

Gary



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: MCI Constructors, Inc.

File: B-240655

Date: November 27, 1990

Thomas B. Newell, Esq., Watt, Tieder, Killian & Hoffar, for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Stephen Gary, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest that nonresponsibility determination lacked a reasonable basis is denied where the determination is based on contracting agency's reasonable perception of inadequate performance by the protester on prior government contracts, even where the protester disputes the agency's interpretation of the facts and where there is some indication of satisfactory performance on other contracts.
2. Since a nonresponsibility determination is based on circumstances at the time of award and is inherently judgmental, the fact that different conclusions as to a firm's responsibility may be reached by others does not demonstrate unreasonableness or bad faith on the part of the contracting officer.

DECISION

MCI Constructors, Inc. protests the award of a contract to Southwood Builders, Inc., the second-low bidder under invitation for bids (IFB) No. DACA65-90-B-0023, issued by the Army Corps of Engineers for the construction of pumping stations and drainage facilities for the James River Basin flood control project in Virginia. The protester objects to the Corps' determination that MCI, the apparent low bidder, was nonresponsible and therefore ineligible for the award.

We deny the protest.

The Corps made its nonresponsibility determination after conducting a preaward survey of MCI and an affiliated company,

Associated Mechanical Contractors, Inc. (AMC). The agency included AMC in the survey after determining that both firms shared the same key management. (In the agency's view, since many of MCI's reported performance problems related to management, the overall performance of both companies had to be considered in assessing MCI's responsibility.) The preaward survey elicited numerous reports of poor performance by MCI and AMC on prior government contracts; according to the Corps, the negative responsibility determination was based primarily on three such reports.

The first report concerned an MCI contract that was terminated for default. MCI had been awarded three separate contracts by the District of Columbia in connection with the District's Blue Plains Wastewater Treatment Plant. One was for work on the Potomac Pump Station, the second, on a chlorination/dechlorination facility, and the third, on a grinding/degritting facility. Through an interagency agreement with the Environmental Protection Agency (EPA), which funded the work, MCI's performance was monitored by the Corps, whose Resident Engineer at the Blue Plains EPA Projects Office advised the Corps that the District had terminated for default the chlorination/dechlorination contract on September 30, 1988. According to the Resident Engineer, the District took this action because MCI was taking too long to perform and appeared to have abandoned the work entirely. He further stated that he did not see how MCI's performance could be expected to improve, since the company was fundamentally inefficient.

In considering the significance of the District's action, the Corps noted that MCI had filed an appeal of the default termination that was still pending, but concluded that the termination nevertheless was relevant to considerations of the firm's responsibility. To a lesser extent, the Corps also relied on the District's report that MCI's performance on the other two contracts was unsatisfactory as well. According to the Corps, although the District advised it that MCI had performed satisfactorily on older contracts, the Corps considered the firm's poor performance on these particular contracts, which were the most recent ones awarded by the District to MCI, to be a more significant indicator of the firm's capacity to perform.

The second major negative report concerned MCI's performance on a subcontract with Hercules Inc., the prime contractor for a coal boiler conversion project at the Department of the Navy's Allegany Ballistics Laboratory in West Virginia. In response to the preaward survey, the Navy reported that an 80-foot coal silo installed on the site by an MCI subcontractor could not be accepted by the Navy because it was between 7 and 11 inches out of plumb, that MCI had refused Hercules'

request that MCI take corrective action, and that, as a result, the project was 4 months behind schedule. The third report involved an AMC contract for utilities and training facility upgrades at Fort A.P. Hill in Virginia, under which the firm received an interim unsatisfactory performance evaluation from the Corps on May 4, 1990. Based on these and, to a lesser degree, other reports of unsatisfactory prior performance,^{1/} the Corps advised MCI that it had found the firm nonresponsible.

MCI argues that the nonresponsibility determination was unreasonable because it was based in part on reports of MCI's poor performance on prior government contracts that were incorrect, out of date, or both. MCI asserts, for example, that the District's default termination was not entitled to the weight given it by the Corps because it occurred 2 years ago and was still in litigation. Even where the agency's information on MCI's poor performance was accurate, moreover, the protester states that the agency acted in bad faith by selectively emphasizing the negative information and ignoring other, more positive information, such as findings by other agencies that MCI was responsible and had performed satisfactorily on other contracts. According to the protester, the agency already had decided not to award the contract to MCI prior to conducting the preaward survey, based on a dispute between the Corps and MCI concerning a contract that was terminated for convenience on June 7, 1988 (the Radford Ammunition Plant project). MCI states that, although the termination was still in dispute, the contracting official involved in the Radford project wrote a strongly negative memorandum to the Corps on July 5, 1990--3 weeks before the completion of the preaward survey and, according to MCI, before any of the firm's references had been contacted--which it believes succeeded in biasing the Corps against the firm. MCI concludes, therefore, that the selectivity reflected in the preaward survey was due to the agency's desire to find support for the decision it had already reached not to make an award to the firm.

As a general matter, we will not question a nonresponsibility determination absent a showing of bad faith by the contracting agency or the lack of any reasonable basis for the determination, since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion.

^{1/} The other reports concerned a wastewater treatment facility in Altavista, Virginia (AMC); a water treatment plant expansion in Harford County, Maryland (MCI); and a Corps contract for the treatment of TNT thick liquor, Radford Army Ammunition Plant, in Virginia (MCI).

Martin Widerker, Eng'r, B-219872 et al., Nov. 20, 1985, 85-2 CPD ¶ 571; S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437, aff'd, B-208744.2, July 14, 1983, 83-2 CPD ¶ 90. In reviewing a nonresponsibility determination based on prior performance, we will consider only whether the determination was reasonably based on the available information. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

With regard to a prospective contractor's prior performance, the Federal Acquisition Regulation (FAR) provides that in order to be found responsible the firm must have a satisfactory performance record, FAR § 9.104-1(c), and that 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 contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts or has appealed a contracting officer's adverse determination. Applied Power Technology Co. and Contract Servs. Co., Inc.--A Joint Venture, B-227888, Oct. 20, 1987, 87-2 CPD ¶ 376, aff'd, B-227888.2, Mar. 10, 1988, 88-1 CPD ¶ 247.

Here, we find that the contracting agency had a reasonable basis for its nonresponsibility determination based on information concerning the protester's prior performance, and that the protester has failed to demonstrate that the agency acted in bad faith. With regard to the first report relied on by the agency, we note that, although a prior default termination does not necessarily require rejection of a firm as nonresponsible, such a termination is a proper matter for consideration in determining a contractor's responsibility despite the fact that an appeal of the termination is pending. S.A.F.E. Export Corp., B-208744, supra. As to whether the termination is still entitled to consideration after 2 years, although the deciding question in a responsibility determination is whether a prospective contractor possesses the current ability to perform, Applied Power Technology Co. and Contract Servs. Co., Inc.--A Joint Venture, B-227888, supra, performance under older but still relatively recent similar contracts is not irrelevant, especially where, as here, more recent performance is mixed. Id. We therefore see nothing objectionable in the Corps' reliance on the default termination as one indication of poor prior performance.

With respect to the second negative report, concerning the Navy's coal conversion project, MCI concedes that it received a "scathing review" from the Navy but takes issue with some of the Navy's objections to its performance. For example, with regard to the silo that was installed out of plumb, MCI states that the contract merely specified that the silo be certified as fit for its intended use, and that MCI's subcontractor did provide the required certification. The protester further states that the Navy has not assessed liquidated damages against MCI, which it was entitled to do for an unexcusable delay in completion, apparently suggesting that the delay was not MCI's fault. We think the Corps reasonably concluded otherwise. The record of the preaward survey includes a report by the Navy's coal conversion project field engineer and project manager, who indicated to the Corps that MCI's quality of work was "terrible," that its performance was "below average," that the firm's main problems were management and support, and that the silo may have to be torn down and completely rebuilt. The Navy also indicated that, although MCI attributed the silo deficiencies to soil problems, it was the contractor's responsibility to obtain any soil tests that might be needed, and that MCI, therefore, was still responsible for the fact that both the silo and the concrete slab it rested on were out of tolerance. Finally, the record includes two letters from Hercules to MCI documenting the unsatisfactory performance. In our view, based on the information available to it, the Corps had a reasonable basis for concluding that MCI had performed poorly on this project.

Concerning the third negative report, which involved AMC's work at Fort A.P. Hill, the protester objects that, despite MCI's good performance on numerous projects, the first item listed in the Corps' preaward survey was the poor performance of its affiliate. According to MCI, this indicates that, contrary to the FAR, the Corps improperly placed paramount importance on the performance of its affiliate. We disagree. FAR § 9.104-3(d) permits the contracting officer to consider an affiliate's past performance in assessing a contractor's responsibility. Here, since the preaward survey noted that MCI was affiliated with AMC through a common parent, and shared a common president and office space, we think it was entirely reasonable for the Corps to give significant consideration to AMC's prior performance. Further, there is no indication that, merely because AMC's contract was listed first, the Corps gave any greater consideration to the affiliate's performance than to MCI's. To the contrary, the record is clear that the agency relied primarily on MCI's performance; of the three projects on which the Corps primarily based its negative determination, two were MCI's. Finally, it is clear that AMC's performance on this contract was poor; it received an unsatisfactory interim performance evaluation on four out of five elements.

MCI further objects that, although it and AMC admittedly have had some performance problems, both firms have a positive performance record on a majority of their government contracts. The protester notes, for example, that the preaward survey establishes that MCI recently performed on four projects for which the contracting officials gave the firm exemplary ratings.^{2/} On one of these, a steam plant modification for the Navy, MCI notes that, despite initial reservations, the Navy made an affirmative responsibility determination and ultimately found MCI's work to be excellent. According to MCI, the Corps improperly gave little emphasis to the affirmative responsibility determination and to the generally positive performance reports, compared to the negative reports discussed above.

We find no support for MCI's view that the Corps unfairly weighted the firm's performance on different contracts. The preaward survey takes note of MCI's successful performance on several contracts and reports the excellent ratings of the contracting officials. Nonetheless the fact remains that, as MCI itself concedes, one of its contracts was terminated for default and it has experienced difficulties on other projects. Consequently, the circumstance that some of the evidence supplied to the contracting officer may have been favorable to MCI does not alter the fact that there was sufficient evidence for the contracting officer to conclude that MCI had a history of performance problems. S.A.F.E. Export Corp., B-208744, supra. Similarly, the fact that MCI has been found responsible for other procurements has no bearing upon the non-responsibility determination at issue here; since such determinations are inherently judgmental, different contracting officers can reach opposite conclusions on the same facts, without either determination being unreasonable or the result of bad faith. Id.

Finally, with respect to MCI's allegation of bad faith, we will not attribute bad faith or fraudulent motives to a contracting agency absent convincing proof that the officials

^{2/} The four projects were a water pollution control plant expansion, Queen Anne's County Department of Public Works; steam plant modification, the Navy; Seneca wastewater treatment plant retention basin, Washington Suburban Sanitary Commission; and wastewater treatment plant additions, City of Niagara Falls.

involved had a specific and malicious intent to harm the protester. Miklin Corp., B-236746.2, Jan. 19, 1990, 90-1 CPD ¶ 72; Kinross Mfg. Corp., B-234465, June 15, 1989, 89-1 CPD ¶ 564. The allegation that the Corps' negative determination was due to a bias against MCI based on an earlier contract is not supported by the record, which shows that the agency gathered and considered accounts of excellent performance as well as poor performance on prior contracts. The Corps merely determined, ultimately, that on balance it could not find that MCI would be capable of performing satisfactorily given its performance history. Consequently, there is no basis for overturning the Corps' determination. Miklin Corp., B-236746.2, supra.

The protest is denied.


James F. Hinchman
General Counsel