



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Garten-und Landschaftsbau GmbH Frank Mohr

File: B-237276; B-237277

Date: February 13, 1990

Leodis C. Matthews, Esq., von Maur, Matthews & Partners, for the protester.

Lt. Colonel Howard G. Curtis, Office of the Judge Advocate General, Department of the Army, for the agency.

George Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Whether evidence of offeror's employees' lack of integrity is sufficient to warrant a finding in a particular case that a bidder is not responsible is a matter primarily for determination by the administrative officers concerned; General Accounting Office will not question determination where protester fails to establish that there is no reasonable basis for it.

2. Agency's nonresponsibility determinations with respect to two prospective contracts does not amount to de facto suspension or debarment, where the findings of nonresponsibility involved practically contemporaneous procurements and were based on current information concerning the protester's business integrity.

DECISION

Garten-und Landschaftsbau GmbH Frank Mohr protests its rejection as nonresponsible under Department of the Army request for proposals (RFP) Nos. DAJA76-89-R-0384 and DAJA76-89-R-0204. The RFPs sought proposals for minor construction and repair at Army facilities in Mainz, West Germany. Mohr, the low offeror on both RFPs, contends that the nonresponsibility determinations were unwarranted.

We deny the protests.

The record indicates that the same contracting officer for both RFPs denied the protester the awards on the ground that it lacked business integrity and thus was not responsible. This finding was based on the results of a 1987 investigation by the Army's Criminal Investigation Command (CID) concerning another German firm, AST, suspected of submitting false claims to the Army following termination of a 1985 contract. Mohr was an AST subcontractor, and CID interviewed Mohr's employees Franz Schick (manager) and his wife Regina Schick (bookkeeper). Mr. Schick was responsible for supervising Mohr's subcontract with AST. During a subsequent investigation of AST by German tax authorities, Mr. Schick admitted to having lied to the CID agent about invoices Mohr had provided to support AST's claim to the Army and whether payment was actually received. Ms. Schick similarly told the German authorities that there were no records on the firm's accounts of the invoices submitted to AST, and that, contrary to the information initially provided to CID, AST in fact had not paid Mohr in accordance with the invoices.

In the course of considering Mohr's responsibility for the awards in question here, the contracting officer advised the protester by letter of August 31 that he was in the process of making a determination that the firm was not a responsible prospective contractor because it had participated in the fraudulent activities of AST and had then lied to the CID about its participation. The firm was given 10 days to respond to the allegations. The protester responded by letter of September 6, denying generally any involvement in the AST fraud, explaining that Mr. Schick had not understood the extent of the CID investigation when he made his false statements. It further stated that Mohr recently had discharged Mr. Schick, had established a system of internal controls, and had engaged outside experts to ensure its future business integrity. By letter of September 14, the contracting officer advised the protester that its September 6 response did not provide any convincing evidence that Mohr, through Mr. and Ms. Schick, had not been involved in fraudulent claims against the Army. On September 22, the protester responded, reiterating that it had fired Mr. Schick effective September 13. By letter of September 28, the protester again advised the contracting officer that Mohr had nothing to do with the AST fraud, had dismissed Mr. Schick from its employ, and had established a system of internal controls to assure that invoices were proper.

Based on the investigation reports and the information furnished by Mohr, the contracting officer concluded that Mr. and Ms. Schick had in fact participated in the fraud by

AST, and that it had not been clearly established that those individuals' affiliation with Mohr had ended. On September 29, the contracting officer determined that Mohr was not a responsible contractor based on an unsatisfactory record of integrity. See Federal Acquisition Regulation (FAR) § 9.104-1(c). On September 30, an award was made to W. Faber GmbH.

The protester argues that its firm should not have been rejected as nonresponsible because: (1) Mr. Schick's misstatement to CID investigators was only a "white lie" in that he did not understand the nature of the investigation--based on a request from AST, he stated that Mohr had invoiced AST (when it had not) merely to speed the processing of AST's claim; (2) Mr. Schick was dismissed from its employ in September; and (3) there are two separate firms, Frank Mohr and Frank Mohr, GmbH, and that Mohr GmbH had nothing to do with the contract with AST.

The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer who, in making that determination, must, of necessity, rely on his business judgment. Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. Because of this broad discretion, our Office generally will not disturb a nonresponsibility determination absent a showing of bad faith on the agency's part or that the determination lacked a reasonable basis. Id. Mohr does not allege bad faith and we find the contracting officer's determinations of nonresponsibility were reasonable.

First, the contracting officer's investigation confirmed that Mr. Schick had in fact lied to CID investigators concerning the AST claim; although the protester characterizes the misstatements as innocent, it concedes that they were intentional, and they prevented the government from properly investigating the fraud perpetrated by AST. The contracting officer also questioned whether Mr. Schick had in fact been dismissed as claimed by Mohr. The Army points out, in this regard, that the register of the Amtsgricht Frankfurt am Main--a West German government bureau with which German firms in the area must register--indicates that as recently as December 22, 1989 (more than 3 months after Mr. Schick supposedly had been dismissed from Mohr), Mr. Schick was listed as the manager of Mohr, with authority to enter into contracts for the company (Mohr contends the register is inaccurate). The Army also considered it significant that when Mr. Schick's lie was exposed by German

authorities, Mohr took no action to remove Mr. Schick until confronted with the possibility that it would lose the subject contracts.

Further, the contracting officer was not persuaded that adequate steps had been taken to prevent future similar incidents; the list of internal controls Mohr allegedly instituted was not provided to the contracting officer until September 28, the day before the contracts were ready to be awarded, and Mohr did not provide the name of the expert the firm allegedly had engaged to implement the internal control program.

Finally, while the protester now states that Mohr GmbH is a separate concern from the company Frank Mohr, which was the actual subcontractor to AST, it never brought this distinction to the agency's attention. In any case, the Army points out, there appears to be a clear affiliation between the two firms: the company Frank Mohr is solely owned by Frank Mohr, who also is the general manager for Frank Mohr, GmbH; both firms use the same address and telephone number; and both firms are involved in the same line of business. Further, Ms. Schick is Frank Mohr's mother, and Mr. Schick is his stepfather.

We conclude that the Army sufficiently investigated this matter and, based on the resulting information, reasonably determined that Mohr had an insufficient record of integrity and thus was nonresponsible. See Frank Cain & Sons Inc., B-236893, Jan. 11, 1990, 90-1 CPD ____; John Carlo, Inc., B-204928, Mar. 2, 1982, 82-1 CPD ¶ 184.

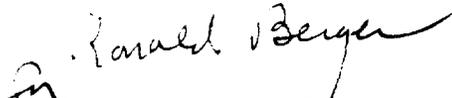
The protester also argues that the determination of nonresponsibility under the two RFPs constituted a de facto debarment or suspension. We have recognized that a firm can only be debarred or suspended through the procedures set forth in FAR Subpart 9.4, which provides for procedural due process. Thus, 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 the repair work and, as noted above, were based on current

information concerning the protester's business integrity. See Firm Erich Bernion GmbH, B-233106, Dec. 28, 1988, 88-2 CPD ¶ 632.

Finally, the protester argues that the contracting officer's August 31 letter failed to place it on notice of the specific charges used to disqualify the firm. As a result, Mohr contends, it was deprived of its due process rights because it was not provided the opportunity 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 under judicial proceedings. Accordingly, a contracting agency may base its determination of nonresponsibility on 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; B-224546, supra. In any event, the Army's August 31 letter referred to the protester's active involvement in fraudulent claims against the Army, as well as false statements; identified the contract under which the fraud was committed as DAJA76-85-C-0419; identified the fraudulent claim as a "settlement agreement between your firm and AST"; and mentioned that Mr. Schick had lied to CID during an investigation. Mohr thus was on notice of the basis for the agency's actions.

The protest is denied.


James F. Hinchman
General Counsel