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**United States Government Accountability Office  
Washington, DC 20548**

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## Decision

**Matter of:** M. Erdal Kamisli Co. Ltd. (ERKA Co., Ltd.)

**File:** B-403909.2; B-403909.4

**Date:** February 14, 2011

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Paul D. Reinsdorf, Esq., for the protester.

Katherine D. Denzel, Esq., Department of the Army, for the agency.

Pedro E. Briones, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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### **DIGEST**

An agency reasonably determined that protester was not responsible based on protester's documented negative past performance, including a termination for default.

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### **DECISION**

M. Erdal Kamisli Co. Ltd. (ERKA Co., Ltd.), of Adana, Turkey, protests the rejection of its proposal and the award of contracts to five other firms, under request for proposals (RFP) No. W912GB-10-R-0011, issued by the Department of the Army, U.S. Army Corps of Engineers, for real property repair, maintenance, construction, and related services. The protester challenges the agency's evaluation of proposals, conduct of discussions, and negative determination of ERKA's responsibility.

We deny the protest.

### **BACKGROUND**

The RFP provided for multiple awards of indefinite-delivery/indefinite-quantity (ID/IQ), task order contracts for real property repair and maintenance, environmental work, force protection, and construction services throughout Romania and neighboring countries. The RFP included detailed specifications and technical requirements for contractors to provide, among other things, design and engineering drawings, debris removal, adequate employee supervision, on-site English-speaking representatives, and protective measures such as construction barricades. RFP, Specifications, §§ 010015, 017800, 024100, 007315. Contractors were also required to establish and maintain effective quality control systems,

comply with safety and occupational health requirements, and adhere to the project schedule. See id., §§ 0131010010, 013300, 013526, 014501.

Offerors were informed that the agency would award contracts on a best-value basis considering the following evaluation factors: experience, past performance, management approach, and price. Id. at 19. The RFP stated that the experience factor was more important than the past performance factor, that the past performance factor was slightly more important than the management approach factor, and that the non-price factors, combined, were equal to the price factor.

With regard to the experience factor, the RFP instructed offerors to identify up to 10 projects that demonstrate the extent of their relevant experience. See id. at 14. The RFP provided that these projects would also be evaluated under the past performance factor for, among other things, customer satisfaction with the quality of the contractor's product, timely performance, effective management, and safety. Id. at 20-21; amend. 3, Questions and Answers, at 3. The RFP also informed offerors that the agency reserved the right to obtain past performance information from any available source.

The agency received 16 proposals, including ERKA's, which were evaluated by the agency's technical evaluation board (TEB). Contracting Officer's (CO) Statement at 12. The CO, who was the source selection authority for this procurement, reviewed the TEB's initial evaluation report and the offerors' price proposals to establish an initial competitive range of seven offerors, including ERKA. Agency Report (AR), Tab 13.a., Initial Competitive Range Determination, at 15.

The agency conducted discussions and informed ERKA that, among other things, the agency found an unsatisfactory level of risk arising from the firm's performance of the "Design Build Eagle Family Housing" project, which was terminated for default. The Corps asked ERKA to provide any information that would mitigate this risk and describe steps taken to address the issues that led to the contract termination. Id., Tab 14.a., Corps Discussion Letter to ERKA, at 3. ERKA responded that the contract should not have been terminated for default because of excusable delays that were not attributable to ERKA and that it was only a "junior member" of the joint venture contractor.<sup>1</sup> ERKA also stated that the default termination did not represent any performance risk to the agency because ERKA had identified other projects on which it had timely performed. See id., Tab 6.b., ERKA's Discussion Response, Factor 2-Past Performance, Aug. 20, 2010.

ERKA's response did not change the evaluators' assessment that the firm's past performance history presented an unsatisfactory performance risk. Id., Tab 12.c.,

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<sup>1</sup> ERKA also informed the Corps that the joint venture had appealed the default termination to the Armed Services Board of Contract Appeals (ASBCA).

Revised TEB Report, at 8-9. Specifically, the TEB noted that, although ERKA had appealed the default termination, it had not shown that it was not at fault in the termination. See id. at 9. The board also found that ERKA had failed to discuss what it would do to ensure future timely performance. In addition, the TEB noted that ERKA had a number of safety issues on other projects.

The CO established a second competitive range that included the proposals of five offerors but not ERKA's. Id., Tab 13.b., Second Competitive Range Determination, at 5. ERKA protested its exclusion from the competitive range to our Office, and in response the agency decided to include ERKA's proposal in the revised competitive range. We dismissed ERKA's initial protest as academic.

The agency conducted a second round of discussions and informed ERKA that:

The offeror was provided the opportunity during [the first round of] discussions to address the past performance issues surrounding [the Eagle Family Housing contract]. Instead of using this forum to assure the Government that the situation would not occur again and providing the Government with information on how the offeror would go about ensuring that the current project would not succumb to the same demise, the narrative provided instead defended the actions and gave excuses for the delays and issues that occurred. There was nothing provided by the offeror that appeared to mitigate the risk involved in awarding to the offeror.

Id., Tab 14.b., Second Corps Discussion Letter to ERKA, at 3. In response ERKA again stated that its recent past performance, including projects in Africa, Iraq, and Romania, demonstrated its commitment to providing timely, quality work. With respect to the defaulted contract, ERKA submitted the identical explanation it had provided during the first round of discussions. Id., Tab 6.c., ERKA's Second Discussion Response, Factor 2-Past Performance, Sept. 22, 2010.

Again, ERKA's response did not change the agency's assessment that the firm's past performance history presented an unsatisfactory performance risk or change its marginal past performance rating.<sup>2</sup> The agency found that ERKA's projects in Africa, Iraq, and Romania were not relevant or comparable to the solicited work because, among other things, they involved minor construction and repair type services or

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<sup>2</sup> Past performance was rated as excellent, good, acceptable, adequate, marginal, poor, or unknown. AR, Tab 4, Source Selection Plan, at 17. A marginal rating reflected a proposal with a high risk level and significant doubt that the offeror will successfully perform the required effort based on its performance record as well as its submission of project examples with very little relevance.

required little, if any, regulatory compliance.<sup>3</sup> See id., Tab 17, Source Selection Decision, at 13-15. With respect to the defaulted contract, the agency noted that ERKA had provided nothing new during the reopened discussions to mitigate the risk of unsuccessful performance and ensure that the performance issues that led to the default termination would not occur here. Id. 14-15. The agency also noted that ERKA had a number of adverse past performance reports on contracts with the Corps, including reports of safety issues, quality control, and lack of on-site safety personnel, as well as a marginal performance rating and a termination for default. Id. at 13.

As part of her source selection decision, the CO evaluated the responsibility of the competitive range offerors. She considered, among other things, the standards for responsible, prospective contractors specified in the Federal Acquisition Regulation (FAR), including whether contractors could comply with the required delivery schedule and had a satisfactory performance record. Id. at 29, citing FAR § 9.104-1. She also considered offerors' financial position, including, where available, offerors' Duns and Bradstreet (D&B) business report and risk indicator rating.

Based primarily on ERKA's past performance record, the CO determined that ERKA's proposal represented a high performance risk and that the contractor was not responsible, and therefore not eligible to receive award. See id. at 39. The CO also took into account ERKA's D&B risk rating, which indicated a fair, slightly greater than average risk associated with trading with ERKA and classified the firm as a potentially slow payer.<sup>4</sup> See id. at 37, 1955-63.

The agency awarded contracts to five other firms and, following a debriefing, ERKA filed this protest.

## DISCUSSION

ERKA raises a number of challenges to the agency's evaluation, source selection decision, and determination that ERKA was not responsible. Because, as described below, we find reasonable the agency's negative determination of ERKA's responsibility, we need only address that determination.

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<sup>3</sup> The Corps also noted that all of the African projects were completed prior to the default termination of the Eagle Family Housing contract. AR, Tab 17, Source Selection Decision, at 14.

<sup>4</sup> ERKA's D&B risk rating was "3," which D&B assigns to concerns believed to be financially sound but with a history of slow payments and some losses or working capital deficit. See AR, Tab 17, Source Selection Decision, at 37, 1955-63.

The protester complains that the CO's negative determination of ERKA's responsibility ignored the firm's positive performance history on projects in Romania, Iraq, and Africa. See Comments at 27-28. The protester also argues that it was improper for the agency to consider the default termination of the Eagle Family Housing contract because the matter is currently under appeal to the ASBCA. See id. at 26-27. Moreover, the protester asserts that it should not be held accountable for this contract, because it was only a junior member of the joint venture holding that contract. Protest at 15. ERKA also disputes the agency's interpretation of the D&B report that showed that ERKA had a history of making slow payments.

The agency responds that it performed a detailed, documented responsibility analysis consistent with the FAR and considered all the information regarding ERKA that was available to the agency. AR, Tab 2, at 28-30. The agency asserts that there was uncertainty as to whether ERKA could comply with the current delivery schedule based on prior problems with timeliness and its negative performance on several relevant projects, including the termination for default. The agency states that ERKA's projects in Africa, Iraq, and Romania were of little relevance or predated the default termination. The agency also complains that ERKA was offered several opportunities to mitigate risks associated with its past performance record, but that the protester only blamed its joint venture partner and offered excuses for its performance problems. Id.; CO's Statement at 18-19.

In making a negative responsibility determination, a contracting officer is vested with a wide degree of discretion and, of necessity, must rely upon his or her business judgment in exercising that discretion. See International Paint USA, Inc., B-240180, Oct. 30, 1990, 90-2 CPD ¶ 349 at 3. Although the determination must be factually supported and made in good faith, the ultimate decision appropriately is left to the agency, since it must bear the effects of any difficulties experienced in obtaining the required performance. For these reasons, we generally will not question a negative determination of responsibility unless the protester can demonstrate bad faith on the part of the agency or a lack of any reasonable basis for the determination.<sup>5</sup> Colonial Press Int'l, Inc., B-403632, Oct. 18, 2010, 2010 CPD ¶ 247 at 2. Our review is based on the information available to the contracting officer at the time the determination was made. Acquest Dev. LLC, B-287439, June 6, 2001, 2001 CPD ¶ 101 at 3.

Here, we find that the CO's negative determination of ERKA's responsibility was reasonable. The contemporaneous record evidences the CO's consideration of all ERKA's past performance and supports her determination that ERKA had

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<sup>5</sup> The FAR contains a presumption of nonresponsibility with respect to any contractor which has been found seriously deficient in recent contract performance, 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 § 9.104-3(b).

performance problems under at least four construction contracts for requirements that were similar to those solicited here. With respect to the Eagle Family Housing contract that was terminated for default, for example, the contractor's performance was found unsatisfactory with regard to quality control, timeliness, cooperation and responsiveness, resource management, jobsite supervision, non-payment of subcontractors, site cleanup, and compliance with safety standards. See, e.g., Tab 25, Final Performance Evaluation, Eagle Family Housing Contract, at 2248-53. The record also shows that with respect to other contracts ERKA was issued numerous non-compliance reports. See id., Tab 20, ERKA Past Performance Information, at 2161-2200 (Fire Training Facility Contract); id. at 2156-57, 2201-02, 13-27 (Pavement ID/IQ Contract; Family Housing Electrical Substation Contract).

As described above, the protester had several opportunities to address its performance of the defaulted contract or to explain what efforts the firm would take to mitigate future performance risks. ERKA's responses to the agency's discussions, however, neither demonstrate why it should not be held responsible for the default termination nor provide any statement as to how the firm would mitigate future performance risk to the agency.<sup>6</sup> See id., Tab 14A, First Discussions at 3 and Tab 14B, Second Discussions at 3. To the extent that the protester contends that its positive performance on other projects should have outweighed the negative past performance presented by the defaulted contract and other contracts, this disagreement does not demonstrate that the CO's judgment with respect to the firm's past performance was unreasonable.

With respect to the CO's consideration of the Eagle Family Housing contract, we disagree with the protester that the agency could not properly consider this termination in its responsibility determination because the matter has been appealed to the ASBCA. See MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431 at 4. An agency may properly rely upon its reasonable perception of a contractor's inadequate performance even where the contractor disputes the agency's position. See MAC's Gen. Contractor, B-276755, July 24, 1997, 97-2 CPD ¶ 29 at 3-4.

We also disagree with ERKA that the agency could not consider the protester's performance as a joint venture partner of the Eagle Family Housing contract. See MCI Constructors, supra, at 5 (reasonable for agency to give significant consideration to affiliate's prior performance in assessing contractor's responsibility); Bluff Springs Paper Co., Ltd./R.D. Thompson Paper Prod. Co., Inc. Joint Venture, B-286797.3, Aug. 13, 2001, 2001 CPD ¶ 160 at 3 (agency generally may consider an individual venturer's performance in assessing joint venture's past

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<sup>6</sup> Although ERKA complains that it did not have an opportunity to address the CO's concerns in her nonresponsibility determination with respect to ERKA's safety record, the protester has not demonstrated that the CO's concerns were unreasonable.

performance). In this regard, the record does not support ERKA's assertion that it was only a junior venture partner. Rather, the firm's joint venture agreement for this project shows that ERKA was a 50 percent partner at the time of contract award. See AR, Tab 19, Joint Venture Agreement, at 1-4.

In sum, the record supports the reasonableness of the CO's determination that ERKA was not responsible. Because ERKA was reasonably determined to be nonresponsible, we need not address its remaining protest issues.

The protest is denied.

Lynn H. Gibson  
General Counsel