

M. Spiegel



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: International Paint USA, Inc.

File: B-240180

Date: October 30, 1990

Janet P. Jakubowicz, Esq., Greenbaum, Doll & McDonald, for the protester.

Stanley R. Soya, Esq., Baker & Botts, for Devoe Coatings Company, an interested party.

Stuart Young, Esq., General Services Administration, for the agency.

Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of this decision.

DIGEST

A contracting officer's determination that a paint contractor was nonresponsible was reasonably based upon a negative pre-award survey, which showed that the contractor's prior performance on four recent similar contracts had been unsatisfactory, and file documentation indicating late performance and delivery of nonconforming paint; the contracting officer had no duty, under the circumstances, to conduct an independent investigation for the purpose of substantiating the accuracy of the pre-award survey, notwithstanding that some of the alleged deficiencies had been disputed by the contractor.

DECISION

International Paint USA, Inc. (IPU) protests its rejection as nonresponsible, and the award of a contract to Devoe Coatings Co., under invitation for bids (IFB) No. TFTP-89-2P-8070, issued by the General Services Administration (GSA), on behalf of the Naval Sea Systems Command (NAVSEA), for ablative anti-fouling paint for use on ship overhauls. IPU alleges that the GSA contracting officer's nonresponsibility determination was unreasonable and made in bad faith, and this led to a de facto sole-source award to the only other potential contractor, Devoe.

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We deny the protest.

GSA issued this solicitation as a request for proposals (RFP) on September 29, 1989, with a closing date of October 31, 1989. The closing date for the RFP was extended twice by amendments to the solicitation, until the solicitation was eventually converted into an IFB by amendment No. 3 on February 15, 1990. By bid opening on March 13, 1990, GSA had received bids from the only two approved sources, IPU and Devoe; IPU submitted the low bid.

GSA requested a pre-award survey of IPU, including a plant facility report (PFR) and a financial report. The PFR reviewed the contractor's facilities, which were found to be adequate, and its performance record under three recent contracts for epoxy paint (GS-10F-51243, -51439 and -51630). That review found numerous late deliveries, quality deficiencies and default terminations. It was concluded in the report, dated April 17, 1990, that IPU was incapable of performing based on unsatisfactory past performance and an unsatisfactory quality control system, and that the contractor's failure to perform did not arise out of causes beyond its control and without its fault or negligence.

On March 22, GSA requested a status report on IPU's performance of a then current anti-fouling paint contract (GS-10F-51462) and found that IPU had 72 late deliveries. Although the contracting officer on that contract characterized the contractor's performance as acceptable, the contract file had no documentation that indicated these late deliveries were excusable. The financial report gave a similarly unfavorable rating to IPU; however, the contracting officer did not significantly rely on that report in making her determination of nonresponsibility. See Transcript of Fact-Finding Conference,^{1/} (Tr.) at 63, 65.

On May 1, the contracting officer found IPU to be a nonresponsible bidder, and on June 12, the agency informed IPU that the contract had been awarded to Devoe. On June 22, IPU filed this protest with our Office. On June 26, GSA made a determination that the contract should proceed due to urgent and compelling circumstances.

^{1/} That conference was for the purpose of examining the contracting officer on the bases of her nonresponsibility determination of IPU.

The Federal Acquisition Regulation (FAR) requires a contracting officer to make an affirmative determination of responsibility of a prospective contractor before award can be made; and that he or she must consider such factors as whether the prospective contractor's record of performance was satisfactory in making that responsibility determination. See FAR §§ 9.103(b), 9.104-1(c) (FAC 84-39); Firm Reis GmbH, B-224544; B-224546, Jan. 20, 1987, 87-1 CPD ¶ 72. The regulations contain a presumption of nonresponsibility with respect to any contractor which has been found seriously deficient in recent contract performance, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that appropriate corrective action has been taken by the contractor. FAR § 9.104-3(c) (FAC 84-47); Becker and Schwindenhammer GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. Thus, the burden is on the prospective contractor to demonstrate affirmatively that it is responsible. Id.

The ultimate determination of a contractor's responsibility must necessarily rest with the procuring agency, which must bear the burden of any performance problems, although that decision is expected to be based on fact and made in good faith. Firm Reis GmbH, B-224544; B-224546, supra. Thus, the contracting officer is vested with broad discretion in exercising his or her business judgment in making that decision. Id. Our Office will not generally disturb a nonresponsibility determination unless a protester can show either that the procuring agency had no reasonable basis for the determination or that it acted in bad faith. BMV Div. of Harsco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67.

Here, the contracting officer's determination that IPU was nonresponsible was primarily based "on the prior performance, their delinquencies, their rejected material that failed to comply with the specifications, their timeliness in responding to inquiries from the administrative contracting office to resolve problems. . . ." Tr. at 11. The PFR, on which the contracting officer relied, showed that the contractor had been seriously deficient in the performance of several recent paint contracts. For example, the PFR and contract file documentation disclosed that IPU had been terminated for default on 53 purchase orders and received numerous quality deficiency notices and laboratory rejection notices under three recent epoxy paint contracts. See Tr. at 11, 14-15. The survey showed these problems were not due to circumstances beyond IPU's control, nor had IPU taken appropriate corrective action to remedy the indicated deficiencies. See Tr. at 43, 54. The contracting officer also found that IPU had been late on delivery of 72 shipments under a current anti-fouling paint contract. Tr. at 20.

IPU contends that GSA acted improperly in basing its nonresponsibility determination upon IPU's performance on unrelated epoxy contracts, and that the agency relied upon "inaccurate information and conclusions in the pre-award survey," while ignoring more pertinent and relevant information. The protester maintains that its performance was satisfactory on all of these contracts and argues that the contracting officer had a duty to resolve the asserted factual conflicts through an independent investigation of her own.

With regard to the epoxy paint contracts, IPU attributes its alleged poor performance to the "inherently unstable" nature of a thixotropic additive and a 30-day test requirement that exacerbated this problem, circumstances which IPU alleges were beyond its control. IPU also asserts that "it [was] unfair to make that comparison" between its performance on "unrelated Mare Island epoxy contracts" and its performance on an anti-fouling paint contract, because the thixotropic additive is not a component of anti-fouling paint which is "a totally different product." Tr. at 77-78. IPU claims further that all of its defaults on these contracts led to cost-saving contract modifications, thereby estopping the government from complaining with respect to that from which it has reaped benefit.

The contracting officer considered that "the epoxy paint contracts were relevant to this contractor's performance" on the instant anti-fouling contract (though she was fully aware of the differences between epoxy and anti-fouling paints), because this was indicative of the contractor's relative ability and willingness to timely comply with contract requirements. Tr. at 16, 18. The contracting officer rejected IPU's claim that it was beyond the contractor's control to stabilize epoxy paint in the presence of thixotropic agents, since she considered IPU's efforts to be "no more than would be expected when they entered into a contract." Tr. at 53. For example, the contracting officer testified that, except for these three contracts, epoxy paint had been delivered during the past 5 years without significant problems by various contractors (including IPU). Tr. at 11. Moreover, IPU was aware of the 30-day test requirement and epoxy paint's thixotropic ingredients, when it submitted its bids for those contracts. Based on our review of the record, including the testimony of the contracting officer and the affidavits of IPU employees, we find that the contracting officer reasonably found IPU's poor performance on these contracts was pertinent to its responsibility to perform the contract at issue here. Contrary to IPU's argument, we do not believe that the decision by GSA to allow continued

performance of those epoxy contracts is an indication that the contractor's performance was satisfactory, particularly where the evidence indicates otherwise. Numax Elec. Inc., B-227925, Oct. 22, 1987, 87-2 CPD ¶ 385.

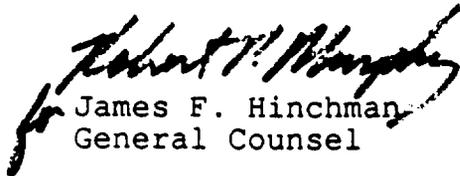
As indicated above, the contracting officer also was concerned about IPU's delinquencies on the anti-fouling paint contract. IPU claims that its performance on this contract was rated satisfactory by the administrative contracting officer (ACO), and that any "late deliveries were due . . . to GSA's request and the Navy's request to get [that is, rearrange] [purchase] orders." The contracting officer testified that: (1) "the ACO was unable to furnish any documentation" in support of her satisfactory rating, although there were 72 delinquent deliveries under the contract; (2) "there had been no modifications issued against the contract to allow for [the] changing of delivery requirements"; and (3) these delinquencies were not caused by GSA. Tr. 20-21, 26-28, 35-36, 70-72. IPU has not persuasively rebutted the contracting officer's explanations.

The contracting officer testified that she reviewed the PFR and contract file documentation, including default and quality deficiency notices, prior to arriving at the conclusion that IPU could not be considered a responsible contractor for the purposes of this particular contract. Tr. at 13-14. The record is replete with examples of the contractor's performance problems on paint contracts. Tr. at 11, 13-14, 18, 20-21. While the contracting officer acknowledged that IPU had successfully performed such contracts in the past and indicated that the protester might again do so in the future, the contractor failed to convince the contracting officer that proper corrective measures had been taken to prevent repetition of those problems on this procurement. See Tr. at 11, 17-18, 20-21, 27.

The contracting officer acknowledges that IPU disputes the existence and extent of some of the noted deficiencies, but testified that she relied upon the agency's position in those matters. Tr. at 58-59, 81, 84-85. A nonresponsibility determination may be based upon a contracting officer's reasonable perception of inadequate prior performance. Becker and Schwindenhammer GmbH, B-225396, supra; Firm Reis GmbH, B-224544; B-224546, supra. Moreover, there is no requirement that the contracting officer conduct an independent inquiry to substantiate those findings, since the pre-award survey and file documentation on current contracts raised numerous concerns regarding the contractor's ability to perform in a timely manner. See Becker and Schwindenhammer GmbH, B-225396, supra.

Finally, the contracting officer was cognizant that the present procurement requires a 30-day delivery time after receipt of orders and that there was an urgent need for the paint,^{2/} yet IPU had been cited repeatedly for delivery delays as well as quality deficiencies in connection with government paint contracts. Based on the foregoing, we conclude that GSA's determination of nonresponsibility was reasonable. Moreover, there is no evidence of bad faith on the part of GSA officials.

The protest is denied.


for James F. Hinchman
General Counsel

^{2/} Indeed, GSA made the requisite determination to proceed with the award, notwithstanding the protest, because of urgent and compelling reasons associated with the scheduling of ship overhauls.