



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Schwendener/Riteway Joint Venture

**File:** B-250865.2

**Date:** March 4, 1993

Scott F. Turow, Esq., Eric A. Oesterle, Esq., and Richard M. Hoffman, Esq., Sonnenschein, Nath & Rosenthal, for the protester.  
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Elizabeth S. Woodruff, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Where an agency's determination of nonresponsibility is based on inaccurate or incomplete information or upon a misinterpretation of available information, the determination is unreasonable.

### DECISION

Schwendener/Riteway, a joint venture composed of Paul H. Schwendener, Inc. and Riteway Construction Company, protests rejection of its bid under invitation for bids (IFB) No. DTFA14-92-B-33279, issued by the Federal Aviation Administration (FAA), Department of the Transportation, on May 26, 1992, for the construction of a 27-story air traffic control tower and base building at O'Hare International Airport, Chicago, Illinois. The contracting officer rejected Schwendener/Riteway's bid after determining that the joint venture was a nonresponsible bidder. Schwendener/Riteway contends that the determination lacked a reasonable basis because it was based on inaccurate and incomplete information.

We sustain the protest.<sup>1</sup>

Nine bids were received by the August 13, 1992 closing date. Schwendener/Riteway was the apparent low bidder with a bid of \$14,460,000. The second lowest bid was \$14,660,000 and the third lowest was \$14,797,000. Because the bid submitted

<sup>1</sup>A hearing was conducted on this protest where testimony was received regarding the basis for the contracting officer's nonresponsibility determination. 4 C.F.R. § 21.5.

by Schwendener/Riteway was 16 percent lower than the government's estimate of \$17,371,263, the contracting officer asked Schwendener/Riteway to verify its bid, which it did on August 26, 1992.

The contracting officer advised Schwendener/Riteway that prior to making an award he would conduct a survey to determine responsibility. He requested that Schwendener/Riteway provide a list of all subcontracts, a security plan, a list of suppliers, and, for each joint venture partner, certified financial statements, the percentage of work the partner would perform, a list of prior projects, a certified construction equipment list, and an employee list. The contracting officer obtained financial information on each of the joint venture partners from Dun & Bradstreet and a list of Schwendener's mechanic's liens from Contractor's Adjustment Company.<sup>2</sup> Finally, the contracting officer held a meeting on September 3, 1992, with representatives of the joint venture for the stated purpose of discussing the joint venture's financial status, high-rise construction experience, and plans for construction of the tower. Tr. 169.

As a result of the pre-award survey, the contracting officer determined that Schwendener/Riteway was nonresponsible based upon the following findings: (1) it did not have the financial capacity to complete the project in a timely manner; (2) it did not have the technical experience for a project of this size and complexity; (3) it did not have a satisfactory performance record; and (4) it did not submit a subcontracting plan. The contracting officer informed the joint venture of this determination in a letter received October 9, 1992. Schwendener/Riteway protested the contracting officer's determination to our Office on October 13 and October 26, 1992.<sup>3</sup> Schwendener/Riteway's earlier protest was consolidated into the protest filed October 26, 1992. Schwendener/Riteway basically asserts that the determination is unreasonable because the contracting officer failed to consider all available information and misinterpreted other information.<sup>4</sup>

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<sup>2</sup>Contractor's Adjustment Company is reportedly in the business of providing mechanic's lien information to financial and other lending institutions. Hearing Transcript (Tr.) 220-21.

<sup>3</sup>The FAA has stayed award of the contract in accordance with 4 C.F.R. § 21.4 and 31 U.S.C. § 3553 (1988).

<sup>4</sup>Secondarily, Schwendener/Riteway asserts that the decision was made in bad faith. As evidence of this bad faith, the  
(continued...)

Contracts may only be awarded to responsible prospective contractors. Federal Acquisition Regulation (FAR) § 9.103(a). To be determined responsible, a prospective contractor must have adequate financial resources to perform the contract or the ability to obtain them. FAR § 9.104-1(a). The contractor must also be able to comply with the required performance schedule, have a satisfactory performance record, and have the necessary organization, experience, operational controls, and technical skills, or the ability to obtain them. FAR § 9.104-1(b), (c), and (e). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must find the firm nonresponsible. FAR § 9.103(b).

Contracting officers have broad discretion in reaching nonresponsibility determinations, and we will not question such a determination unless a protester can establish that it lacked any reasonable basis or was made in bad faith. Diversified Cont. Servs., Inc., B-237209, Jan. 22, 1990, 90-1 CPD ¶ 84; Betakut USA Inc., B-234282, May 8, 1989, 89-1 CPD ¶ 432. In making a responsibility determination, the contracting officer may rely on the results of a pre-award survey. However, where the contracting officer relies upon a pre-award survey, our Office will consider the accuracy of the survey information in determining whether a contracting officer's determination of nonresponsibility was reasonable. BMV, Div. of Harsco Corp., B-233081, B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67. The contracting officer should give the bidder a reasonable opportunity to offer relevant information with respect to issues raised by the pre-award survey if time permits. Tomko, Inc., 63 Comp. Gen. 218 (1984), 84-1 CPD ¶ 202.

During the hearing, the agency stipulated that two of the grounds upon which it determined the protester to be nonresponsible were not supported by the record before the contracting officer. Specifically, as discussed in further detail below, the agency stipulated that the joint venture had adequate bonding capacity to perform the work under the contract and it stipulated that the joint venture had included adequate costs in its bid to cover the costs of the

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<sup>4</sup>(...continued)

protester points to the contracting officer's inquiry on August 18, 1992, and again at the September 3, 1992 meeting, whether the joint venture wanted to "withdraw" its bid. In both instances, however, the contracting officer was doing no more than is required of him by FAR § 14.406. This regulation provides that, in cases where the contracting officer suspects that a mistake in bid has been made, he must request a verification from the bidder and permit the bidder an opportunity to withdraw.

cranes needed to perform the work. We find that the other reasons articulated by the contracting officer in support of the nonresponsibility determination are also flawed in that the contracting officer either misinterpreted the information available or relied upon incomplete and inaccurate information.

#### FINANCIAL CONDITION

The protester is a joint venture comprised of Paul H. Schwendener, Inc. and Riteway Construction Services, Inc. Schwendener is the eleventh largest contracting concern in the Chicago area and has been in operation since 1921. Riteway is a minority-owned small business. Schwendener holds a 75 percent interest in the joint venture; Riteway holds a 25 percent interest. Although the joint venture agreement indicates that the joint venture was established for the sole purpose of entering into the contract at issue, the partners are also presently engaged in one other project as a joint venture--the remodeling of the American Airlines concourse at O'Hare Airport. Tr. 186. The agreement provides that Schwendener and Riteway are jointly and severally liable for all debts of the joint venture.

In his nonresponsibility determination, the contracting officer suggests that he found the protester nonresponsible because no financial information was available for the joint venture.<sup>5</sup> However, at the hearing, the contracting officer stated that he made his determination based upon financial information that was provided for the joint venture partners

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<sup>5</sup>The contracting officer also expressed concern that the joint venture had been "very late" in providing the financial and other information he requested. Tr. 172. The contracting officer first requested information in a telephone conversation on August 17, 1992; this request was confirmed by letter dated August 19, 1992. In that letter, the contracting officer requested that Schwendener/Riteway provide nine separate items by August 26, 1992. The record establishes that on August 26, Schwendener/Riteway submitted some material and requested additional time, until August 28 (a Friday) to submit the remainder, and that the contracting officer granted the request. The remaining available information was not submitted until August 31 (the following Monday). The only part of the contracting officer's request for information that was not met by August 31 was for documents that did not exist. Tr. 196-97, 279. The fact that the joint venture was one day late in providing all information that was available is hardly significant given that there was no apparent urgency in proceeding with the award. See Tomko, Inc., supra.

individually. Tr. 200. The contracting officer concluded that Riteway did not have the financial resources to compete for the project on its own and was totally dependent upon Schwendener. The protester does not dispute the contracting officer's conclusion that Riteway alone could not assume responsibility for this job. The protester argued, and the contracting officer admitted at the hearing, Tr. 266, that the joint venture agreement would satisfy the requirements of FAR § 9.104-1(a) if Schwendener itself could establish that it was financially responsible.

The contracting officer concluded that Schwendener was not financially responsible because the value of its outstanding projects would over-extend its monetary and manpower resources, making it "unable to comply with the required performance schedule."<sup>6</sup> This conclusion was based, in part, upon the contracting officer's belief that Schwendener was presently involved in a number of large incomplete projects that, if activated, would exceed Schwendener's available bonding capacity extended by its surety. The agency has stipulated, however, that Schwendener did, in fact, have adequate bonding capacity to cover this project. Tr. 6. Thus, we do not need to address this issue.

The contracting officer also concluded that Schwendener was financially nonresponsible based the number of mechanics liens that he believed were outstanding against Schwendener.<sup>7</sup> Tr. 202. In making his determination, the

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<sup>6</sup>In the hearing, the contracting officer testified that he was also concerned that the certified financial statement submitted for Paul H. Schwendener, Inc. was combined with that of Schwendener Construction Company and, thus, did not reflect the financial capacity of Paul H. Schwendener, Inc. alone. Tr. 271. Even though the contracting officer had the benefit of an accountant to review the financial statements and to advise him as to their reliability, no issue was raised at that time regarding the combined nature of the financial statements. Tr. 274. The financial statement included a note explaining that Schwendener Construction Company is a performing subcontractor of Paul H. Schwendener, Inc. Tr. 273. In addition, Mr. Schwendener testified that he discussed the net worth of each of the companies with the contracting officer. Tr. 298. This issue was not mentioned in the nonresponsibility determination as a basis for the determination and, based upon this record, it does not appear to be a significant concern.

<sup>7</sup>Although the nonresponsibility determination is vague concerning whether the contracting officer was most troubled (continued...)

contracting officer reviewed information from Contractor's Adjustment Company (see note 2, above) which, the contracting officer concluded, showed 149 liens in excess of \$7 million filed against Schwendener between December 1987 and June 1992. The contracting officer did not independently verify whether this information was correct. Tr. 218, 248. Although the issue of liens was raised during the September 3 meeting, it is apparent from the contracting officer's notes of the meeting that the issue was raised with respect to liens filed against only one Schwendener project. The contracting officer did not request any information regarding the status of any of the other liens included on the lien list. Despite the fact that he was unfamiliar with Contractor's Adjustment Company, had never used their services before, and did not know whether the information on the list was reliable, the contracting officer assumed that all liens recorded on that list represented an outstanding debt. Tr. 177. In fact, the record demonstrates that virtually all of the liens shown on the Contractor's Adjustment Company list had been released prior to submission of the bid.

The lien list itself establishes that there was no reasonable basis for the contracting officer's assumption. The Contractor's Adjustment list includes 149 entries, some of which are duplicates, that were recorded over a ten year period, not a five year period as is stated in the nonresponsibility determination. The list indicates that some of the liens had already been released by providing both a docket number and a release date. The contracting officer testified that he questioned Contractor's Adjustment Company whether the company "checked" the liens on the list and that he was told that they did so at least monthly. However, the contracting officer admitted that he did not ask specifically whether the company checked whether liens included on the list had been released. Tr. 225. The contracting officer failed to appreciate the difference between the filing of a lien and the release of a lien, which has a significant negative impact on the reasonableness of his determination.<sup>8</sup> Tr. 225.

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<sup>7</sup>(...continued)

by the existence of this number of liens or the outstanding nature of the liens, it is clear that the contracting officer's primary concern was with the financial obligation that he believed these liens represented. Tr. 178.

<sup>8</sup>The contracting officer testified at the hearing that even if he had known that the liens had been released, he would not have changed his nonresponsibility determination because this number of liens suggested to him that the company was  
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Based upon our review, we find the contracting officer's finding that Schwendener was not financially responsible was unsupported and does not provide a basis for determining that Schwendener/Riteway is nonresponsible.

#### PRODUCTION, CONSTRUCTION AND TECHNICAL ABILITY

The contracting officer also found that Schwendener/Riteway was nonresponsible because neither the joint venture nor either of its individual partners had a satisfactory performance record in projects similar to the O'Hare air traffic control tower. Specifically, the contracting officer testified that, in order to be determined technically responsible for this contract, a contractor needed "experience in high-rise construction and . . . something as difficult as the airport work." Tr. 188. The contracting officer concluded that Schwendener/Riteway had no qualifying experience.

In fact, Schwendener/Riteway had experience that meets both prongs of the stated test for minimum technical qualifications. As noted above, the joint venture is presently engaged in a successful renovation of the American Airlines concourse at O'Hare Airport. This work obviously meets the contracting officer's requirement for experience working in a high-density area under the unique conditions imposed by an extremely busy airport. The project requires special traffic plans, permits, briefings, security, and work air side. Tr. 249. The contracting officer's only explanation why this airport work was not qualifying was that it "was a small-rise project." Tr. 187. Thus, it appears that the contracting officer's determination was based solely on what he perceived to be the joint venture's lack of high-rise construction experience. However, the protest record also demonstrates that Schwendener's management team had significant experience building structures from 24 to 44 stories. The contracting officer acknowledged that, had he been aware of this experience prior to making his determination, he would not have found

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<sup>8</sup>(...continued)

poorly managed. Tr. 177-78, 202-03. However, the contracting officer made no effort whatsoever to determine why 149 mechanics liens had been filed against Schwendener. In fact, there are a number of reasons for the filing of a mechanic's lien which are not due to the contractor's management problems. For example, Schwendener explained that a number of liens were filed against one of its projects as a result of the developer's insolvency. Tr. 52-53. Thus, it was not reasonable for the contracting officer to conclude, without any discussion with Schwendener, that the liens were filed due to some fault of the contractor.

Schwendener/Riteway nonresponsible based upon lack of qualifying experience. Tr. 258.

The contracting officer's only explanation why, in light of this qualifying experience, he nevertheless found Schwendener/Riteway nonresponsible in this area is that the contractor did not offer detailed evidence of its high-rise experience until it filed its protest. However, we find that there was sufficient discussion of Schwendener's high-rise construction experience at the September 3 meeting, at a minimum, to put the contracting officer on notice to inquire further.<sup>9</sup> The fact that the contracting officer was not cognizant of any detailed evidence of Schwendener's high-rise experience appears to have been caused by his failure to request it or otherwise indicate that it was an area of concern. On August 19, the contracting officer requested a list of the joint venture partner's past projects; he did not indicate, however, that he was particularly interested in projects that involved high-rise construction. Indeed, there is nothing in any of the contracting officer's correspondence to suggest that he was singling out high-rise construction experience as opposed to experience involving other complex construction. Although a contracting officer has significant discretion in determining what experience is relevant in making a responsibility determination, see Martech USA, Inc., B-244714, Nov. 12, 1991, 91-2 CPD ¶ 447, he may not mislead a contractor regarding the nature of his inquiry and later rely on the fact that the contractor failed to provide critical information.

In finding Schwendener/Riteway nonresponsible based upon lack of technical expertise, the contracting officer also relied upon his conclusion that the joint venture did not have a plan how it would accomplish the crane work. Tr. 193. However, the contracting officer's own notes of the September 3 meeting shows that Schwendener/Riteway advised the contracting officer that it intended to rent or lease a crane and discussed the make and model of the cranes that it was considering. The contracting officer testified that his concern regarding the crane was primarily that Schwendener/Riteway had failed to include in its bid sufficient funds for this work. Tr. 261. However, the agency has stipulated

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<sup>9</sup>Although the contracting officer testified that he did not recall any discussion of specific high-rise projects, the testimony offered by Schwendener's representatives that such discussion did take place is more persuasive since one of the reasons the contracting officer called the meeting was to discuss the joint venture's experience. Tr. 169, 250, 256.



that the funds allocated to the crane rental in Schwendener/Riteway's Schedule of Values (cost estimates) were, in fact, adequate to cover the costs of leasing and operating the crane. Tr. 6. Thus, there was no factual basis for the contracting officer's conclusion based upon this record that Schwendener/Riteway had not properly planned its work.<sup>10</sup>

#### PERFORMANCE RECORD

The contracting officer found that Schwendener/Riteway was nonresponsible based upon an unsatisfactory performance record. In making this determination, the contracting officer relied upon a single unsatisfactory performance report. The contracting officer interviewed the project manager for the architect on one of Schwendener's ongoing projects, who reported that the job was behind schedule because shop drawings and schedule changes had not been submitted in a timely manner. This opinion was not confirmed by discussions with the owner or any other person familiar with the project. It was also an opinion that was not shared by any of the references for the fifteen other projects investigated by the contracting officer, including another project manager at the same architectural firm. In fact, a majority of the other references were very complimentary and the remaining references said that they had too little experience with the firm to comment. The contracting officer offered no reasonable explanation why he found this one unfavorable report to be a more accurate representation of Schwendener's performance record than fifteen favorable reports. While a nonresponsibility determination may be based upon a contracting officer's perception of inadequate prior performance, that perception must be a reasonable one. See International Paint USA, Inc., B-240180, Oct. 30, 1990, 90-2 CPD ¶ 349. Under these circumstances, where the overwhelming weight of the reports were favorable, it was unreasonable for the contracting officer to conclude that the protester's performance was inadequate based upon a single unfavorable report. At a minimum, the contracting officer had an obligation to investigate the circumstances surrounding the one

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<sup>10</sup>In light of our findings and recommendation, we do not address the contracting officer's finding that the contractor was also nonresponsible because it did not intend to perform 25 percent of the work with its own workforce, as required by the solicitation. This determination was based upon the contracting officer's understanding of the joint venture's Schedule of Values. The stipulation demonstrates that contracting officer's understanding of the contractor's allocations was flawed. Furthermore, the contracting officer appears to have waived this requirement by advising Schwendener/Riteway that its "best efforts" were acceptable.

unfavorable reference before concluding that the protester was nonresponsible.

#### SUBCONTRACTING PLAN

The contracting officer also determined Schwendener/Riteway nonresponsible based upon the joint venture's failure to submit the subcontracting plan required by the solicitation. The solicitation provided that

[i]n accordance with FAR 19.708, FAR Clause 52.219-9 Alt 1, incorporated by reference in Section I, the successful bidder (if considered a large business) shall submit a subcontracting plan to the Contracting Officer within 10 calendar days of notification as the apparent low bidder.

The protester was present at the bid opening and was aware that the contracting officer was undertaking a pre-award survey. Thus, it was on notice that it was the apparent low bidder. The FAR clause referenced by the IFB, FAR § 52.219-9, Alternate 1, provides that the apparent low bidder in a sealed bidding procurement, "upon request by the Contracting Officer," shall submit a plan which addresses separately its plans to subcontract with small business concerns and with small disadvantaged business concerns. The clause further provides that the plan shall be submitted within the time specified by the contracting officer. The contracting officer admits that he never requested that Schwendener/Riteway submit a subcontracting plan. Tr. 171, 173. He explained his failure to ask for this plan by stating only that he did not believe he had to "spell everything [out]." Tr. 173. The joint venture did submit a plan, on October 23, 1992; thus, there is no basis for concluding that it was incapable of preparing such a plan.<sup>11</sup> Under the circumstances, there was no basis to find Schwendener/Riteway nonresponsible based on a plan that was never requested during the pre-award survey. See Hewlett-Packard Company, Medical Products Group, B-216125.2, 85-1 CPD ¶ 597, May 24, 1985 (bidders should be notified of deficiencies in areas used to determine their responsibility and afforded a reasonable opportunity to correct those deficiencies where time allows).

The contracting officer also claims that Schwendener/Riteway did not submit, in a timely manner, a "specific list of subcontracts they propose to subcontract for the above project." Schwendener/Riteway explained that it advised the

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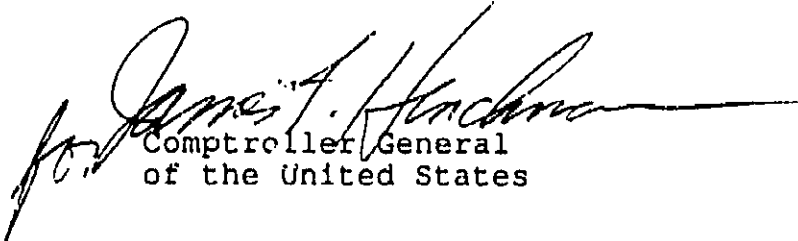
<sup>11</sup>There is no evidence in the record whether the agency has reviewed this plan or whether the plan meets the regulatory requirements for approval.

contracting officer at the September 3 meeting that it could not provide such a list because it had not definitized its subcontracts and would be unable to do so until it was assured of an award and had an approved schedule. Tr. 28. Thus, the protester's failure to submit the plan did not, as the contracting officer suggested, indicate a lack of perseverance or a lack of cooperation so much as it indicated a reasonable method of doing business. The contracting officer testified that his sole reason for requesting such a list was to get the contractor "to think about a subcontracting plan." Tr. 170. While the contracting officer has considerable discretion to request information relevant to a responsibility determination, it appears here that the relevant information the contracting officer should have requested was the subcontracting plan itself and not a list of subcontractors for a contract which had not yet been awarded.

#### CONCLUSION

The contracting officer misinterpreted information concerning Schwendener's bonding capacity and outstanding liens and thus concluded, unreasonably, that the joint venture is financially nonresponsible. The contracting officer misinterpreted the joint venture's Schedule of Values and thus concluded, unreasonably, that it had not properly allocated its crane costs. The contracting officer failed to seek relevant information regarding Schwendener's high-rise construction experience, and failed to seek relevant information regarding the true status of Schwendener's current performance, which led him to conclude, again unreasonably, that the joint venture did not have the necessary construction and technical expertise to perform the project. Finally, the contracting officer unreasonably relied upon the joint venture's failure to provide a subcontracting plan, which the contracting officer never requested, to conclude that the joint venture was nonresponsible from a performance standpoint.

Accordingly, we find that Schwendener/Riteway was improperly determined to be nonresponsible. We therefore recommend that award be made to that firm, if otherwise proper. We also find that Schwendener/Riteway is entitled to the costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d)(1) and (3).

  
Comptroller General  
of the United States