Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Standard Tank Cleaning Corp.

File: B-245364

Date: January 2, 1992

A. Wayne Lalle, Jr., Esq., Graham & James, for the protester.
David H. Turner, Esq., Department of the Navy, for the agency.
John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where contracting agency determined that offeror was nonresponsible under two solicitations because of an unsatisfactory record of integrity, the determinations did not constitute a de facto debarment or suspension and the protester's due process rights were not violated by the agency's failure to grant the firm notice and an opportunity to respond because the two nonresponsibility determinations involved practically contemporaneous procurements for similar services and were based on current information indicating a lack of responsibility.

2. Contracting agency reasonably determined protester was nonresponsible based upon preaward survey and information from various state agencies which showed a history of environmental violations.

DECISION

Standard Tank Cleaning Corp. protests the determination by the Department of the Navy, Naval Regional Contracting Center (NRCC), Philadelphia that it is not a responsible prospective contractor under request for proposals (RFP) No. N00140-90-R-2253, issued for tank, bilge and pipe cleaning services, gas freeing, hazardous waste analysis and contaminated liquids and hazardous waste removal and disposal on surface ships.

We deny the protest.

The solicitation contemplated the award of a firm-fixed-price, indefinite delivery, indefinite quantity contract with a 12-month base period and 2 option years. According to the solicitation, the contractor is to provide all materials, equipment and employees to perform services on surface ships in response to delivery orders issued by the Navy. The solicitation included two lots: Lot 1 for services in Brooklyn and Staten Island, New York and Earle, New Jersey and Lot 2 for services in the Philadelphia, Pennsylvania area.

Two firms submitted proposals under the solicitation. Standard Tank proposed to supply the services under Lot 1 only while AK Engineering submitted a proposal for both lots. After evaluation of the initial proposals and discussions, the Navy requested and the offerors submitted best and final offers. Standard was the low priced offeror on Lot 1.

The contracting officer requested that the Defense Contract Management Area Office, Springfield, New Jersey (DCMAO) perform a preaward survey of Standard Tank. In its preaward survey report dated June 14, 1991, DCMAO stated that its inquiries to the United States Environmental Protection Agency (EPA) and the New Jersey Department of Environmental Protection (DEP) revealed that Standard Tank had been cited over 150 times between August 1983 and March 1991 for violations by the New Jersey DEP. The report states that 11 of those cases were still open with penalties owed in the amount of $101,925 and another 26 cases were pending. The report also stated that the New Jersey DEP was seeking $7,000,000 in fines for the violations.

The survey report also stated that several of the violations concerned Standard Tank's Bayonne, New Jersey site which the firm proposed to use on the Navy's contract to separate oil, sludge and water and that use of that site for the proposed contract was questionable. Further, according to the report, in November 1990 the firm's former president, Evelyn Frank, who with her family owns Standard Tank and affiliated companies, had been found guilty by a New Jersey court of illegal dumping of sludge off the New Jersey shore and had been sentenced to sever all ties with the firm. According to the report, since the former president had severed all ties with the firm, and new management has taken over, 11 violations of environmental regulations have occurred. Based on this review, DCMAO recommended that no award be made to Standard Tank.

On June 27, the contracting officer determined that Standard Tank was nonresponsible based on the negative preaward survey report and additional information from the New York Department of Environmental Conservation (DEC). According

to the contracting officer, a review of this information revealed an extended and serious history of environmental abuses by Standard Tank and affiliated corporations. The contracting officer concluded that the evidence indicated "a failure by the firm's management to demonstrate the requisite integrity, responsibility and ability to comply with the solicitation requirements necessary for participation in a Government procurement." After the contracting officer concluded that Standard Tank was nonresponsible, the Navy awarded the contract to AK for both lots and, by letter of June 28, notified Standard Tank of the nonresponsibility determination and the award.

Standard Tank protested to the Navy arguing that it should have been found responsible and that AK should not have been found to be a responsible contractor. The Navy denied that protest.

In its protest to this Office, Standard Tank argues that the contracting officer improperly relied on information in the preaward survey and provided by New York DEC without attempting to independently verify the accuracy of the information. In this respect, Standard Tank argues that the information which the contracting officer relied on was inaccurate, unreliable, incomplete and in some cases irrelevant to a determination of Standard Tank's responsibility. Thus, Standard Tank maintains that there is no basis for the contracting officer's conclusion that the firm has a history of environmental abuses.

The regulations provide that contracts shall be awarded to responsible contractors only, and list several standards that a prospective contractor must meet. Federal Acquisition Regulation (FAR) §§ 9.103 and 9.104-1. Those standards include a satisfactory performance record, and a satisfactory record of business integrity and ethics. FAR § 9.104-1. The regulations place the burden on a prospective contractor to affirmatively demonstrate its responsibility, FAR § 9.103(c), and state that in the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR § 9.103(b).

In general, the determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. We therefore will not question a nonresponsibility determination unless the record shows bad faith on the part of contracting officials or that the determination lacks a reasonable basis. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

Standard Tank first argues that because the nonresponsibility determination was based on a lack of integrity, in accordance with Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980), a greater standard of care with regard to assembling and using information and a higher degree of procedural protection should have been afforded to it. In this respect, the protester argues that because of the effect that an integrity based nonresponsibility determination can have on a business, contracting agencies are required by Old Dominion to provide due process, including notice and an opportunity to be heard. The protester also urges that because of the nature of this nonresponsibility determination Old Dominion mandates that we give the agency's action especially close scrutiny.

In Old Dominion, the court held that where a de facto debarment[1] results from an agency's determination that a contractor lacked integrity, due process guaranteed by the Fifth Amendment of the United States Constitution required that notice of the charges be given to the contractor as soon as possible so that the contractor could present its side of the story before adverse action was taken. Old Dominion, 631 F.2d at 968.

The protester states that it has been found nonresponsible for the same reasons by the Navy on three different solicitations and for that reason it is entitled to the additional protection mandated by Old Dominion for contractors that have suffered the stigmatizing effects of multiple nonresponsibility determinations. According to the protester, in addition to the solicitation which is the subject of this protest, it was also found nonresponsible by the Navy under RFP No. N00140-91-R-0701 under which Standard Tank was proposed as a subcontractor by one of the offerors and under a solicitation for bilge removal from Navy ships during the Navy's "Fleet Week" exercises.

The record shows that Standard Tank has been found nonresponsible by the Navy under two solicitations. In addition to the solicitation in question here, on June 4, the Navy found Standard Tank nonresponsible under the "Fleet

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[1]A de facto debarment occurs where a firm is excluded from contracting because of a contracting agency's making repeated determinations of nonresponsibility or even a single determination of nonresponsibility as a part of long-term disqualification attempt, without following the procedures for suspension or debarment set forth in FAR Subpart 9.4. Becker and Schwindenhammer, GmbH, supra.

Week" solicitation.[2] This in our view did not constitute an exclusion from government contracting or subcontracting or, in other words, a de facto debarment or suspension, because while more than one nonresponsibility determination was made they involved virtually contemporaneous procurements of similar services and were based upon essentially the same current information indicating Standard Tank's lack of responsibility.[3] Under such circumstances a de facto debarment or suspension does not result. Becker and Schwindenhammer, GmbH, supra; The Aeronetics Div. of AAR Brooks & Perkins, B-222516; B-222791, Aug. 5, 1986, 86-2 CPD ¶ 151. We therefore conclude that Standard Tank was not entitled notice and an opportunity to be heard prior to the contracting officer's determination, see Frank Cain & Sons, Inc.--Recon., B-246893.2, June 1, 1990, 90-1 CPD ¶ 516, and we find that it is proper to review the protest based upon a standard of reasonableness normally used in responsibility cases. Becker and Schwindenhammer, GmbH, supra.

As far as the substance of the nonresponsibility determination is concerned, Standard Tank has filed numerous submissions in support of its agency level protest and its protest to this Office. In those submissions it has explained in great detail its position with respect to its environmental compliance record, corrective actions it has taken and its current record of compliance. Nonetheless, as we explain below, even based on this expanded record, including Standard Tank's explanation of the recent actions it has taken to improve its environmental compliance, we think the contracting officer's decision to find Standard Tank nonresponsible was reasonable.

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[2] With respect to the other RFP under which Standard Tank argues that it was found nonresponsible, the Navy reports that an affiliate of Standard Tank was proposed as a subcontractor under that solicitation. In an affidavit submitted to this Office, the contracting officer for that solicitation explains that the firm which proposed the Standard Tank affiliate as a subcontractor lost the award simply because it was not the low priced offeror and that a nonresponsibility determination was not made under that solicitation.

[3] As noted above, Standard Tank was found nonresponsible under the "Fleet Week" solicitation on June 4, and the Navy informed the firm that it was nonresponsible under the current solicitation in a letter dated June 28.

The nonresponsibility determination was based on consideration of information from New Jersey and New York state agencies and the EPA showing environmental violations and alleged violations by Standard Tank and affiliated companies. The contracting officer specifically mentioned in his determination the July 1990 guilty plea by the firm's former president for criminal violations resulting from the sinking of a Standard Tank barge. He also cited information in the preaward survey relating to 150 citations issued to Standard Tank by the New Jersey DEP from 1983 until March 1991 and information from the New York DEC indicating that in March 1991 the state revoked licenses issued to the firm and prohibited the operation of its barges in New York waters. Finally, the contracting officer's nonresponsibility determination stated that 11 additional violations had occurred since the new management of the firm had taken over in November 1990.

Standard Tank argues that the New York and New Jersey allegations are without merit and are being contested. The protester explains that it has filed suit in United States District Court, Eastern District of New York, seeking to annul the enforcement actions of the New York DEC. Standard Tank's submissions to this Office include detailed arguments contesting the violations and alleged violations in New York and arguing that those matters were not as serious as alleged by New York authorities, that many of the violations occurred more than 5 years ago and were the result of errors on the part of personnel on board barges and that its current management and new procedures will prevent future problems.

According to Standard Tank, although New Jersey is seeking $7,000,000 in fines against the company for a series of alleged violations, the matter is pending in a New Jersey state court and the only action taken against Standard Tank to date is that it has been ordered not to exceed the discharge parameters of its New Jersey permit. According to the protester, the improper discharges that it is accused of in New Jersey caused no environmental harm, were technical in nature and are still in litigation. The protester also seeks to minimize the conviction of its former president by stating that it concerned a failure on her part to properly supervise employees and pointing out that she is no longer affiliated with the firm.

Under our standard of review, a nonresponsibility determination may be based upon the contracting agency's reasonable perception of the contractor's previous performance on government contracts, even where the contractor disputes the agency's interpretation of the facts or has appealed adverse determinations. Firm Otto Einhaupl, B-241553 et al., Feb. 20, 1991, 91-1 CPD ¶ 192. We think that this standard

should also apply to a case such as this where the determination concerns a firm's integrity as opposed to just its past performance on government contracts because in both instances the agency must consider and evaluate information concerning the firm's past operations.

Here, the contracting officer had reviewed detailed information concerning Standard Tank's history of poor environmental compliance. Most of that information had been generated by the preaward survey team in the few months prior to his consideration of the matter. While Standard Tank offers explanations and interpretations of the record that provide a more favorable picture of its history than that drawn by the contracting officer, this does not alter the fact that there was in our view more than sufficient evidence for the contracting officer to conclude that Standard Tank's operations had experienced a long history of serious environmental problems.

Further, although the protester argues that the contracting officer should have gone beyond the information he had in the preaward survey and gathered more detailed data on Standard Tank, there is no requirement that the contracting officer conduct an independent inquiry to substantiate the accuracy of a preaward survey report. Becker and Schwindenhammer, GmbH, supra. In any event, here the contracting officer did not simply rely on the information in the preaward survey report, obtaining additional information from the EPA and from the state agencies concerning Standard Tank.

In further support of its position that the negative information was not carefully analyzed by the contracting officer, Standard Tank argues that much of the information from New Jersey, New York and the EPA which the contracting officer considered related not to Standard Tank but to other, affiliated firms. For instance, in determining that Standard Tank is nonresponsible, the contracting officer considered a March 25, 1991, decision and order of the New York DEC which confirmed a summary abatement order that revoked 14 petroleum facility licenses and prohibited the operation of certain barges in the waters of the State of New York. Standard Tank points out that the action concerned Berman Enterprises, Inc., General Marine Transport Corporation, Standard Marine Services, Inc., Jane Frank Kresch, Evelyn Berman Frank and Peter M. Frank and states that Standard Tank is not included among these corporate entities. According to the protester, therefore, the New York action is irrelevant to a determination of Standard Tank's responsibility.

We do not agree. As the Navy points out, Standard Tank and the companies and individuals named in the New York action are closely affiliated. Standard Tank admits that Standard Marine Services, Inc. is the parent company which holds 100 percent of the stock in General Marine Transport Corporation, Berman Enterprises, Inc. and Standard Tank, the protester. Standard Tank also admits that Standard Marine Services, Inc., the parent company, is owned 100 percent by members of the Berman and Frank families. Under the circumstances, it was reasonable for the Navy to consider the New York action and other environmental violations and alleged violations by affiliates of Standard Tank in a determination of Standard Tank's responsibility. See Garten-und Landschaftsbau GmbH Frank Mohr, B-237276; B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186.

Standard Tank further argues that the contracting officer inadequately considered changes the firm has made in its operations or its current ability and willingness to comply with environmental regulations. Standard Tank explains that since it severed ties with its previous president, it is under new management, has retained a team of professionals to ensure environmental compliance, has implemented an extensive training program and created new procedures and is using new equipment.

As evidence of its enhanced ability to avoid problems, Standard Tank argues that since it came under new management in November, 1990 its environmental compliance record has improved. In this regard, the protester disputes the agency's statement that 11 violations have occurred under the new management. Standard Tank maintains that there have been no violations under its new management. According to the protester, although three notices of violation have been issued by the EPA concerning a loose top on a drum and missing labels on two drums, it immediately addressed those issues and no penalties were assessed. Also, Standard Tank argues that three notices of violation were erroneously issued by the New Jersey DEP for allegedly operating two boilers without a permit and three other notices of violation were issued for allegedly exceeding sulfur emissions levels. According to Standard Tank, it has requested a hearing on each of these notices of violation and to date no violations have been found or penalties assessed in these cases.

With respect to the recent alleged violations, the Navy states that the contracting officer reasonably relied on the preaward survey report in determining that the pattern of environmental noncompliance continued after the firm's change in management. The Navy argues that the contracting officer had no duty to independently verify the findings in the report with respect to recent violations and, in any

event, according to the Navy, the protester has essentially confirmed the finding of the preaward survey report that Standard Tank's environmental problems have continued in spite of its new management.

We agree with the Navy. Although it appears that the preaward survey report inaccurately stated that Standard Tank had committed 11 violations since its new management took over, the protester admits that it has been accused by the New Jersey DEP of a number of recent violations. In fact, the record indicates that there have been nine citations.

It is not surprising that the alleged violations that occurred after the change in management had not yet been fully adjudicated and we see no reason why the contracting officer should have ignored them in his responsibility determination. Further, Standard Tank's management changed in November 1990, only 7 months before the nonresponsibility determination. Considering the long history of the firm's serious problems with various environmental enforcement entities, we do not think that this relatively short time under the new management combined with at least some continuing problems with the enforcement authorities compels a conclusion that Standard Tank has shown a current ability and willingness to comply with environmental regulations.

The protest is denied.

for James F. Hinchman
General Counsel