



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: North American Construction Corp.

File: B-270085

Date: February 6, 1996

Thomas E. Hill, Esq., Haynes and Boone, for the protester.
Leonard Crowley, Esq., and Cynthia S. Guill, Esq., Department of the Navy, for the agency.

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DIGEST

Agency reasonably determined that protester was nonresponsible, despite some indication of satisfactory performance on certain contracts, based upon information that the protester's performance on five recent contracts was deficient.

DECISION

North American Construction Corp. protests the agency determination that it is nonresponsible under invitation for bids (IFB) No. N68711-95-B-7525 issued by the Department of the Navy, the Naval Facilities Engineering Command, Southern Division, for the excavation, removal, and replacement of underground storage tanks at the Marine Corps Base, Camp Pendleton, California. North American argues that the nonresponsibility determination was improper.

We deny the protest.

Nine bids, including one from North American, were opened on the August 24, 1995, bid opening date. The low bid of \$2,174,717 was eliminated as nonresponsive. North American, the second low bidder at \$2,608,517, was then considered for award.

The Navy requested information from North American about its experience in performing similar contracts and made its own inquiries as to North American's ability to perform the work. Specifically, the contracting officer relied upon two sources: a telephone survey, including four references submitted by North American, concerning recently completed work or current work being performed by

North American, and, to a lesser extent, information from the United States Army Corps of Engineers Construction Contractor Appraisal Support System (CCASS), which is a computerized listing of previous contracts held by a firm with the Corps.

The Navy's six telephone inquiries revealed that North American was rated highly satisfactory on two contracts, satisfactory on two contracts, and unsatisfactory on two contracts. The two unsatisfactory evaluations were for a power system modification at Miami International Airport, contract No. DTFA06-94-C-50049, and a clinic addition/alteration at Keesler Air Force Base, Mississippi, contract No. 92-C-0779.

On the Miami International Airport contract, North American was rated unsatisfactory for poor management of subcontractors, poor subcontractor electrical work which North American had to redo, and for being extremely slow. Also, the government representative faulted North American for submitting an overabundance of change order requests. Similarly, on the Keesler Air Force Base project, North American was rated unsatisfactory for poor management, requiring the redesign and rework of concrete columns, and for being significantly behind schedule. This government representative also characterized North American as a "change order artist," stated that there were many outstanding claims against North American, and indicated that North American was being audited for fraudulent claims by the Defense Contract Audit Agency (DCAA).

Additionally, with respect to contract No. N63387-89-E-4924 for repairs to a power plant on San Clemente Island, the Navy was apprised that, although North American had been rated satisfactory, North American's performance was unsatisfactory because of its handling of contaminated soil, insulation of engines on concrete, and the operation and testing of the engines. The Navy's report indicated that North American was given a satisfactory evaluation to avoid liquidated damages and to get the project completed. Based on the telephone interview, the Navy assessed this project as a "unsatisfactory" in its overall review.

The CCASS summarized 23 completed projects from November 1990 through January 1996. Of these 23, North American's performance was evaluated as outstanding on 5 projects, satisfactory on 16 and unsatisfactory on 2. The two unsatisfactory performance ratings were both for construction contracts: contract No. DACA4591C0099 at Whiteman Air Force Base, Missouri and No. DACW6892C0038 at Walla Walla, Washington. North American was rated unsatisfactory on the Whiteman contract with respect to quality of work, timely performance, effectiveness of management and compliance with safety standards. North American was rated unsatisfactory on the Walla Walla project on timely performance and effectiveness of management. North American was also criticized for not effectively managing its subcontractors, using unsatisfactory materials and requiring extensive rework.

Considering both the phone surveys and the CCASS, the Navy determined that while North American's work on some current contracts was satisfactory, it had been rated unsatisfactory on five other contracts from 1992 through 1995. The following deficiencies were noted in the Navy's summary memo concerning North American's responsibility: management needs attention, difficulty adhering to approved schedules, quality of work, though acceptable, is weak and some projects required considerable rework.

After reviewing these findings, the Navy concluded that the above information warranted a finding that North American was not responsible. The Navy advised the firm of this nonresponsibility determination by letter dated September 29, and award was made to Perry Williams, Inc., the next low, responsible, responsive bidder. This protest followed.

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 nonresponsive, 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); Integrated Waste Special Servs., B-257057, Aug. 25, 1994, 94-2 CPD ¶ 80. 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. Id.

North American generally argues that it has a satisfactory record of performance and integrity and adequate financial resources to perform the work. In its response to the agency report, the protester vigorously disputes the various performance deficiencies found by the contracting officer in North American's current and previous contracts and argues that the Navy ignored favorable information and failed to view its evaluations in their entirety. North American maintains that the telephone survey conducted by the Navy is "replete with errors and mis-characterizations" and that the Navy's "summary of the CCASS evaluations also contains numerous errors and presents an unreasonable and irrationally distorted picture of North American's performance on these projects." North American argues that a fair review of each project would show that North American is a responsible contractor.

For example, the protester maintains that the deficiencies under its current contract at Keesler Air Force Base are mainly excusable and beyond the firm's control. First, with regard to its being significantly behind schedule, North American states

that while "it may appear to be behind the currently 'approved' schedule, North American believes resolution of open issues . . . will result in an adjustment to the schedule such that North American's performance will be viewed as substantially on time." Also, North American argues that, contrary to the Navy's summary, although there are "open issues" to resolve, it has no claims on this project. North American argues that it has claims pending on two other projects, but states that the government only contests one of these claims. As to the required rework of concrete columns, North American states that it inadvertently misplaced some of the internal reinforcement bars so that they were too close to the outside perimeter in a few of the columns. However, the protester maintains that it quickly and effectively resolved this problem by hiring an outside engineer and consulting with agency engineers and ultimately adding additional rebar where necessary. The protester states that the Air Force's characterization of it as a "change order artist" is misleading and irrelevant. The protester states that of the 16 change orders that have been negotiated on this project, only two were initiated by North American. Finally, while North American admits that it is currently being audited by DCAA, North American states that the audit was requested by the Air Force and that North American believes the audit is unnecessary.

With regard to the Miami International Airport project, North American agrees that the government has granted a 100-day extension to it under the Changes and Differing Site Conditions clauses. According to North American, with that contract extension, it is actually ahead of schedule. The protester also states that it has requested an additional extension of up to 80 days. While the agency has agreed to an extension, the parties have not reached an agreement on the length of the extension. North American admits that its electrical subcontractor, a minority-owned enterprise, is weak, but argues that because it undertakes some remedial work itself demonstrates its support of minority-owned businesses and its responsibility as a prime contractor.

North American also disagrees with the Navy's assessment of its performance on the San Clemente Island contract. As noted above, North American was rated satisfactory for this contract but the Navy considered North American's performance to be less than satisfactory in light of the information obtained from its telephone inquiries. North American disagrees that its satisfactory rating was the result of any "deal" or "agreement" for completion of the project.

As to the two unsatisfactory performance ratings reported on the CCASS, North American states that the difficulty it experienced on the Walla Walla contract was in part due to the relatively isolated location of the site and the limited number of subcontractors available. North American also states that it has terminated its project manager for this project. As for the Whiteman contract, North American believes that it was adversely affected by personality problems unrelated to performance and that its unsatisfactory rating was not fair or objective. The

protester argues that neither of these two unsatisfactory ratings should be weighed heavily against North American because North American took appropriate corrective action.

In our view, the Navy's nonresponsibility determination is reasonably based. The contracting officer reviewed information concerning North American's performance under previous and current contracts and, as discussed above, primarily based his decision that North American was nonresponsible on North American's deficient performance on five contracts--Walla Walla, Whiteman, San Clemente Island, Miami International Airport, and Keesler. North American disputes these performance evaluations, arguing generally that the deficiencies were minor or mischaracterized in the Navy summary and therefore are an inadequate basis for determining that North American was nonresponsible. However, North American's favorable characterization of the deficiencies and its mere disagreement with the contracting officer's conclusion that the deficiencies in those contracts raised questions about North American's ability to perform the work required under this contract does not demonstrate that the decision was unreasonable.

For example, as to the Navy's alleged mischaracterizations, the record shows that the Navy's assessment that North American's management needs attention, that North American had some difficulty in adhering to approved schedules, that the quality of work, though acceptable, is weak and that some projects required substantial rework to meet acceptable standards, is reflective of the negative ratings in either the telephone inquiries or the CCASS. Indeed, North American admits to significant schedule changes and the need for rework on the Miami and Keesler projects. Additionally, North American received unsatisfactory ratings on timely performance on the Whiteman and Walla Walla contracts. While North American may object to the Navy's phrasing of the deficiencies or to the emphasis the Navy placed on the deficiencies, it is evident from the record that North American has experienced timeliness and quality of work problems. Similarly, the Navy's finding that North American's management needs attention is supported by the CCASS report on Whiteman and Walla Walla and by comments made to the Navy in two of the six phone inquiries. The Navy's assessment that North American's quality of work is weak is supported by unsatisfactory ratings as to quality of work on the Whiteman, Miami, and Keesler projects. Therefore, while the protester may offer its explanation of what it believes to be the cause of the unsatisfactory performance ratings and may disagree with the Navy's conclusions regarding these ratings, the Navy's findings are supported by the record, and the protester has not demonstrated that the Navy's conclusion is unreasonable.

North American also suggests that the Navy ignored favorable information and improperly based its determination solely on a small number of unsatisfactory ratings. This argument is without merit. First, the record shows that the premise is inaccurate since, while the Navy ultimately focused on deficiencies under five

contracts, the agency also reviewed other North American contracts with government agencies. Specifically, the Navy's summary acknowledges five outstanding evaluations and 21 satisfactory evaluations, including two satisfactory ratings on current contracts. The Navy's summary of the phone inquiries acknowledges two highly satisfactory ratings and two satisfactory ratings. In the final analysis, however, the Navy considered the firm's poor performance on the five contracts in the last 3 years the most significant element in its review. The fact that some of the evidence supplied to the Navy may have been favorable to North American does not alter the fact that there was sufficient evidence for the agency to conclude that North American has had recent performance problems. See Integrated Waste Special Servs., supra.

Finally, North American suggests that the nonresponsibility determination here is unreasonable because it has just been awarded a contract by the Corps of Engineers despite its two unsatisfactory ratings in the CCASS. The fact that North American has been found responsible for other procurements has no bearing upon the nonresponsibility determination at issue here; such determinations are inherently judgmental and different contracting officers can reach opposite conclusions on the same facts, without either determination being unreasonable or the result of bad faith. Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235.

The protest is denied.

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