



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Firm Reis GmbH
File: B-224544; B-224546
Date: January 20, 1987

DIGEST

1. Contracting officer's findings of nonresponsibility were reasonable where the findings were based on negative preaward survey reports which stated that the protester's prior performance on two similar contracts was unsatisfactory and the preaward survey reports are supported by the record.
2. An offeror may be found to be nonresponsible even though its alleged unsatisfactory prior performance did not result in terminations of its contracts and the alleged performance deficiencies are disputed and have been appealed by the firm.
3. Agency's nonresponsibility determination is reasonably based even though one aspect of the protester's capability may have been incorrectly evaluated by the preaward survey team. It is only when the record shows that such determinations are based on unreasonable or unsupported conclusions in many areas that the General Accounting Office will recommend reconsideration of the determinations.
4. Agency's nonresponsibility determinations with respect to two prospective contracts does not amount to de facto debarment, because a finding of nonresponsibility unlike a debarment does not prevent a firm from competing for other government contracts and receiving awards if the firm is otherwise qualified and convinces the agency that it has corrected its past problems.

DECISION

Firm Reis GmbH (Reis) protests the Department of the Army's findings that Reis was nonresponsible with respect to requests for proposals (RFP) Nos. DAJA37-86-R-0806 and DAJA37-86-R-0618. These RFPs asked for proposals to provide boiler firing services to United States military installations in the Stuttgart and Berchtesgaden areas of West Germany. Reis' proposal prices were low on both RFPs and it contends that the nonresponsibility determinations were arbitrary, irrational and based upon erroneous preaward survey reports.

We deny the protests.

The preaward surveys were conducted at the request of the contracting officer to provide information with respect to Reis' then current capabilities and facilities so that the required responsibility determinations could be made. In each instance, the survey report recommended against award to Reis because its technical and quality assurance capabilities were unsatisfactory and its performance on two similar contracts was poor.

The determination of a prospective contractor's responsibility rests within the broad discretion of the contracting officer who in making that decision must of necessity rely primarily on his or her business judgment. Venusa, Ltd., B-217431 et al., Apr. 22, 1985, 85-1 CPD ¶ 458. While the determination should be based on fact and reached in good faith, the ultimate decision should be left to the discretion of the contracting agency because it must bear the brunt of any difficulties experienced during performance of the contract. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48 at 4,5. The contracting officer also has broad discretion as to whether a preaward survey should be conducted and, if conducted, the degree of reliance to be placed on the results of the survey. Newport Offshore, Ltd., B-219031 et al., June 13, 1985, 85-1 CPD ¶ 683. Because of the broad discretion of the contracting officer in these matters, our Office generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the agency's part or a lack of a reasonable basis for the determination. Pauline James & Associates, B-220152 et al., Nov. 20, 1985, 85-2 CPD ¶ 573.

Since Reis has not alleged bad faith on the part of the contracting officials, the only question for our review is whether the contracting officer's determinations that Reis was nonresponsible were reasonable, based on the information available at the time the determinations were made. See Decker and Co. et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100 at 5. In this regard, the Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.104-3(c) (1985), provides that a prospective contractor that recently has been seriously deficient in contract performance must be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were beyond the contractor's control or that the contractor has taken appropriate corrective action. No such determination has been made with regard to Reis. Moreover, under this FAR provision, past failure to apply sufficient tenacity and perseverance to perform acceptably is strong evidence of nonresponsibility.

The contracting officer's determinations of nonresponsibility stated that Reis' performance on one of the prior contracts (DAJA37-84-C-0882) was so deficient that 10-day cure notices demanding performance improvements were issued to Reis on December 13, 1984, and again on August 14, 1985. The contracting officer also stated that Reis' performance on another contract (DAJA37-84-C-0881) was even more unsatisfactory and the record indicates that a 10-day cure notice was also issued to Reis for its poor performance on this contract and that deductions from Reis' billings were made for improperly performed services. Among the many deficiencies cited concerning Reis' poor performance were poor management and supervision, inexperienced and unqualified personnel, lack of the required bilingual supervisors, boiler plants left unattended, boilers without proper water levels, failure to provide heat and water at the required temperatures, failure to make required inspections, failure to perform required preventative maintenance and failure to keep proper records. These and other deficiencies, including Reis' apparent unfamiliarity with the scope of work of the contracts, convinced the contracting officer that the options to extend the contracts should not be exercised. After studying Reis' current responsibility status, the contracting officer determined that Reis had a similar vague understanding of the more demanding specifications for the proposed contracts and that it was unreasonable to expect adequate performance from Reis under those contracts because Reis still lacked the proper supervision, personnel, and technical and quality assurance qualifications.

Reis contends that the Army is irrational in considering as unsatisfactory Reis' performance on previous contracts because, in each case, the parties negotiated an agreement under the contract to reduce payments to Reis to compensate for the reduced services the Army received. Reis also states that it has appealed these reductions to a board of contract appeals. Thus, Reis argues, the contracts must be considered as satisfactorily completed. We do not agree.

Under FAR, 48 C.F.R. § 9.104-1(c), and our prior cases, the circumstances surrounding an offeror's prior performance should be considered as one of several factors when reviewing a prospective contractor's responsibility. See C.W. Girard, C.M., 64 Comp. Gen. 175 (1984), 84-2 CPD ¶ 704. Moreover, we have held that even where alleged prior performance deficiencies are still in dispute, a contractor may properly be found to be nonresponsible for failure to comply with contract specifications. Howard Ferriell & Sons, Inc., B-184692, Mar. 31, 1976, 76-1 CPD ¶ 211; Halo Optical Products, Inc., B-178573 et al., May 17, 1974, 74-1 CPD ¶ 263.

Reis further contends that the nonresponsibility determinations were not based on its alleged poor performance but primarily upon allegations "relating to personnel and its capability to perform the specifications." Since adequacy of personnel and capability to perform are factors on which responsibility determinations can be based, we are not sure of the thrust of this argument. See Patrick A. Bianchi, M.D., B-221539, May 8, 1986, 86-1 CPD ¶ 443. As stated above, however, the preaward survey reports noted the unsatisfactory performance on Reis' prior contracts as one of the bases for the recommendation that the contracts not be awarded to Reis. The reports also stated that Reis' current technical and quality assurance capabilities were unsatisfactory. In addition, the contracting officer had responsibility for Reis' prior contracts since May 1985, and was thoroughly familiar with the problems. His determinations of nonresponsibility gave emphasis to the prior poor performance and survey reports indicating that adequate performance could not be expected from Reis on the proposed contracts since Reis still lacked the necessary technical and quality assurance capabilities.

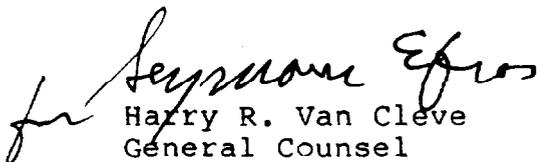
Thus, we find that the record clearly reflects that Reis' prior poor performance and its failure to convince the Army that corrective measures had been taken to prevent repetition were the primary reasons for the nonresponsibility determinations, and we conclude that the Army's reliance upon them was reasonable.

Reis argues that the Army's record of negotiations with respect to RFP No. DAJA37-86-R-0806 erroneously stated that the preaward survey report indicated that Reis was financially as well as technically incapable of performing the required services adequately. Reis is correct on this point since the record shows that a requested financial capability report had not been received and no finding with respect to Reis' financial capability was made. Moreover, the survey report for RFP No. DAJA37-86-R-0618 found that Reis' financial capability was satisfactory. However, an agency's ultimate nonresponsibility determination is not necessarily impaired even if one aspect of the firm's capability may have been evaluated incorrectly by the preaward survey team. Omneco, Inc. et al., B-218343 et al., June 10, 1985, 85-1 CPD ¶ 660 at 10. It is only where the record shows that the agency's determination is based on unreasonable or unsupported conclusions in many areas that this Office will recommend that the determination be reconsidered. See Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654. The record here provides ample and reasonable support for the Army's determinations of nonresponsibility.

Reis also argues that the findings of nonresponsibility constitute a de facto debarment from competitive contracting with the Army. We disagree. A debarment prevents a firm from competing for government contracts for a specified period of time depending upon the seriousness of the cause and generally does not exceed 3 years. FAR, 48 C.F.R. § 9.406-4. A finding of nonresponsibility pertains only to the contract in question and does not bar the firm from competing for future contracts and receiving awards if it is otherwise qualified and convinces the agency that the firm's past problems have been corrected.

Finally, Reis contends that it should have been provided the opportunity to demonstrate its ability to perform the contract "or correct the alleged personnel difficulties." Responsibility determinations, however, are administrative in nature and do not require the procedural due process otherwise necessary in judicial proceedings. System Development Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644. Accordingly, a contracting officer may base a determination of nonresponsibility upon the evidence in the record without affording offerors the opportunity to explain or otherwise defend against the evidence, and there is no requirement that offerors be advised of the determination in advance of the award. United Aircraft and Turbine Corp., B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267. In any event, in view of the 10-day cure notices, the deductions from Reis' billings and the meetings and letters to discuss performance shortcomings, we believe that Reis should have known that its prior performance was not considered acceptable by the agency. Thus, under FAR, 48 C.F.R. §§ 9.103(c) and 9.104-3(c), Reis had to demonstrate to the agency that corrections and changes had been, or would be, made so that a repetition of the previous poor performance would not occur.

The protests are denied.


Harry R. Van Cleve
General Counsel