



Washington, D.C. 20548

Decision

Matter of: Integrated Waste Special Services
File: B-257057
Date: August 25, 1994

Sam Zalman Gdanski, Esq., for the protester.
Lester Edelman, Esq., Phillip E. Santerre, Esq., and James J. Rich, Department of the Army, for the agency.
Sylvia Schatz, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that nonresponsibility determination lacked a reasonable basis is denied where the determination was based primarily on information received during pre-award survey showing that protester was inadequately performing two current government contracts.

DECISION

Integrated Waste Special Services (IWSS) protests the negative determination of its responsibility under invitation for bids (IFB) No. DACA85-93-B-0025, issued by the U.S. Army Corps of Engineers for the excavation, removal, and replacement of underground fuel storage tanks at Elmendorf Air Force Base, Alaska. IWSS argues that the nonresponsibility determination was improper.

We deny the protest.

The IFB was issued on November 30, 1993. Eight bids were opened on the January 25, 1994, bid opening date. IWSS submitted the apparent low bid of \$2,488,613. Following a review of information gathered during a pre-award survey of IWSS, the Corps determined that IWSS was nonresponsible. The survey consisted primarily of two reports which showed serious deficiencies in IWSS' performance on two current contracts, one with the Army Corps of Engineers for debris removal at Elson Lagoon in Point Barrow, Alaska (DACA85-93-C-0002), and another with the Air Force for removal of underground storage tanks at Elmendorf Air Force Base, Alaska (F65501-92-C0071).

The report on IWSS' performance on the Elson Lagoon contract stated that IWSS had failed to submit information required by the contract, such as a revised contractor quality control plan, a subcontractor insurance certificate, project schedule diving plan, debris removal plan, environmental plan, and safety plan. In addition, the report revealed that IWSS' contract performance was delinquent; IWSS had completed only 17.8 percent of the work, whereas the scheduled completion was 40 percent. The Corps had requested IWSS to submit, for review and approval, its plan for regaining the scheduled rate of progress on the contract, including a projected start date for the summer phase of work and all actions the contractor intended to take to improve its work performance. Finally, the report showed that IWSS had not paid its subcontractor (Equi-Nautical Enterprises) for work performed, and that the Corps had notified the firm that it was required by the terms of its contract to either make prompt payment to its subcontractors within 7 days after the government made progress payments to IWSS or, if payment were withheld, to provide a written explanation of the reason to the subcontractor and the Corps.

The report on the Elmendorf contract stated that IWSS had failed to comply with Alaska Department of Environmental Conservation (ADEC) regulations which were incorporated into its contract. Specifically, IWSS failed to timely provide ADEC with site assessment reports identifying the amount of contaminated soil encountered during removal of the tanks. As a result, ADEC suspended all further payments to the contractor (pending receipt of these assessment reports), and discussed with the Air Force the possibility of imposing fines of as much as \$200,000 on the Air Force, the cost of having the tests performed by another contractor. The Elmendorf report also showed that IWSS had not paid its subcontractor (AGI, Inc.), and that AGI in turn had failed to pay its subcontractors for work performed on the contract.

The Corps asked IWSS to respond to the concerns raised by the pre-award survey. After reviewing IWSS' response, the Corps concluded that the above information, along with information on other IWSS contracts,¹ warranted a finding

¹The agency reviewed, to a lesser extent, reports on IWSS' performance on four prior contracts with both government agencies and companies for demolition services. The survey revealed that although IWSS' performance on a majority of these contracts was satisfactory, the firm had some performance problems. These included: failure to promptly pay subcontractors; failure to process paperwork in a timely

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that IWSS was not responsible. The Corps advised the firm of this nonresponsibility determination by letter dated April 8.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. Federal Acquisition Regulation (FAR) § 9.103(b). With regard to a prospective contractor's prior performance, the firm must have a satisfactory performance record, and 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 appropriate corrective action has been taken by the contractor. FAR §§ 9.104-1(c) and 9.104-3(c); International Paint USA, Inc., B-240180, Oct. 30, 1990, 90-2 ¶ 349. We will not question a nonresponsibility determination absent a showing of bad faith by the contracting agency or the lack of any reasonable basis for the determination, since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion. Standard Tank Cleaning Corp., B-245364, Jan. 2, 1992, 92-1 CPD ¶ 3.

IWSS maintains that the deficiencies under its two current contracts were excusable and beyond the firm's control, and thus did not support the nonresponsibility determination. First, with regard to its untimely performance on the Elson Lagoon contract, IWSS argues that extreme cold and windy weather conditions in the lagoon were the cause of IWSS' untimely performance; it explained this to the Corps and stated that it would use aerial rather than surface searches to expedite removal of the debris, and that it was investigating alternate methods that would allow timely completion of the contract. Second, with regard to the subcontractors' complaints of nonpayment on both current contracts, IWSS states that it had paid its subcontractors for all work completed, and that for various reasons all of the disputes were the fault of the subcontractors. Third, regarding its failure to submit satisfactory site assessment reports on the Elmendorf contract, IWSS states that it had not received written notice from the government stating that the ADEC was considering imposing fines on the agency for violating Alaska environmental regulations. The protester concludes that, based on this more detailed information on

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manner; stopping performance based on a claim of changed site conditions that the government did not accept; and untimely completion of performance.

its performance under the current contracts, IWSS should have been found responsible.

IWSS does not allege (and there is no evidence of) bad faith on the part of the Corps, and we find the nonresponsibility determination made by the Corps to be reasonable.

First, the Corps rejected--properly, we find--IWSS' explanations regarding its untimely performance on the Elson Lagoon contract. The Corps considered IWSS' claim of bad weather as an excuse for stopping contract performance, but found that it was rebutted by reports from on-site Corps representatives who stated that weather conditions were not extreme enough to halt contract performance. Further, IWSS' statement that it would use aerial searches and investigate alternate methods in order to timely complete contract performance did not constitute appropriate corrective action, as it was not a specific plan containing details such as timetables (as the Corps had requested). In addition, as the agency noted, IWSS provided no explanation or corrective measure for its failure to provide the numerous plans or subcontractor insurance certificate required by the Elson Lagoon contract.

Further, the Corps was unpersuaded--reasonably so in our view--by IWSS' explanation regarding its subcontractor payment problems, in light of IWSS' failure to comply with the requirement in its contracts that it provide notice to the subcontractors and the agency before withholding any payments. In any case, a prime contractor is responsible for the performance of its subcontractors; thus even assuming that the problems under the contracts were caused solely by the subcontractors, these subcontractors' actions under the current contracts properly could be considered by the contracting officer in determining IWSS' responsibility. See NJCT Corp., 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342. The agency also determined, and we agree, that the fact that IWSS had not received written notice from ADEC of the potential fines did not excuse--or explain, for that matter --IWSS' failure to comply with ADEC regulations, as required under its contract.

The protester suggests that the Corps ignored favorable information and improperly based its determination solely on the two current contracts. This argument is without merit. First, the record shows that the premise of this argument is incorrect; as indicated, although the Corps ultimately focused primarily on deficiencies under IWSS' current contracts, the agency also reviewed four other IWSS contracts with government agencies and companies, and concluded that IWSS' performance had been mixed. In the final analysis, however, the Corps considered the firm's poor performance on the two current contracts the most

significant element in its review, since these were the most recent contracts and one involved the same location (Elmendorf) as here, and a similar requirement. In this regard, the Corps found the ADEC deficiencies particularly important, since the current solicitation for removal of underground storage tanks also requires the submission of assessment reports, and IWSS provided no information indicating that these problems had been corrected so they would not be repeated under this procurement. See International Paint USA, Inc., supra. The fact that some of the evidence supplied to the Corps may have been favorable to IWSS does not alter the fact that there was sufficient evidence for the agency to conclude that IWSS had a history of performance problems. S.A.F.E. Export Corp., B-208744, Apr. 22, 1983, 83-1 CPD ¶ 437, aff'd, B-208744.2, July 14, 1983, 83-2 CPD ¶ 90.²

In its comments on the agency report, IWSS submits additional documents on the Elson Lagoon and Elmendorf contracts, which for the most part show the corrective actions IWSS has taken since the agency's responsibility determination was made; IWSS suggests that these documents show that the agency's nonresponsibility determination was unreasonable. This argument is without merit. In reviewing a nonresponsibility determination based on recent contract performance, we will consider only whether the determination was reasonably based on the available information. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. Since these documents were not available to the Corps at the time of its nonresponsibility determination, they are irrelevant here.

The protest is denied.

Robert P. Murphy
 Robert P. Murphy
 Acting General Counsel

²Similarly, the fact that IWSS has been found responsible for other procurements has no bearing upon the nonresponsibility determination at issue here; since such determinations are inherently judgmental, different contracting officers can reach opposite conclusions on the same facts, without either determination being unreasonable or the result of bad faith. Id.