

**DECISION**



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

**FILE:** B-220807; B-220808; **DATE:** January 28, 1986  
B-220809; B-220813; B-220817  
**MATTER OF:** Decker and Company;  
Baurenovierungsgesellschaft, m.b.H.

**DIGEST:**

1. Protest against contracting officer's negative responsibility determination is denied where the determination was based on a negative preaward survey report which found that the prospective contractor had an unsatisfactory record of prior performance, and the record contains documentation that provides a reasonable basis for the preaward survey findings and the contracting officer's determination.
2. Protest against negative responsibility determinations is sustained where the determinations were based on a preaward survey report of prior unsatisfactory performance that did not disclose that the performance deficiencies cited were those of an alleged affiliate of the firm being surveyed; where the record indicates that the firm's own performance record was never investigated, but was in fact satisfactory, and where the preaward survey report contains no indication that the surveyor ever determined that the alleged affiliate's past performance might actually adversely affect the protester's responsibility.

Decker and Company and Baurenovierungsgesellschaft, m.b.H. (BRG) protest the U.S. Department of the Army's determinations that the firms are nonresponsible under various solicitations for repairing and renovating buildings at military installations in West Germany. Decker was found nonresponsible, because of prior unsatisfactory performance, under requests for proposals (RFP) Nos. DAJA76-85-R0045 and DAJA76-85-R-0593. BRG was found nonresponsible under RFP Nos. DAJA76-85-R-0411,

DAJA76-85-R-0444, and DAJA76-85-R-0596. The determinations that BRG was nonresponsible were based on a finding that it is affiliated with Decker because the two firms have the same management. All of the protested solicitations contemplated the award of fixed-price contracts to the low responsible offeror, and the protesters' offers were low under each solicitation.

Decker asserts that the Army acted unreasonably in finding it nonresponsible and contends that its past performance has been satisfactory. BRG argues that it is not affiliated with Decker and that its own prior performance record has always been satisfactory. We deny Decker's protest and sustain BRG's protest.

#### Preliminary Matters

After filing its protest with our Office, BRG also filed suit in the United States District Court for the District of Columbia seeking declaratory and injunctive relief (Baurenovierungsgesellschaft, m.b.H. v. United States Department of the Army, Civil Action No. 85-3835). We are considering BRG's protest in light of the indication in a stipulation approved by the court that the court desires our opinion in this matter. See, e.g., Bullock Associates Architects, Planners, Inc., 64 Comp. Gen. 415 (1985), 85-1 CPD ¶ 340.<sup>1/</sup>

The Army argues that we should dismiss both Decker's and BRG's protests because the protesters did not file a copy of their protests with the contracting officer within one working day after filing with this Office. See Bid Protest Regulations, 4 C.F.R. § 21.1(d) (1985). The protesters assert that they did file copies of their protests with the United States Army Contracting Agency, Europe within the one day filing period. They do not dispute that the contracting officers did not receive the protests until two working days after they were filed with this Office, but contend that this was the fault of Army personnel, who allegedly did not deliver the copies to the contracting officers identified in the correspondence.

As the Army itself recognizes, we will not dismiss a protest for failure to furnish a copy to the contracting officer within the one day period required by our Bid

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<sup>1/</sup>BRG's suit involves one solicitation that has not been protested to this Office, DAJA76-85-R-0551. The issues are the same, however.

protest Regulations where the failure did not seriously delay the protest proceedings. Container Products Corp., B-218556, June 26, 1985, 64 Comp. Gen. \_\_\_\_, 85-1 CPD ¶ 727. The Army does not allege that there was any such delay here, and none is apparent from the record. Accordingly, we will not dismiss the protests.

#### Decker Protest

Decker was found nonresponsible by the same contracting officer under both protested RFPs based on a preaward survey that concluded that Decker had an unsatisfactory record of performance on past and current government contracts. Prior to making his nonresponsibility determinations, the contracting officer conducted an investigation into the basis for the negative preaward survey findings and determined that there were performance difficulties on six of the eight contracts reviewed. Decker disputes these findings and asserts that to the extent any prior delinquencies may have occurred, they were due to circumstances beyond the firm's control.

A contracting agency has broad discretion in making responsibility determinations, which must of necessity be a matter of business judgment. Costec Associates, B-215827, Dec. 5, 1984, 84-2 CPD ¶ 626. Such judgments should, of course, be based on fact and reached in good faith; however, it is only proper that they be left to the administrative discretion of the agency involved as the agency must bear the brunt of difficulties experienced in obtaining the required performance. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Therefore, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or a lack of any reasonable basis for the determination. System Development Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644. Decker has not made the necessary showing here. Rather, we find that the record provides a reasonable basis for the preaward survey findings, and the contracting officer's decisions.

For example, on contract No. DAJA76-84-C-0355 for exterior building and heating repair work, the preaward surveyor and contracting officer received reports of Decker's delinquent performance and learned that a cure notice had been issued to the contractor. On contract No. DAJA76-84-C-1602 for renovation of boiler plant equipment, the preaward surveyor and contracting officer also received reports of unsatisfactory performance. Specifically,

continued delays in Decker's performance were noted, and the contracting activity advised that it intended to assess liquidated damages against Decker for this reason.

Similarly, on contract No. DAJA76-83-C-0872 for modernization of a dining facility, the record shows that Decker received a negative "Construction Contractor Performance Evaluation Report." We consider this report indicative of the kinds of problems encountered by the government in all the contracts that were relied on by the preaward surveyor and contracting officer; therefore, we quote the inspector's comments from this report in full:

"The timely completion by firm Decker was poor. The firm continuously put in requests for time extensions or delays. Granted some of the delays or extensions were warranted, but it is felt that firm Decker did not put forth a serious enough effort to complete the project within the time set forth by the contract.

"Manpower was also a questionable area. There didn't seem to be enough workers on site to do the required work within the time requested.

"It is therefore recommended that firm Decker be evaluated very closely upon his next bid or not awarded any more government contracts."

While Decker attempts to discredit the report on contract No. DAJA76-83-C-0872 by noting that the date for contract completion was May 25, 1984 rather than May 25, 1983, as indicated in the report, we find this unper-  
suasive. In this connection, the inspector's comments indicate that he had examined Decker's record of performance in detail, recognized that some delays occurred that were excusable, but nevertheless concluded that there were unwarranted serious delays on Decker's part. We do not think that actual confusion about the date for contract completion is consistent with this apparent thorough examination of the facts and circumstances by the inspector here.

Decker also takes issue with the conclusion that it was delinquent in its performance of the contracts relied on by the preaward surveyor and the contracting officer for the nonresponsibility determinations. Decker contends in

each case that any performance deficiencies that occurred were excusable. For example, on contract No. DAJA76-84-C-0355, Decker argues that the issuance of the cure notice was unreasonable because the Army previously had issued a suspension of work order directing the firm to suspend all work on the contract. Decker asserts that although the contract was later modified to incorporate changes necessary due to changed conditions discovered during contract performance, this modification only pertained to additional work and did not authorize the contractor to resume performance of the work as originally awarded. Thus, Decker asserts that it could not complete the contract because the suspension of work order was never canceled.

We find that the question of whether Decker's prior performance deficiencies were excusable is a matter of contract administration and therefore not for resolution under our Bid Protest Regulations. See 4 C.F.R. § 21.3(f)(1) (1985); Tangfeldt Wood Products, Inc., B-207688, May 3, 1983, 83-1 CPD ¶ 468. The only question for our review here is whether the contracting officer's nonresponsibility determinations were reasonable based on the information available at the time he made the determinations. See John Carlo, Inc., B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184.

In this connection, Decker asserts that the preaward surveyor and contracting officer did not adequately investigate the reports of the protester's delinquent performance and that had they done so, they would have found the complaints unjustified. However, we think the record reasonably supports the nonresponsibility determinations. Although Decker cites conclusory statements in the agency report and nonresponsibility determinations in support of its position, the fact is that the record is well-documented both as to the nature and extent of the deficiencies found, and as to any circumstances that may have excused Decker's delinquent performance. This documentation includes cure notices issued to Decker, negative performance evaluations, and reports by contracting officials of continued performance delays and deficiencies attributed to Decker. It also includes letters from Decker that respond to and take issue with the cure notices, as well as information indicating that some contract delays that occurred were caused by the government. (The record also indicates that the agencies involved recognized this, but did not think it excused Decker's deficiencies.)

Since all of this information was considered in making the nonresponsibility determinations, we find no basis to question those determinations. Although Decker asserts that there were circumstances beyond its control that excuse its prior performance deficiencies, we think that based on the record before him, the contracting officer could reasonably determine otherwise. See Pauline James & Associates, B-220152 et al., Nov. 20, 1985, 85-2 CPD ¶ 573; Lithographic Publications, Inc., B-217263, Mar. 27, 1985, 85-1 CPD ¶ 357. We also find nothing unreasonable in the reliance by the preaward surveyor and contracting officer on the documentation and reports received from the contracting activities involved, and we are not aware of any requirement that this documentation had to be subjected to any further in-depth investigation. Nor do we think, as the protester suggests, that the preaward surveyor or contracting officer were required to "second guess" the contracting activities involved concerning the legitimacy of the problems they reported with Decker's prior performance.

Decker also contends that the nonresponsibility determinations were unreasonable because it has been found responsible in the recent past as the result of other preaward surveys performed by the Army. Although documentation supplied by Decker does indicate that the firm was found responsible after two recent preaward surveys, both surveys specifically note that negative reports were received on Decker's prior performance. Moreover, it is clear that the magnitude of the negative information in those surveys was not as great as that here. Accordingly, we do not think the earlier preaward survey results provide an adequate basis for questioning the subsequent negative responsibility determinations. See NJCT Corp., B-219434, Sept. 26, 1985, 64 Comp. Gen. \_\_\_\_\_, 85-2 CPD ¶ 342.

Decker alleges that Federal Acquisition Regulation (FAR) section 9.106-4(c) requires that the preaward survey report specify the extent to which the prospective contractor plans or has taken action to correct prior unsatisfactory performance, but the survey here did not do so. See FAR, 48 C.F.R. § 9.106-4(c) (1984). We find no prejudice to Decker as a result of this omission. The record relied on by the contracting officer and preaward surveyor, in our view, adequately demonstrates that to the extent Decker may have taken corrective action, it was either unsatisfactory or considered insufficient to mitigate the prior delinquency.

We conclude that the record before us provides a reasonable basis for the nonresponsibility determinations in this case, despite the protester's assertions to the contrary. Accordingly, Decker's protest is denied.

#### BRG Protest

BRG was found nonresponsible under RFP Nos. DAJA76-85-R-0411, DAJA76-85-R-0444, and DAJA76-85-R-0596 based on a preaward survey that concluded that BRG had an unsatisfactory record of performance. BRG contends that the preaward survey and subsequent nonresponsibility determinations were unreasonable because they were based on Decker's, rather than BRG's, past performance. BRG asserts that its own performance record is entirely satisfactory.

The Army admits that the nonresponsibility determinations made on BRG were based entirely on negative reports of Decker's past performance, but argues that the determinations were justified at the time they were made because the contracting officers involved were entitled to rely on the negative preaward survey report, which did not indicate that it was based on Decker's past performance. The Army also asserts that the negative preaward survey report was reasonable because BRG is affiliated with Decker by virtue of common management, and Decker clearly has an unsatisfactory performance record. We do not agree with either of these arguments.

The Army correctly points out that we have held that contracting officers may rely on the results of preaward surveys in making responsibility determinations, and that they have no obligation to make an independent evaluation. See Products Research and Chemical Corp., B-214293, July 30, 1984, 84-2 CPD ¶ 122. We have also concluded, however, that a contracting officer's nonresponsibility determination is not reasonable where it is based primarily on unreasonable or unsupported conclusions by the preaward survey team. See Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654; cf. Omneco Inc. et al., B-218343 et al., June 10, 1985, 85-1 CPD ¶ 660; Schreck Industries, Inc. et al., B-204050 et al., July 6, 1982, 82-2 CPD ¶ 14 (reliance of agency on inaccurate information contained in a preaward survey report does not render the resulting responsibility determination invalid where the inaccurate information is not pivotal to the determination).

Accordingly, we do not agree with the Army that the contracting officers' nonresponsibility determinations here were reasonable simply because they were based on the

apparently adequate negative preaward survey results. Rather, we think that if the preaward survey information and conclusions relied on by the contracting officers were substantially inaccurate or unreasonable, the contracting officers' ultimate responsibility determinations should be considered invalid, as they in fact lack any reasonable basis.

Concerning the results of the preaward survey, the Army argues that it was reasonable for the industrial specialist who conducted the survey to attribute Decker's past performance to BRG because the firms are affiliates by virtue of common management.<sup>2/</sup> We do not find it necessary to resolve the question of whether Decker and BRG are affiliates, however. This is because we find that even if the firms are affiliates, under the circumstances of this case, Decker's unsatisfactory performance did not provide a reasonable basis for the nonresponsibility determinations regarding BRG. Moreover, the record shows that the determinations were based on inaccurate and misleading information, as well as unsupported and unreasonable conclusions, in the preaward survey report.

The FAR, 48 C.F.R. § 9.104-3(d), specifically provides:

Affiliated concerns (see "Affiliates" and "Concerns" in 19.101) are normally considered separate entities in determining whether the concern that is to perform the contract meets the applicable standards for responsibility. However, the contracting officer shall consider the affiliate's past performance and integrity when they may adversely affect the prospective contractor's responsibility.

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<sup>2/</sup>FAR, 48 C.F.R. § 19.101, defines "affiliates" as follows:

[B]usiness concerns are affiliates of each other if, directly or indirectly, (a) either one controls or has the power to control the other or (b) another concern controls or has the power to control both. In determining whether affiliation exists, consideration is given to all appropriate factors including common ownership, common management, and contractual relationships. . . .

Thus, the FAR indicates that normally affiliation is not a consideration in determining responsibility. While the contracting officer is directed to consider an affiliate's past performance when it may adversely affect the prospective contractor's responsibility, this does not establish that affiliation per se provides a proper basis for a non-responsibility determination. In addition, the FAR clearly does not indicate that the prospective contractor's own performance record can or should be ignored. Yet, that is precisely what happened here.

In fact, the preaward survey report relied on by the contracting officers in this case does not disclose that the prior unsatisfactory performance cited in the report is Decker's, rather than BRG's performance. The report simply states that BRG's past performance record is unsatisfactory and then cites various negative reports on "the contractor's" performance, which are actually reports on Decker's past performance. Moreover, there is no indication in the record that the preaward survey included any investigation of BRG's own past performance or revealed any information that would adequately support a negative responsibility determination based on the firm's own performance. Nor is there any evidence that the industrial specialist who conducted the preaward survey ever determined that Decker's past performance actually might adversely affect BRG's responsibility. The sole statement in the record in this regard is that Mr. Liedtke is the general manager for both firms, and this justifies finding both firms nonresponsible. (This statement is not contained in the preaward survey report, but in a subsequent "Personal Statement" by the industrial specialist.)

In this connection, we consider it significant that after BRG filed its protest here, the agency actually investigated BRG's own performance record for the last 12 months, and discovered no performance deficiencies in four out of five contracts. On the fifth contract, "minor deficiencies" were noted. The agency then determined that BRG would be considered responsible for four unawarded contracts on which no final responsibility determination

had yet been made.<sup>3/</sup> Apparently, the firm's alleged affiliation with Decker was not considered to warrant a contrary conclusion.

The Army attempts to gloss over the different responsibility determination results by noting that the contracting officer who found BRG responsible was a different person than the contracting officers who had found BRG nonresponsible. The Army notes that we have stated that even if a protester has been found responsible by other contracting officers during the same period in which the protester was found nonresponsible under a protested procurement, this does not demonstrate bad faith or the lack of a reasonable basis for the decision, because such determinations are inherently judgmental. See Amco Tool & Die Co., 62 Comp. Gen. 213 (1983), 83-1 CPD ¶ 246. We do not find this general rule to be applicable here, however. Rather, we think the decision to find BRG responsible based on its own performance record demonstrates that BRG in fact was prejudiced by the contracting officers' prior negative responsibility determinations that were based on the inaccurate information and unsupported conclusions in the preaward survey report. We simply do not think that the different results--one based on accurate information and the other based on inaccurate information--can be reasonably attributed to judgmental differences.

Accordingly, we sustain BRG's protest and recommend that the Army reconsider the nonresponsibility determinations based on accurate information. If BRG is found

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<sup>3/</sup>BRG had previously been notified by the Army that it intended to find the firm nonresponsible with respect to these contracts on the basis of the preaward survey report at issue here. In fact, these contracts were originally also the subject of this protest. However, after the agency reconsidered its position and found BRG responsible for the purposes of the four unawarded contracts, BRG withdrew the protests.

responsible, the protested contracts should be terminated and award made to BRG.<sup>4/</sup> By separate letter, we are so advising the Secretary of the Army.

*for Milton J. Fowler*  
Comptroller General  
of the United States

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<sup>4/</sup>We are not recommending outright contract termination and award to BRG because an affirmative responsibility determination must be made before BRG can be awarded the contracts.