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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Information Resources Incorporated

**File:** B-271767; B-271768; B-271769; B-271770

**Date:** July 24, 1996

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Charles E. Marks for the protester.

Kerry L. Miller, Esq., Government Printing Office, for the agency.

Jerold D. Cohen, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## **DIGEST**

Record does not support the protester's argument that the contracting agency acted in bad faith in finding the protester nonresponsible based on poor past performance while awarding contracts to other firms with poor records where the performance records of the other firms were substantially better than the protester's, who recently had experienced serious performance deficiencies on similar contracts with the same agency.

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## **DECISION**

Information Resources Incorporated (IRI) protests the Government Printing Office's (GPO) determinations that IRI was nonresponsible for purposes of awards under GPO programs B-880S, B-562S, B-354S, and B-532S for microfilm reproduction and distribution.

We deny the protests.

IRI submitted the lowest bid under each of the four invitations, but was rejected following the contracting officer's determination that IRI was a nonresponsible concern for purposes of any awards. The contracting officer was the same individual in each case, and his determination, concurred in by the GPO Contract Review Board, was made concurrently with the nonresponsibility determinations made regarding IRI's other three bids. IRI protests that the contracting officer's nonresponsibility determinations discriminated against IRI essentially because the companies that ultimately were awarded contracts (and companies previously awarded GPO contracts) had performance records no better than IRI's.

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 finding,

since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion. Triad Mechanical, Inc., B-258129, Dec. 6, 1994, 94-2 CPD ¶ 224. In reviewing a nonresponsibility determination based on prior performance, we will consider whether the determination was reasonably based on the information available to the contracting officer. Id. Moreover, in order to show bad faith, a protester must present virtually irrefutable evidence that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Schenker Panamericana (Panama) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67.

The contracting officer's determination regarding IRI in each case included the following finding:

". . . This firm consistently had production and quality problems for the past 6 months on various similar contracts as evidenced by the attached documentation which shows consistent problems with non compliance with various terms of existing and past contracts.

"Over the past 12 month period, of 244 orders performed, 30 orders have been rejected for a rate of 12%. Additionally, the contractor has received 26 cure notices and has been defaulted 4 times<sup>[1]</sup> over the past 12 months."

IRI takes issue with some of the contracting officer's decisions in that 12-month period with respect to, for example, whether cure or show cause notices should have been sent, whether performance concerns should have been handled through oral communication (rather than written notices), and whether GPO should have subjected IRI's performance to as many inspections as it did. We will not consider IRI's arguments in that regard, however, since we do not consider as part of our bid protest function the propriety of a contracting agency's decisions about the best way to administer an existing contract. See Bid Protest Regulations, 4 C.F.R. § 21.5(a) (1996). In this respect, we point out that we have recognized that a contracting officer may base a nonresponsibility determination on a reasonable perception of inadequate prior performance even where the agency did not terminate a prior contract for default, or where the contractor disputes the agency's interpretation of the facts. See Schenker Panamericana (Panama) S.A., supra.

IRI further argues that GPO has a history of awarding contracts to firms with unsatisfactory performance records, including the awardees here. IRI complains that those performance problems are handled less severely than are IRI's (for

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<sup>1</sup>GPO advises that IRI in fact was defaulted only once, but that the number of actual defaults was not itself a determinative factor in the contracting officer's decision.

example, often by oral admonishment rather than by cure notice), and that GPO's contracting officer consequently employed different standards of responsibility for IRI than for other contractors in finding only IRI nonresponsible. IRI thus presumably is arguing that either the actual awardees in the four GPO programs in issue should have been found nonresponsible, or IRI should have been awarded the contracts.

Based on our review of the record, we find nothing unreasonable or otherwise improper in GPO's determinations regarding IRI vis a vis the other awardees.

For example, IRI claimed in its responses to cure notices issued under Program B-823S, which later was terminated for default (on October 6, 1995), that its performance problems were due to quality control failures resulting from specific mechanical and personnel problems that had been identified and corrected by September 4, 1995. Also, in its current protests, IRI claims that its poor performance under Program B-823S was an anomaly, limited to one production run under one contract stemming from one isolated event. The record shows, however, that IRI continued to suffer performance problems even after September 4. By October 6, when IRI's contract for Program B-823S was terminated, IRI had received additional cure notices on that and other GPO programs, as well as several customer complaints. Further, IRI's performance was problematical after its default, with IRI receiving numerous additional cure notices for unsatisfactory performance, rejections for poor quality, written and telephonic warnings concerning deficient performance, and numerous customer complaints about poor service as well as cure notices stemming from IRI's failure to satisfy customer complaints. IRI's pre-award survey shows that in the period leading up to award, IRI had a 13-percent lateness rate for the year; an 86-percent rejection rate for orders inspected (30 of 35), with a 12-percent overall rejection rate (30 of 244 orders); and 8 cure notices issued in the preceding 4 months. We also note that while IRI blamed its poor performance under Program B-823S at least partly on staffing issues, and then claimed it had taken steps to resolve that problem,<sup>2</sup> in February of 1996 IRI still was blaming poor contract performance on staff shortages.<sup>3</sup>

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<sup>2</sup>In a September 13 response to a cure notice, IRI stated, "[t]he addition of a second shift operation and inspection/quality control personnel, should return us to our prior level of shipping / quality conformance." In a September 25 response to another cure notice, IRI stated that production problems "were remedied by . . . [h]iring of new inspection manager and quality control staff."

<sup>3</sup>In its response to February cure notices, IRI stated, "[d]ue to reduced number of orders received and the resulting staff reduction during the month of January . . . (continued...)

On the other hand, the record shows that neither of the two awardees under the programs in issue (two companies each received two awards) had experienced similarly significant and consistent performance problems during the period leading up to award. B&B Information's record as reflected in its pre-award survey shows no defaults and a 7-percent lateness rate for the year, and although the record shows a 50-percent rejection rate for the 2 orders inspected, the overall rejection rate was .19 percent (1 of 538 orders). Further, B & B had no late orders in the preceding 3 months, and no cure notices were issued to the contractor in the preceding 4 months (although 1 had been prepared--its issuance was deemed unnecessary). The pre-award survey for Court Reporting Services (formerly Microform, Inc.) shows no defaults, a 1-percent lateness rate for the year, and a 25-percent rejection rate for inspected orders (1 of 4), with an overall rejection rate of .1 percent (1 of 538 orders). In the 3 months preceding the awards, Court Reporting had an 8-percent lateness rate and 1 show cause notice issued.

In our view, then, when contrasted with IRI's performance record for the same period, the disparity in performance between the protester and the awardees is quite apparent. IRI experienced serious performance deficiencies on similar contracts, including one contract default, and continued to experience performance problems despite a reduced work load (after the default). Both awardees had much better performance histories on previous contracts, successfully executing a greater number of orders with fewer problems and a greater level of consistency. The record thus does not support the protester's position that a review of the performance records of GPO contractors establishes that the contracting officer's nonresponsibility determinations with respect to IRI were made in bad faith.

The protests are denied.

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<sup>3</sup>(...continued)

Information Resources lapsed in the delivery of the required postage and distribution reports."