

DECISION



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

FILE: B-220486

DATE: October 4, 1985

MATTER OF: Pan Am Aero

DIGEST:

1. GAO will not review a challenge to a contracting agency's affirmative responsibility determination where there is no allegation or showing that the contracting officials acted fraudulently or in bad faith, or that the solicitation contained definitive responsibility criteria that have not been met.
2. Protester's contention that the contracting agency was required by procurement regulations to find the prospective awardee non-responsible based on unsatisfactory performance on a prior contract is without merit since poor prior performance does not automatically render a firm ineligible for future contracts.

Pan Am Aero protests the award of a contract to Oscar Pollack Associates under invitation for bids No. N62470-85-B-4014, issued by the Navy for grounds maintenance services in the Panama Canal Zone. Pan Am challenges the Navy's determination that the awardee is capable of performing the contract. We dismiss the protest.

Because a contracting officer's determination that a bidder is capable of performing a contract is based in large part on subjective judgment, our Office will not consider a protest challenging such an affirmative responsibility determination unless there is a showing either that the determination may have been made fraudulently or in bad faith by contracting officials, or that definitive responsibility criteria in the solicitation may not have been met. Tudor Inns of America, Inc., B-218944, June 11, 1985, 85-1 CPD ¶ 671; Bid Protest Regulations, 4 C.F.R. § 21.3(f) (5) (1985). Here, the basis of Pan Am's protest is that the Navy was required to find the awardee nonresponsible

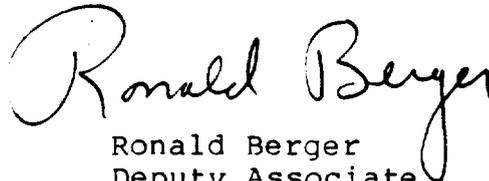
based on (1) the fact that the Army had terminated for default a prior contract for grounds maintenance in the Canal Zone awarded to a firm in which the awardee was a key employee; and (2) an alleged misrepresentation by the awardee as to the reasons for terminating that contract. Pan Am does not argue that either exception under which we will consider protests concerning affirmative responsibility determinations applies here. Instead, Pan Am asserts that procurement regulations require a nonresponsibility determination in this case.

Pan Am relies on the Federal Acquisition Regulation (FAR), § 9.104-3 and the Navy Acquisition Regulation Supplement § 9.105-290 as support for its contention that the termination for default of the prior contract required that the awardee be found nonresponsible. FAR, § 9.104-3(c) recognizes that the contracting officer is to consider deficiencies in past performance when making a responsibility determination, and provides that a prospective awardee that recently has been "seriously deficient" in contract performance will be presumed to be nonresponsible unless the contracting officer finds that the circumstances were beyond the awardee's control or that corrective action has been taken. Similarly, section 9.105-290(a) of the Navy's supplemental regulations provides that unsatisfactory past performance "shall be sufficient to make a decision of nonresponsibility." In Pan Am's view, these regulations require a finding of nonresponsibility whenever prior unsatisfactory performance is shown.

Unsatisfactory past performance does not automatically render a firm ineligible for future contract awards, however; rather, performance history is only one of several factors an agency should take into account when considering a prospective contractor's responsibility. See Turbine Engine Services--Request for Reconsideration, B-218477.2, June 25, 1985, 64 Comp. Gen. _____, 85-1 CPD ¶ 721; FAR, § 9.104-1. Contrary to Pan Am's interpretation, there is no basis in the FAR or the Navy's regulations for automatically finding a prospective awardee nonresponsible on the basis of past performance, without also considering the awardee's current capability to perform the contract. Thus, even assuming that the awardee in this case can be held accountable for the poor performance of the prior contractor, the Navy was not required as a result to find the awardee nonresponsible for purposes of the current contract.

With respect to Pan Am's second contention, that the awardee misrepresented to the Navy that the sole basis for the termination of the prior contract was the contractor's failure to provide a performance bond, when in fact the contract was terminated for unsatisfactory performance as well, so that the awardee should be found lacking business integrity, and, therefore, nonresponsible, Pan Am offers no evidence that such a misrepresentation was made. In addition, we see no reason to assume that the Navy accepted the awardee's characterization of the basis for termination of the prior contract, since full documentation of the termination decision was available in the Army's files also located in the Canal Zone. In any event, the contracting officer's determination that the awardee is capable of performing the current contract, despite the prior termination for default, is an affirmative responsibility determination that will not be reviewed except in circumstances not alleged or in any way evident in this case.

The protest is dismissed.



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