

S. Cooper



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Theodor Arndt GmbH & Co.

File: B-237180

Date: January 17, 1990

DIGEST

1. Protest that contracting officer's nonresponsibility determination lacked a reasonable basis is denied where determination is based upon contracting officer's reasonable conclusion that the protester did not provide the necessary proof that it would be able to comply with the required performance schedule.
2. Protest that nonresponsibility determination was tantamount to a de facto debarment is denied where protester was awarded another agency contract and will not be precluded from competing and receiving award of future contracts, assuming it is otherwise qualified.
3. Where a protester later supplements a timely protest with new grounds, the later raised allegations are untimely if filed more than 10 working days after the basis of protest is known or should have been known since those allegations must independently satisfy the timeliness requirements.

DECISION

Theodor Arndt GmbH & Co. protests its rejection as nonresponsible and the award of a contract to Wachdienst Rheinland-Westfalen GmbH under request for proposals (RFP) No. DAJA04-89-R-0206 issued by the Army's Regional Contracting Office, Fuerth, West Germany, for armed guard services at U.S. military facilities in Aschaffenburg, West Germany. Arndt challenges the nonresponsibility determination made by the Army and the Army's failure to stay contract performance when notice of Arndt's protest was received within 10 days after contract award.

We deny the protest.

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The RFP, issued on June 14, 1989, called for a 1-year performance period beginning September 1, 1989, with 2 option years. The Army received six proposals by the July 20 closing date. After the low offeror withdrew, the Army requested preaward surveys for the next two low offerors, Arndt and Rheinland. Arndt's preaward survey, dated August 22, was negative, citing the fact that Arndt had available only 23 of the 41 required qualified guards and could not present any evidence to show that the firm had commitments for the other 18 guards needed, or that qualified guards could be hired on short notice. In addition, Arndt had a number of commercial contracts that utilized a large percentage of the firm's personnel capacity. Based on the preaward survey, the contracting officer determined Arndt to be nonresponsive on August 28.

Despite the negative preaward survey and nonresponsibility determination, when performance on the contract was delayed until September 29, an Army contract specialist telephoned Arndt on September 6 to verify whether Arndt had the capability to supply guards under the Aschaffenburg RFP as well as three other ongoing Army procurements for guard services in the Wuerzburg, Schweinfurt, and Bad Kissingen military communities; Arndt had submitted proposals for all four procurements. Arndt replied by letter of September 6. Arndt first listed the three contracts other than Aschaffenburg, stating that performance could begin on them on September 30, 1989, and that the firm would have 110 qualified guards by September 29; Arndt then stated that "the co-workers for the order DAJA04-89-R-0206, Aschaffenburg, will be available to us with the corresponding training by October 15, 1989." The contract specialist asserts, and Arndt denies, that Arndt stated in the September 6 conversation that the firm could move personnel among the first three areas, but not to Aschaffenburg.

On September 14, Arndt received the contract for guard services at Wuerzburg. On that date the firm's project manager also met with the contracting officer for the contract at issue here and discussed the firm's past performance and starting dates. Arndt again stated that the personnel would be available for the Aschaffenburg contract on October 15, but also mentioned that the firm might be able to begin services as early as October 9.

After exploring the possibility of awarding the contract to Arndt in fiscal year 1989 (FY 89) with performance to start on October 15, in fiscal year 1990 (FY 90), the Army decided that an award in FY 89, with services to begin in FY 90, would conflict with the "bona fide needs" rule, which

provides that a fiscal year appropriation may be obligated only to meet a legitimate, or bona fide, need arising in the fiscal year for which the appropriation was made. See Magnavox--Use of Contract Underrun Funds, B-207433, Sept. 16, 1983, 83-2 CPD ¶ 401. The Army also concluded that the soldiers now performing guard services were untrained guards and were needed for their intended military mission. Accordingly, the Army awarded a contract to Rheinland, the next low offeror, on September 20, with performance to begin on September 29. In the interim, Arndt was not awarded the Schweinfurt guard services contract and the Army canceled the Bad Kissingen guard services solicitation.

Arndt protested the nonresponsibility determination to our Office on September 28. The Army did not stay performance of the contract; executed a determination to proceed with performance notwithstanding the protest on October 19; and informed our Office of that determination on October 27.

Arndt argues in its initial protest filing that the contracting officer's determination of its performance capability was based on erroneous information, was arbitrary and capricious, and amounts to a de facto debarment. Arndt further argues in its December 2 comments on the agency report that the contracting officer erroneously relied on the "bona fide needs" rule regarding the use of appropriated funds and, in a November 22 supplemental submission as well as its December 2 comments, that the contracting officer acted in bad faith and contrary to the Competition in Contracting Act of 1984, by failing to stay contract performance following notice of Arndt's protest. Arndt also supplemented its comments on December 20, arguing that a news article published in a September 25, 1989 issue of the Army's Stars and Stripes newspaper revealed that the Army violated the procurement integrity provisions of the Office of the Federal Procurement Policy Act Amendments of 1988 (OFPP Act), Pub. L. No. 100-679, § 27, 101 Stat. 4055, 4064 (1988), by allegedly disclosing source selection information prior to award.

With respect to Arndt's first contention challenging the contracting officer's nonresponsibility determination, responsibility relates to a potential contractor's ability to meet certain general standards set forth in Federal Acquisition Regulation (FAR) § 9.104-1, as well as any special standards set forth in a solicitation. The FAR standards include, among others, the requirements that a prospective contractor be able to comply with the required performance schedule, taking into account all existing

commercial and governmental business commitments, and have a satisfactory performance record. FAR §§ 9.104-1(b) and (c).

The regulations place the burden on a prospective contractor to affirmatively demonstrate its responsibility, FAR § 9.103(c), and require that in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR § 9.103(b).

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. We therefore will not question a nonresponsibility determination unless the protester shows bad faith on the part of the agency or that the determination lacks any reasonable basis. Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 CPD ¶ 158. Arndt has not alleged bad faith with respect to the nonresponsibility determination and has not made the necessary showing with respect to reasonableness here. Rather, the record reflects a reasonable basis for the contracting officer's decision.

With respect to Arndt's ability to comply with the required performance schedule, the ultimate decision on that issue is reserved for the contracting officer. Here, the contracting officer relied on a preaward survey conducted 1 month before award, but updated in writing from the protester 2 weeks before award, and again orally verified on September 14, 1 week before award. Each time Arndt stated that the firm would not have the requisite number of trained guards to perform the contract until October 15, or at the earliest October 9.

Arndt argues that it could have moved personnel from the other three contracts for which it had submitted proposals to Aschaffenburg and that the contracting officer was aware of that fact; the contracting officer alleges via affidavit from the contract specialist who spoke with Arndt that Arndt stated that guards proposed for the other three contracts were not interchangeable with those proposed for Aschaffenburg. Moreover, the contracting officer asserts that even in the September 14 meeting, Arndt did not offer to shift guards to Aschaffenburg.

Since it is the burden of the offeror to affirmatively demonstrate its responsibility, it was incumbent upon Arndt to provide information on its own initiative regarding the Aschaffenburg procurement once it had lost one contract and the Army had canceled another. If Arndt's capability to supply trained guards for Aschaffenburg by the required

September starting date had changed since the September 14 meeting, it was up to Arndt to so inform the contracting officer. See Oertzen & Co. GmbH, B-228537, supra.

In fact, a contracting officer may base a 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 an offeror be advised of the determination in advance of the award. Firm Reis GmbH, B-224544, B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. The evidence in the record here demonstrates that the contracting officer gave Arndt every opportunity to show itself able to provide the required 41 trained guards by the required September starting date. In view of the failure of Arndt to provide the necessary proof of responsibility as required by FAR § 9.10-3(c), the contracting officer's decision to find Arndt nonresponsible was reasonable in the absence of information clearly establishing Arndt's responsibility.

Arndt further argues that the contracting officer's determination that Arndt was nonresponsible was tantamount to a de facto debarment. 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. Firm Erich Bernion GmbH, B-234680, B-234681, July 3, 1989, 89-2 CPD ¶ 1. The record here shows that Arndt was awarded another Army contract for guard services on September 14 and will not be precluded from competing and receiving award of future contracts, assuming it is otherwise qualified.

With respect to the argument Arndt raises regarding the Army's reliance on the bona fide needs rule, Arndt in effect argues that the Army was required to delay the starting date for contract performance in order to accommodate Arndt's staffing capacity. We disagree, particularly in light of the fact that the Army had a pressing need for the guard services to begin in order to free up soldiers currently performing the guard services for other duties. Further, there is nothing in the record to suggest that the decision not to delay the start of contract performance was made to avoid awarding a contract to Arndt.

Arndt also alleges that the Army violated the procurement integrity provisions of the OFPP Act and FAR § 3.104 by disclosing source selection information prior to award to a reporter at the Army's Stars and Stripes newspaper for an article that was published on September 25. The article, without describing the names of any competitor, states that the low bidder for the Aschaffenburg contract had not been

selected due to its lack of staff and that the next low bidder was being considered for award. We need not decide whether the disclosures in the article constituted a violation of the now-suspended procurement integrity provisions of the OFPP Act^{1/} since we fail to see how, and Arndt does not establish, that it was prejudiced by publication of the article.

Finally, Arndt challenges the Army's failure to stay performance when Arndt's protest was filed within 10 days after award, and contends that the Army's action demonstrates bad faith toward Arndt. There is no evidence in the record showing that the Army's decision to proceed with performance was motivated by bad faith and, given that we find the decision to reject Arndt was reasonable, Arndt was not prejudiced by the failure to stay performance. Further, the Army has investigated the action, acknowledges that it was improper, and has taken steps to prevent its repetition in the future.

The protest is denied.

for 
James F. Hinchman
General Counsel

^{1/} Section 507 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, ___ Stat. ___ (1989), suspended section 27 of the OFPP Act for the period December 1, 1989 - November 30, 1990.