business concern.

Moreover, DLA indicates that a preaward survey was conducted on NJCT because NJCT, unlike Globe, had an unfavorable procurement history. We have previously held that contracting officers have broad discretion regarding whether to conduct surveys. See Carolina Waste Systems, Inc., B-215689.3, Jan. 7, 1985, 85-1 C.P.D. ¶ 22; PAE GmbH, B-212403.3, et al., July 24, 1984, 84-1 C.P.D. ¶ 94. Neither the fact that an agency may have conducted an unnecessary preaward survey, see Ebonex, Inc., B-213023, supra, 84-1 C.P.D. ¶ 495 at 4, nor the failure to conduct a survey on a firm whose record of satisfactory performance is known to the contracting officer demonstrates bias, see PAE GmbH, B-212403.3 et al., supra, 84-2 C.P.D. ¶ 94 at 4.

Accordingly, we conclude that NJCT has failed to meet its burden of demonstrating that the nonresponsibility determination lacked a reasonable basis or was made in bad faith.

The protest is denied.


for Harry R. Van Cleave
General Counsel