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**Comptroller General  
of the United States**

Washington, D.C. 20548

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# Decision

**Matter of:** Pacific Photocopy and Research Services

**File:** B-281127

**Date:** December 29, 1998

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Bernard Dane Stein, Esq., for the protester.

Linda R. Horowitz, Esq., Administrative Office of the U. S. Courts, for the agency.

Katherine I. Riback, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

Protest against nonresponsibility determination is denied where the determination was reasonably based upon the contracting officer's conclusion that the protester's recent contract performance on similar work was inadequate because of consistently high volume of unresolved customer complaints, notwithstanding protester's disagreement with the agency's interpretation of the underlying facts.

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Pacific Photocopy and Research Services protests the determination by the Administrative Office of the U. S. Courts that Pacific is nonresponsive, under an unnumbered invitation for bid (IFB) for a licensing agreement to provide copy center services for the U. S. Bankruptcy Court for the Southern District of Florida. Pacific asserts that the nonresponsibility determination lacked a reasonable basis and was made in bad faith.

We deny the protest.

## BACKGROUND

A predecessor IFB was issued on March 2, 1998, seeking bids to provide both off-site and on-site vendor operated copy centers to furnish copying and related services for the provision of court documents to the public for the divisional offices of the U. S. Bankruptcy Court in the Southern District of Florida (FLSBC) located in Fort Lauderdale, West Palm Beach and Miami. Section H.2 of the IFB entitled "Conduct" provided that: "Vendors will be providing services to the public and all conduct by Vendors may affect the public's opinion of the Court. Therefore, Vendors are expected to provide timely, courteous service to the public, and conduct business in a fashion befitting the Court at all times."

The IFB instructed vendors to provide along with their bids a list of three private references, as well as all courts for which the vendor had previously provided

copying and/or related services to the public. The IFB stated that "[a]ward will be made to the responsive, responsible vendor submitting the lowest aggregate price." IFB at 42. The court received seven bids by the March 18 due date, of which Pacific's was low. At that time Pacific had been performing the services being acquired for the FLSBC since 1993. On April 1, the contracting officer determined that, while Pacific was the lowest bidder, it was not a responsible vendor and award was made to the next lowest, responsible bidder, Americo.<sup>1</sup> The contracting officer's nonresponsibility determination was based upon Pacific's unsatisfactory and deficient performance for the FLSBC, as well as its poor performance as the copy center vendor for the U. S. District Court in the Southern District of Florida (FLSDC) and the U. S. Bankruptcy Court in the Middle District of Florida (FLMBC). The clerks at each of the courts where Pacific had provided copying services expressed their substantial dissatisfaction with Pacific's performance, and stated that they had received a constant stream of verbal and written complaints from the public regarding Pacific's performance. The contracting officer also determined that as the incumbent contractor that Pacific had consistently breached the terms of the license agreement despite repeated notices by the clerk of the FLSBC to Pacific regarding those infractions. The next lowest bidder on this IFB, Americo, was then awarded the license agreement for the FLSBC. Subsequently, effective August 14, Americo was terminated for poor performance.

On August 11, the IFB in question here was issued to all interested vendors to provide these same copying services. The court received two bids, and again Pacific was the apparent low bidder. The contracting officer then reexamined and reevaluated Pacific's responsibility, endeavoring to obtain the most current information concerning Pacific's performance. Because at the time Pacific was providing copy services for the FLMBC, the court contacted each of the three divisional managers in the three separate court locations for the FLMBC located in Orlando, Tampa, and Jacksonville, to discuss Pacific's performance as the current copy service vendor. Each of the court managers reported that the court continued to receive written and oral complaints regarding Pacific's performance. The complaints primarily concerned Pacific's billing practices, the professionalism of Pacific's staff, and the timeliness with which the public was provided with requested copies of court documents. The court also contacted two out of the three private references that Pacific provided in its bid, both of whom gave Pacific

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<sup>1</sup>Pacific did not protest this finding of nonresponsibility, which was not referred to the Small Business Administration for consideration under the certificate of competency (COC) procedures because the court does not fall within the relevant statutory definition of "agency" for purposes of the COC referral requirements. Lithographic Publications, Inc., B-217263, Mar. 27, 1985, 85-1 CPD ¶ 357 at 2.

favorable references.<sup>2</sup> While the contracting officer took cognizance of Pacific's favorable private references, she determined that Pacific's performance in the federal courts was more relevant to her responsibility determination because, under this IFB, Pacific would also be providing copies of court documents to the public. Based upon Pacific's record of unsatisfactory performance in the FLSBC and the FLSDC, as well as the unfavorable reference information obtained from the FLMBC, where Pacific's performance problems were ongoing, Pacific was found nonresponsible. The court then made award to Judicial Research and Retrieval Services, the remaining bidder, which was found responsible. This protest followed.

## ANALYSIS

Pacific contends that the court's nonresponsibility determination lacks a reasonable basis and contains generalities and unsupported attributions. Basically, Pacific argues that it has not experienced any serious performance problems and that some complaints are bound to occur simply due to the large volume of business that it conducts. Pacific provides a response to each of the letters of complaint that the court included in its report to our Office.

The court views Pacific's record as replete with serious performance problems, and notes that, because the public can only obtain copies of court documents through the court designated copy service, the conduct of the vendor is particularly important, as noted in the IFB, because the vendor's conduct affects the public's opinion of the court. The court was particularly concerned that the constant stream of complaints regarding Pacific's performance, especially regarding its billing practices, has served to tarnish the reputation of the court. The court notes that despite its receipt of consistent complaints regarding, for example, Pacific's billing practices, and the court's notification to Pacific of these complaints, the problems, and the resultant complaints persist.

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).

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<sup>2</sup>The record shows that the contracting officer also made four attempts to contact Pacific's third private reference, without success.

Our Office 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 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. Applying this standard here, the court's determination was clearly reasonable.

While Pacific is of the view that any performance problems were excusable and its performance satisfactory, the record provides a reasonable basis for the court to conclude that Pacific's performance was deficient and that the deficiencies were not due to circumstances beyond Pacific's control. At the time of the nonresponsibility determination, the contracting officer reviewed the nonresponsibility determination that had been made 5 months earlier and sought to update it by obtaining current information regarding Pacific's performance. Accordingly, the contracting officer contacted the three divisional managers for the FLMBC, where Pacific was currently providing copy services, in the three separate court locations in Orlando, Tampa, and Jacksonville, and learned that the court continued to receive written and oral complaints regarding Pacific's performance. While Pacific offers explanations and interpretations of the record that provide a more favorable picture of Pacific's activities than that drawn by the contracting officer, this does not alter the fact that there was ample evidence for the contracting officer to conclude that Pacific had a protracted and continuous history of serious performance problems. See MCI Constructors, Inc., B-240655, Nov. 27, 1990, 90-2 CPD ¶ 431 at 6.

Pacific also seems to argue that the court failed to forward to it each complaint received and did not provide Pacific with an opportunity to comment prior to the contracting officer's making her nonresponsibility determination. However, responsibility determinations are administrative in nature and do not require the procedural due process otherwise necessary in judicial proceedings. Accordingly, a contracting officer may base a negative determination of responsibility on evidence in the record, and there is no requirement that offerors be advised of the determination in advance of the award. Lithographic Publications, Inc., *supra*, at 4-5.

Finally, we find without merit the Pacific's allegation that the determination was made in bad faith. To show bad faith, a protester must submit proof that the contracting agency directed its actions with the specific and malicious intent to injure the protester. Molly Maguires, B-278056, Dec. 22, 1997, 97-2 CPD ¶ 169 at 5. Pacific's argument that the nonresponsibility determination must have been made in

bad faith is contradicted by the record, which, as discussed above, reflects that the contracting officer had a reasonable basis to find Pacific nonresponsible. Accordingly, the allegation of bad faith is unfounded.

The protest is denied.

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