

DeGeorge

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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Metalcastello s.r.l.

File: B-244510

Date: October 21, 1991

Richard P. Diehl, Esq., for the protester.
Maj. William R. Medsger, Esq., and Mary Lee McCreight, Esq.,
Department of the Army, for the agency.
Steven W. DeGeorge, Esq., and John Brosnan, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Protest is denied where agency reasonably determined pro-
tester was nonresponsible based upon contracting officer's
conclusion that protester's recent contract deliveries for
similar items were seriously deficient, notwithstanding that
such prior contracts were not terminated, or protester's
disagreement with the facts.

DECISION

Metalcastello s.r.l. protests the determination of the
Department of the Army, Tank Automotive Command (TACOM),
finding it nonresponsible for award of a contract under
request for proposals (RFP) No. DAAE07-91-R-D437 for gear
spurs for the M60 tank. Metalcastello contends that the
Army's responsibility determination was arbitrary because it
was based upon a negative delivery capability report which
failed to consider surrounding circumstances. The protester
also objects to the agency's failure to conduct a preaward
survey.

We deny the protest.

The RFP, issued on February 28, 1991, provided for award to
the lowest priced offeror complying with the material
requirements of the solicitation and meeting the
responsibility criteria contained at Federal Acquisition
Regulation (FAR) § 9.104. Eight proposals were received by
the April 1 closing date of the RFP, with the protester's
being the lowest in price. On April 3, the contracting
officer requested a delivery capability report on
Metalcastello pertaining to the firm's performance of
current and past TACOM contracts. This report revealed that
the protester had a 66 percent delinquency rate on three

prior contracts for similar items, and was 100 percent delinquent on two current contracts, one of which was for items identical to those being procured in this instance. Based upon this report, and a concurrent recommendation of the TACOM Tank Support Section that award to Metalcastello would involve a high risk of late performance, the contracting officer determined that the firm was not a responsible contractor.¹ Award was subsequently made to the second low offeror.

The protester argues that the agency lacked a reasonable basis to find it nonresponsible because the contracting officer did not take into consideration all of the pertinent information concerning the firm's performance of the contracts which were the subject of the delivery capability report. While not disputing that its performance was delinquent on those contracts, the protester maintains that its delinquency was excusable for circumstances beyond its control, and in any event, was not so serious as to justify a finding of nonresponsibility. For example, the protester states that the delivery delays under the two current contracts were largely the result of changes in the government's inspection system as well as a modification to the specifications contained in one of the contracts. Additionally, the protester asserts that the deliverables under both of these contracts were required to be shipped by sea and that the ship not only sailed late, but also improperly stored the cargo, necessitating a time-consuming reinspection prior to ultimate delivery of the contract items to the government. With respect to the past contracts with TACOM, the protester states that delivery schedules were either unreasonable or that its late deliveries were waived by the government's failure to terminate for default. Further, the protester maintains in general that if its performance had been "seriously delinquent" under any of these contracts, they would have been terminated for default. Since they were not so terminated, the protester argues that the agency therefore had no reasonable basis to find it nonresponsible. Finally, the protester argues that the contracting officer failed to consider whether the reported delays were excusable or request a preaward survey

¹ FAR § 9.104-3(c) provides in relevant part:

"Satisfactory performance record. 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. . . ."

which could have disclosed the mitigating circumstances surrounding its delinquent performance.

The agency responds that there was nothing in either the delivery capability report or the relevant contract files which indicated that the protester's delinquent performance under these past and current contracts was excusable or beyond the firm's control. In this regard, the firm had submitted no written excuse or explanation for late delivery in connection with any of the relevant contracts. Accordingly, the agency maintains that based upon the information available to the contracting officer, it reasonably found Metalcastello nonresponsible. Additionally, in its protest report submitted to our Office, the agency has responded to the protester's specific allegations concerning its performance. The agency reports, for example, that the current contracts did not in fact require shipment by sea, and that the protester had the option of shipping the items by air which would have saved considerable time. Also, the agency reports that the cited change in the government's inspection system simply involved a change in administrative offices which should have had no impact on Metalcastello's performance of the current contracts. Finally, the agency notes that the specification change referred to by the protester was done at its request. With respect to the prior contracts, the agency similarly denies that the protester's delinquent performance was excusably delayed or waived.

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 where 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; B-224546, 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. Becker and Schwindenhammer, GmbH, B-225396, supra. Applying this standard here, we find that the agency's determination was reasonable.

Based on the record before us, we believe that the contracting officer reasonably concluded that Metalcastello's prior performance was seriously deficient and not due to circumstances beyond its control. There is no dispute that the information before the contracting officer showed that the protester had a prior delinquency rate of 66 percent and a current delinquency rate of 100 percent. Faced with this information, and no indication in

the contract files that Metalcastello's performance had been excusably delayed, we think that the contracting officer acted reasonably in finding the firm nonresponsible. Additionally, as indicated above, we think that the explanations now offered by the protester were satisfactorily refuted by the agency in its report. For example, while the protester maintains that its late deliveries under one of the contracts were due to a change in the contract specifications, the agency points out that the change was requested by the protester without an accompanying request for additional time to deliver. These explanations offered by the protester do not alter our view of the reasonableness of the contracting officer's determination. See MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431.

Finally, Metalcastello argues that a preaward survey should have been conducted and that it should have been given an opportunity to respond to the agency's findings prior to the responsibility determination. These arguments are unpersuasive. Preaward surveys are not a prerequisite to determinations of responsibility, and a contracting officer may use other information available. Carolina Waste Sys., Inc., B-215689.3, Jan. 7, 1985, 85-1 CPD ¶ 22. In this case, the contracting officer was provided with a delivery capability report on the potential contractor's recent performance under similar contracts with the agency, and also had access to the administrative files pertaining to those contracts. In our view, this was sufficient information upon which to base a responsibility determination. Further, 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 a negative determination in advance of contract award. Firm Reis GmbH, B-224544; B-224546, supra.

The protest is denied.


James F. Hinchman
General Counsel