



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Continental Transport & Moving, Inc.

File: B-280538

Date: October 15, 1998

Michael Nolan for the protester.

Dennis J. Gallagher, Esq., Department of State, for the agency.

Robert C. Arsenoff, Esq., and Paul I. Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging nonresponsibility determination is denied where record provides reasonable basis for contracting officer's conclusion that protester's performance record was unsatisfactory based on seriously deficient recent past performance.

DECISION

Continental Transport & Moving, Inc. protests the issuance of purchase order No. S-KZ100-98-M-0376 to Interdean International Movers by the Department of State for packing and shipping goods belonging to a foreign service officer who was being transferred. Continental, which submitted a lower quotation than Interdean, principally objects to the agency's determination that it is nonresponsible.

We deny the protest.

On June 15, 1998, the agency requested Interdean and Continental to provide "packing-out" estimates for the effects of a foreign service officer who was being transferred from Kazakhstan to Cyprus. Although Continental quoted a lower price, the General Services Officer (GSO) in charge at the time advised the Embassy Customs and Shipping Assistant that Continental was not a responsible offeror because it had recently undergone a change in management, fired its chief local employee and had not paid its employees in several months. As a result, the assistant telephonically informed Interdean that it would receive the purchase order.

Upon her return to the embassy in Almaty, the present GSO (and contracting officer) issued the protested purchase order to Interdean on June 29, essentially ratifying the earlier nonresponsibility determination. This protest was filed on July 7 after Continental learned that it had not received the purchase order. Subsequently, the contracting officer obtained written confirmation of Continental's recent financial and performance problems in Almaty.

Continental raises various issues and questions about the propriety of the procurement process; however, the principal focus of our analysis is its challenge to the nonresponsibility determination¹ since competitive prejudice is an essential element in every viable protest, Sytel, Inc., B-277849.2, B-277849.3, Jan. 8, 1998, 98-1 CPD ¶ 21 at 11, and we, therefore, need not consider the other issues if the nonresponsibility determination was reasonably based because Continental could not have received the purchase order in any event.

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). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. Id. With regard to a prospective contractor's prior performance, the firm must have a satisfactory performance record, and a contractor that is, or has recently 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. FAR § 9.104-3(b).

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. Schenker Panamericana (Panamá) S.A., B-253029, Aug. 2, 1993, 93-2 CPD ¶ 67 at 2-3. The contracting officer may base her or his determination upon a reasonable perception of inadequate past performance, even where the contractor disputes the agency's interpretation of the facts or has appealed an adverse determination. Id. at 3.

The agency has detailed confirming evidence which supports its nonresponsibility determination in its report on the protest. The first document is a July 17 letter from the Almaty office of Sea-Land--a transportation firm from which Continental booked shipping containers. That letter states that a container en route to the U.S. was put on hold in Rotterdam because Continental had not paid for two previous containers of diplomatic cargo despite numerous and prolonged unsuccessful collection attempts. The second document is a July 20 letter from a former supervisory employee of Continental who worked for the firm from late 1997 until he resigned in June 1998, stating that he had not been paid his full salary in any

¹Although Continental appears to be a small business, the nonresponsibility determination was not referred to the Small Business Administration for consideration under its certificate of competency program because program eligibility requires that the contract to be performed must be performed in the United States. 13 C.F.R. § 125.5(b)(ii) (1998); see Venusa, Ltd., B-217431, B-217432, Apr. 22, 1985, 85-1 CPD ¶ 458 at 1 n.1.

given month, that he and the packers who worked for him went for 4 months with no salary at all, and that in May 1998 he asked the embassy to pay him \$1,000 directly so that he could pay himself and the packers. The third document is a July 9 account of a Marine officer who had recently been packed by Continental in Almaty for a move to Peru reporting that when he arrived at his destination and unpacked he discovered that his stereo had been stolen and replaced with rocks--a circumstance he believed had occurred before the shipment left Kazakhstan.

Continental replied regarding this evidence in its comments on the agency report. With respect to the Sea-Land account, in addition to suggesting a social relationship between the author of the July 17 letter and the contracting officer, the protester principally characterized the description of events as inaccurate because some of the cargo involved was not diplomatic. The protester did, however, admit the arrearage to Sea-Land, explaining that it was due to a principal company officer being away on travel for 2 months leaving the Almaty office without an American employee. Further, Continental represented that payment had since been made as a result of the principal employee's intervention upon his return. With respect to the former supervisor's account, Continental argued that the employee had been coerced by the contracting officer, and disputed the actual length of service of the employee, the agreed upon salary and the allegations that employees had not been paid for 4 months. The protester also maintained that the \$1,000 payment by the embassy to the employee constituted a violation of Kazakstani labor law. Finally, Continental submitted that the Marine officer's speculation as to how the theft of his stereo occurred was unsubstantiated and submitted a document from Vanipac Carrier, Inc.--another freight forwarder with which the protester contracts--stating that it was still investigating the incident without any conclusive findings as of August 14.

The agency provided additional responses to Continental's position. Regarding the Sea-Land arrearage situation, the agency points out that the absence of a principal employee for 2 months from Almaty together with the lack of competent staff and the consequent nonpayment of Sea-Land's bills is indicative of nonresponsibility. Appended to the supplemental report is another document by Sea-Land which states that, notwithstanding Continental's representations that payments had been made, Sea-Land had no record of the payments. Regarding the supervisory employee, the agency denies coercing the individual and reports that, after checking with agency experts, there was no violation of local labor law in the direct payment of \$1,000 to the employee. Finally, the supplemental report contains a claim for stolen and damaged goods in a late 1997 shipment packed by Continental in Almaty. Continental elected not to comment on the supplemental agency responses.

This record supports the reasonableness of the agency's position. In the absence of information clearly indicating that Continental was responsible, FAR § 9.103(b) calls for a finding of nonresponsibility. Here, the Sea-Land arrearage remains unresolved and did not arise from circumstances beyond the protester's control. With regard to

the supervisory employee's account, the weight of the evidence supports his basic contention of underpayment or nonpayment by Continental resulting in the agency's direct payment of \$1,000 as alleged, and not by the protester. Finally, with respect to claims for stolen and damaged goods, the best that can be said for Continental's position with regard to the Marine officer's claim is that, pursuant to the protester's own evidence, the matter is still under investigation and, with regard to the other claim relating to a late 1997 shipment, Continental has elected not to respond.² In sum, the record reflects recent instances of unsatisfactory performance by Continental which provided the contracting officer with a reasonable basis to conclude that Continental is nonresponsible.

The protest is denied.

Comptroller General
of the United States

²Continental also alludes to bad faith on the part of embassy personnel. The protester's generalized and unsupported allegations are not sufficient to support a finding of bad faith which must be established by evidence that the agency acted with specific and malicious intent to injure the protester. Schenker Panamericana (Panamá) S.A., supra, at 5-6. In this regard, rather than acting in bad faith, the record reflects that the agency has previously contracted with Continental and has expressed its clear willingness to issue purchase orders to Continental in the future if its present performance problems are corrected.