

B. Miller



Comptroller General
of the United States

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Washington, D.C. 20548

Decision

Matter of: Tutor-Saliba Corp., Perini Corp., Buckley & Co.,
Inc., and O & G Industries, Inc.,
A Joint Venture

File: B-255756.2

Date: April 20, 1994

E. Manning Seltzer, Esq., and Mark E. Davis, Esq., Seltzer and Rosen, for the protester.
A. Wayne Lalle, Jr., Esq., Graham & James, for CBPO of America, an interested party.
Lester Edelman, Esq., Mary S. Byers, Esq., and Stephen Temmel, Esq., Department of the Army, for the agency.
Behn Miller, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office will not review a protest against an agency's affirmative determination of an awardee's responsibility in the absence of a showing of fraud or bad faith on the part of the contracting officer.

DECISION

The Joint Venture of Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Industries, Inc. (hereinafter Joint Venture) protests the award of a contract to CBPO of America, Inc. (CBPOAmerica), under invitation for bids (IFB) No. DACW09-93-B-0010, issued by the Los Angeles District of the United States Army Corps of Engineers, for the construction of the Seven Oaks Dam and appurtenances at San Bernardino County, California.

The Joint Venture contends that the contracting officer acted in bad faith by determining the awardee to be a responsible contractor in the face of evidence that the awardee's foreign affiliate--Construtora Norberto Odebrecht (CNO), a Brazilian corporation--is currently being sued for civil penalties by the Brazilian government as a result of the affiliate's alleged involvement in bribery of various Brazilian government officials to obtain Brazilian public works contracts. The Joint Venture also contends that the contracting officer ignored in bad faith a January 1994 Brazilian Congressional Investigating Committee Report focusing on alleged political corruption in Brazil's federal construction procurements. In this regard, with respect to responsibility determinations, Federal Acquisition

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Regulation (FAR) § 9.104-3(d) requires the contracting officer to consider an affiliate's or subcontractor's past performance and integrity when they may adversely affect the prime contractor's responsibility; here, the record shows that CBPOAmerica is relying on its CNO affiliate to comply with the solicitation's prime contractor experience definitive responsibility criterion.

We dismiss the protest.

This is the second protest the Joint Venture has filed challenging the responsibility of the awardee. In its first protest, filed with our Office on November 12, 1993, the Joint Venture similarly contended that the contracting officer had determined CBPOAmerica to be responsible in bad faith since the official allegedly ignored certain information submitted by the protester to demonstrate the CNO affiliate's alleged lack of business ethics and integrity.¹ We concluded that there was no showing of bad faith. See Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, supra.

Evidence of the current Brazilian civil suit and the January 1994 Committee Report was not available until March 24, 1994, when the Joint Venture presented this information to the Army in a supplemental agency-level protest dated that same day. By decision dated March 29--the same date we denied the Joint Venture's November 12, 1993 protest to this Office--the Army denied the Joint Venture's supplemental March 24 agency-level protest. On March 31, the Joint Venture filed this protest with our Office which essentially reiterates its March 24 supplemental agency-level protest; the Joint Venture maintains that the contracting officer ignored the new evidence of CNO's nonresponsibility in bad faith.

The determination of a prospective contractor's responsibility rests principally within the broad discretion of the contracting officer, who, in making that determination, must of necessity rely on his or her business judgment. See Garten-und Landschaftsbau GmbH Frank Mohr, B-237276; B-237277, Feb. 13, 1990, 90-1 CPD ¶ 186. While we will review an affirmative responsibility determination where it is shown that it may have been made fraudulently or

¹In that protest, the Joint Venture also contended that the language of the prime contractor experience definitive responsibility criterion precluded the awardee from relying on its affiliate to comply with the requirement; we denied this protest ground. See Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756, Mar. 29, 1994, 94-1 CPD ¶ 223.

in bad faith, see Bid Protest Regulations, 4 C.F.R. § 21.3(m) (5) (1993); All Rite Rubbish Removal, Inc., B-241288, Jan. 31, 1991, 91-1 CPD ¶ 99, we find no such showing here.

The record shows that the Army determined that CBPOAmerica has the current capacity and integrity to perform the contract in accordance with the IFB despite the Joint Venture's new allegations of nonresponsibility. Specifically, the contracting officer states that he read all documents pertaining to the Brazilian government's civil suit as well as the Committee Report which were submitted by the protester in its March 24 agency-level protest to demonstrate the nonresponsibility of CNO. As a result of these submissions, the contracting officer referred the matter of CBPOAmerica's and CNO's business ethics and integrity to the Defense Criminal Investigative Service (DCIS), which proceeded to conduct relevant inquiries with the California Attorney General's Office, the Department of Justice, and the Department of Defense Contract Management Division; the DCIS also conducted a "global Financial Criminal Enforcement Check" of both CBPOAmerica and its CNO affiliate. The DCIS' independent investigation did not reveal any evidence of criminal activity, indictments, or administrative actions involving either the CNO affiliate or CBPOAmerica.

In sum, the investigation prompted by the agency's consideration of the Brazilian civil suit and the Committee Report revealed no evidence which suggests a lack of integrity on the part of CBPOAmerica or its affiliate. Moreover, the record shows that the contracting officer had reliable information--including an extensive preaward survey, affidavits, and recommendations from federal agencies for which CBPOAmerica has successfully performed other construction projects--which demonstrated CBPOAmerica's responsibility.²

We see no basis in this record for the protester's speculation that the contracting officer determined CBPOAmerica to be a responsible contractor in bad faith.

²We note that while the FAR directs contracting officers to consider an affiliate's past performance and integrity when it may adversely affect the prospective contractor's responsibility, the FAR clearly does not indicate that the prospective contractor's own performance record can or should be ignored; thus, affiliation with an entity whose responsibility is questionable does not per se establish a proper basis for a nonresponsibility determination. See Decker and Co.; Baurenovierungsgesellschaft, m.b.H., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100.

The Committee Report and the civil suit³ did not mandate a nonresponsibility determination against CBPOAmerica, and the fact that the Army exercised its discretion in favor of CBPOAmerica's responsibility does not constitute evidence of bad faith; it is not proof that contracting officials acted with the intent to harm the Joint Venture. ProServe Corp.-- Protest and Request for Costs, B-247948.2; B-247948.3, Oct. 5, 1992, 92-2 CPD ¶ 225. While the Joint Venture may disagree with the contracting officer's determination of responsibility, that disagreement does not suffice to show that the contracting officer acted in bad faith. See EPD Enterprises, Inc., B-234193, Feb. 21, 1989, 89-1 CPD ¶ 182. Under these circumstances, we will not review the agency's affirmative responsibility determination. ProServe Corp.-- Protest and Request for Costs, supra; U.S. Constructors, Inc., B-248757, Aug. 31, 1992, 92-2 CPD ¶ 146.

The protest is dismissed.

Christine S. Melody
 Christine S. Melody
 Assistant General Counsel

³The Committee Report shows that the Committee apparently questioned one of CNO's officials about that entity's role in an alleged cartel of Brazilian construction companies purportedly engaged in improperly lobbying members of the Brazilian Congress; that official testified that CNO had engaged in no wrongdoing. The civil suit pertains to bribes allegedly made during Brazilian business deals conducted by the affiliate 4 years ago.