Ayer

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Firm Otto Einhaupl

File: B-241553; B-241557; B-241559; B-241561

Date: February 20, 1991

Reed L. von Maur, Esq., and Leodis C. Matthews, Esq., von Maur, Matthews & Partners, for the protester.
Linda Selinger, Esq., Department of the Army, for the agency.
Roger H. Ayer, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency reasonably determined protester was nonresponsible based upon contracting officer's conclusion that the protester's recent contract performance on similar work was inadequate, notwithstanding that the protester disputes the agency's interpretation of the facts, where the nonresponsibility determination is based on circumstances present at the time of award.

DECISION

Firm Otto Einhaupl protests the Department of the Army, Corps of Engineers' negative determination of Einhaupl's responsibility under four similar requests for proposals (RFP)--Nos. DACA90-90-R-0052, DACA90-90-R-0054, DACA90-90-R-0061 and DACA90-90-R-0062 for the repair of various buildings at the Hohenfels Training Area, West Germany, on each of which Einhaupl submitted the low offer. Einhaupl contends that the Army's negative determinations of Einhaupl's responsibility are based on information that is stale, incorrect and inaccurate.

The protests are denied.

The Army reports that the contracting officer's review of Einhaupl's performance, on its three most recent contracts with the Europe Division, showed deficiencies in Einhaupl's technical and management capability. The contracting officer asserts that the four RFPs in question here called for repair work to be performed concurrently and were "indistinguishable in nature and involved work similar to that for which Einhaupl had performed unsatisfactorily." Einhaupl received interim unsatisfactory performance ratings during its performance of two contracts and an unsatisfactory rating on quality of

performance on the third contract. All of these ratings were dated between February and April 1990.

Specifically, Einhaupl received an unsatisfactory performance rating on a water storage tank repair contract for (1) failing to timely start the performance;1/ (2) inadequate supervision of the construction work;2/ (3) dereliction of its duty to inspect its work including late/non-submission of quality control reports; and (4) a poor safety record.3/

Einhaupl argues that its performance on the water storage tank repair contract is an insufficient basis upon which to find a nonresponsibility determination because the cited information is inaccurate. Einhaupl maintains that it completed the contract within its original term, the Army did not assess liquidated damages for delay against Einhaupl, and the Army did not issue an unsatisfactory final report on Einhaupl's performance. Einhaupl attributes its late start to the weather--it could not lay underground water pipe until the spring thaw--and the Army's agreement to wait until spring.4/ Einhaupl also contends that the Army's failure to process

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1/ The Army issued a notice to proceed on December 23, 1988, and Einhaupl began work 5 months later on May 10, 1989.

2/ According to the Army, Einhaupl did not control its subcontractor, who dug trenches for the water lines throughout the Army camp and then left them open for several weeks, posing a safety hazard to Army personnel. Also, for 6 months the contractor performed construction work without a supervisor or quality control person.

3/ The Army reports that Einhaupl violated its own safety plan by leaving utility trenches open for several weeks without providing warning lights--one night, a soldier fell into one of trenches and broke his arm--and that during the absence of Einhaupl's quality control manager, Einhaupl's subcontractor cut an energized cable, which remained exposed in an open trench for 6 days until the Army found it. The Army provided our Office with a video tape and pictures indicating Einhaupl's poor safety practices.

4/ The Army disputes that it authorized Einhaupl to delay all aspects of performance because of the weather, noting that it advised Einhaupl that it could proceed with interior work and administrative matters, such as the completion of construction progress schedules and its quality control plans, if it was unable to perform exterior work. The Army notes that the winter of 1988-1989 was extremely mild and did not hinder another government contractor's successful installation of heating lines in the same areas.

necessary contract modifications delayed Einhaupl's progress. Regarding safety violations, Einhaupl admits that an electrical cable was cut, but argues that the cable was not live, that it provided all required safety items, and that its safety practices were in accordance with German craft rules.5/ Finally, Einhaupl takes the position that the above information should not have been considered because on September 19, 1990--when the negative determination of Einhaupl's responsibility was made--the information was no longer current.

Similarly, on a contract for work on a motor pool building at Grafenwoehr, Einhaupl's quality of work was rated as unsatisfactory because of its inability to control its subcontractor and due to the numerous deficiencies found at the pre-final and final inspection.6/ Einhaupl contends that its performance on this contract had improved since 1989 and, in any event, many of the Army's alleged deficiencies were not requirements under the contract.

Similarly, on a contract for work on two buildings at Grafenwoehr, Einhaupl received an unsatisfactory rating for its failure to timely perform the contract and its ineffective management.7/ According to Einhaupl the Army was only indirectly affected by its performance of the two-building contract, since the German Finanzbauamt (FBA) directly administered the contract and the Army only indirectly administered it. Einhaupl contends that its late start on the work under the two-building contract was excusable because of

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5/ The Army disputes whether Einhaupl's unsafe practices met any proper standards, asserting that there is no real difference between the contractor's obligation to furnish a safe work environment and applicable German craft rules for the safety violations documented at Einhaupl's worksite.

6/ The Army reports that in the end Einhaupl received an overall satisfactory performance rating, but its performance remained unsatisfactory under the critical element, "quality of work." The Army notes that on August 22, 1 year after the pre-final inspection, two typed pages of deficiencies remained on the punch list despite the removal of three items Einhaupl was unable to correct and the Army's completion of other items that could no longer wait for Einhaupl to correct. While Einhaupl ultimately finished the punch list, by December 3, at the time of the contracting officer's September 19 negative determination of responsibility, the punch list remained unresolved.

7/ The Army reports that Einhaupl did not begin work when it said it would, and was absent from the work site on several occasions (once for over 5 weeks).

government caused delays and that FBA concurred in Einhaupl's view that it was not responsible for the delay. The Army admits that one FBA letter indicated that Einhaupl was not responsible for certain construction delays; however, the Army points out that there are several later FBA letters indicating that the project delays were the contractor's responsibility.8/ Further, the Army reports that Einhaupl's unsatisfactory, untimely and sporadic performance on the first building delayed the start on the second building to the point where the second building was deleted from the contract.

The Army disagrees with Einhaupl's general contention that the contracting officer's information was not current, contending that the unfavorable performance ratings that formed the basis of the determination constituted current information since they were all issued within approximately 8 months of the date of the nonresponsibility determination. In any event, the contracting officer reviewed Einhaupl's performance on these contracts since the interim unsatisfactory performance evaluations and found insufficient improvement to warrant a change in the negative determination of responsibility. Finally, the Army urges that the performance problems encountered on the water storage tank repair contract alone provide a sufficient basis for the contracting officer's nonresponsibility determination. We agree.9/

The Federal Acquisition Regulation (FAR) provides that contracts shall be awarded only to responsible contractors.

8/ Einhaupl urges that its German contract did not require it to meet any milestones but only required that the contract work be timely completed. The Army agrees that the German contract lacked specific milestone dates that Einhaupl was required to meet. However, the contract did require Einhaupl to provide a progress schedule and remedies should the "contractor delay the commencement of execution or if he falls in arrears with completion" of the contract. Both the Army and FBA interpreted this "as requiring the Contractor to make sufficient progress on the contract work to assure that the work would be completed in a timely fashion."

9/ Einhaupl contends that upon completion of the water storage tank contract the Army and Einhaupl entered into a mutual and binding release of claims that has the legal effect of barring the Army from considering Einhaupl's untimely performance in making a responsibility determination. The protester cites no authority for this position, and we are aware of none. The agency's agreement to release its right to assert a claim against a contractor is not related to its duty to determine contractor responsibility before the award of later contracts.

FAR § 9.103(a). In order to be found responsible, a prospective contractor must have a satisfactory performance record. FAR § 9.104-1(c). 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 an agency'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 consider only whether the negative determination was reasonably based on the information available to the contracting officer at the time it was made. International Paint USA, Inc., B-240180, supra; Becker and Schwindenhammer, GmbH, B-225396, supra. Applying this standard here, we find the Army's determination was reasonable.

While Einhaupl argues that its delays on these contracts were excusable and its performance satisfactory, we think, based on the record before us, that it was reasonable for the Army to conclude that Einhaupl's performance was deficient and that it was not due to circumstances beyond its control. At the time of nonresponsibility determination, the contracting officer had reviewed detailed information concerning Einhaupl's poor performance record on the work, which was similar in nature to the work called for under these four RFPs, that had been generated in the 8 months prior to his consideration of the matter. This record affords us no basis upon which to question the Army's nonresponsibility determination. While Einhaupl offers explanations and interpretations of the record that provide a more favorable picture of Einhaupl's activities than that drawn by the contracting officer, this does not alter the fact that there was sufficient evidence for the contracting officer to conclude that Einhaupl had a history of performance problems. See MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431.

Finally, Einhaupl contends that the Army improperly denied it an opportunity to respond to this attack upon 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 a negative determination of responsibility 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, supra.

The protests are denied.

for James F. Hinchman
General Counsel