



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Firm Erich Bernion GmbH

File: B-233106

Date: December 28, 1988

DIGEST

1. Nonresponsibility determination may be based upon contracting agency's reasonable perception of inadequate performance even where the protester disputes the agency's interpretation of the facts.
2. The question of whether protester's performance deficiencies were excusable is a matter of contract administration which General Accounting Office does not consider under our Bid Protest Regulations.
3. Agency's nonresponsibility determinations with respect to two prospective contracts does not amount to de facto suspension or 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 Erich Bernion GmbH protests the determination of the Department of the Army that Bernion was nonresponsible and thus ineligible for award under request for proposals (RFP) No. DAJA02-88-R-0086 for building renovation services in West Germany. Bernion contends that the Army's determination lacked a reasonable basis and amounted to a de facto debarment.

We deny the protest.

The basis of the Army's nonresponsibility determination is Bernion's unsatisfactory prior performance of 7 of 11 of its contracts within the last year. The Army states that of these seven contracts, one contract was terminated for default for failure to perform and three other contracts were behind schedule but not terminated for default because

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termination was determined not to be in the government's best interest. In addition, Bernion's performance as a subcontractor was criticized by the prime contractor.

The contracting officer in making his nonresponsibility determination reviewed a September 2, 1988, memorandum, with supporting documentation, from the contract administration branch which detailed Bernion's performance deficiencies. The contracting officer also reviewed a September 15, 1988, Pre-Award Survey (PAS) and Monitor Report concerning Bernion. The PAS team concluded that Bernion had a satisfactory quality performance record; however, the PAS Monitor disagreed with that finding and determined that Bernion's recent performance had deteriorated. The PAS Monitor noted that Bernion's last satisfactory performance report was dated June 1988, while unsatisfactory reports had continued until September 1988. Also on September 21, 1988, the contracting officer met with Bernion and Bernion admitted its recent performance problems. Furthermore, Bernion did not contend in that meeting that its performance problems were caused by factors beyond its control.

On September 19, 1988, the contracting officer made an initial determination under the RFP that Bernion was nonresponsible, and, on September 30, this determination was affirmed by the chief of the Seckenheim Regional Contracting Office. Contemporaneous with this nonresponsibility determination, Bernion was also determined to be nonresponsible under another solicitation, No. DAJA02-88-R-0089. The basis of the Army's nonresponsibility determination under solicitation No. 0089 was Bernion's prior performance deficiencies.

The Federal Acquisition Regulation (FAR) provides that contracts shall be awarded only to responsible contractors. FAR § 9.103 (FAC 84-18). In order to be found responsible, a prospective contractor must have a satisfactory performance record. FAR § 9.104-1(c) (FAC 84-18). In particular, a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsible unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR § 9.104-3(c).

A nonresponsibility determination may be based upon the procuring agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default or the contractor disputes the agency's interpretation of the facts or has appealed a

contracting officer's adverse determination. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; Firm Reis GmbH, B-224544, et al., Jan. 20, 1987, 87-1 CPD ¶ 72. In our review of nonresponsibility determinations, we will consider only whether the contracting officer's determination was reasonably based on the information available at the time it was made. Becker and Schwindenhammer, GmbH, B-225396, supra. Applying this standard here, we find the Army's determination was reasonable.

Bernion argues that its delays in the performance of its contracts were due to causes beyond its control and are therefore excusable. For example, Bernion was awarded contract No. DAJA02-88-C-1026 for the supply of 260 computer carrying cases of 4 different sizes. The Army terminated this contract for default when Bernion failed to deliver the cases within the contract schedule. Bernion argues that although "the contract information described the specifications of the cases in sufficient detail to enable bids to be made, it lacked plans necessary for the actual construction of the cases." Despite Bernion's contentions to our Office, it did not appeal the contracting officer's default determination.

Similarly, on contract Nos. DAJA02-87-C-0614 and DAJA02-87-C-0624, Bernion failed to complete the contract work within the time scheduled and was assessed liquidated damages. Bernion contends that these contracts were delayed as the result of government modifications and that the government did not provide sufficient time extensions to allow timely completion of the contracts. Bernion also did not appeal the contracting officer's assessments of liquidated damages on these two contracts.

While Bernion argues that its delay on these contracts was excusable, we think that it was reasonable for the Army to conclude that Bernion's performance was deficient and that it was not due to circumstances beyond its control. In this regard, we note that the question of whether Bernion's prior performance deficiencies were excusable is a matter of contract administration which we do not consider under our Bid Protest Regulations. See 4 C.F.R. § 21.3(m)(1) (1988); Decker and Co., et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100. The only question for our review is whether the contracting officer's nonresponsibility determination was reasonably based on the information available at the time of the determination. Id. At the time of nonresponsibility determination, the contracting officer had reviewed detailed information concerning Bernion's poor performance record.

Based upon this record, we have no basis to question the Army's nonresponsibility determination.

In this connection, Bernion argues that the contracting officer failed to consider Bernion's present capability to perform. Bernion states that the contracting officer ignored the recommendation of the PAS team that Bernion be awarded a contract under the RFP. The record reflects, however, that the Army did consider the PAS. In this regard, the PAS Monitor disagreed with the PAS team and recommended that based upon Bernion's recent poor performance record that award not be made to Bernion.

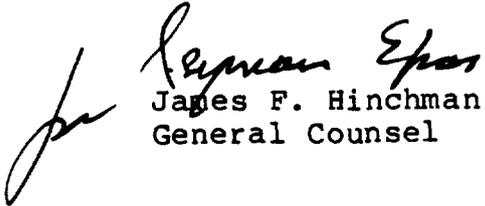
Bernion also argues that the determination of nonresponsibility under this RFP in conjunction with a nonresponsibility determination under solicitation No. DAJA02-88-R-0089, constituted a de defacto debarment or suspension. We have recognized that a firm can only be debarred or suspended through the procedures set forth in FAR Part 9.4 which provide for procedural due process. Thus, it is improper for a contracting agency, without following the procedures for suspension or debarment, to exclude a firm from contracting with it by making repeated determinations of nonresponsibility, or even a single determination of nonresponsibility if it is part of a long-term disqualification attempt. Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107.

This, however, is not a case of de facto debarment or suspension, because the nonresponsibility determinations involved practically contemporaneous procurements for construction services and, as noted above, were based on current information concerning Bernion's performance deficiencies. Becker and Schwindenhammer, GmbH, B-225396, supra. Furthermore, the contracting officer noted that any future responsibility determinations regarding Bernion would be made independently on the basis of information available at that time.

Finally, Bernion contends that it should have been provided the opportunity to demonstrate its ability to perform the contract or to rebut the allegations made in connection with its responsibility. However, responsibility determinations are administrative in nature and do not require the procedural due process otherwise necessary in judicial proceedings. Accordingly, a contracting officer may base its determination of nonresponsibility upon 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. Firm Reis GmbH, B-224544, supra.

The protest is denied.

James F. Hinchman
General Counsel