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**Comptroller General
of the United States**

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

Decision

Matter of: Gray Graphics Corporation

File: B-295421

Date: February 18, 2005

Anthony Hawks, Esq., for the protester.

LaTonya D. Hayes, Esq., Government Printing Office, for the agency.

Peter D. Verchinski, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester's allegation that agency improperly rejected its low bid for printing services after determining that it was nonresponsible is denied; agency's nonresponsibility determination was reasonable based on information showing that protester had made late deliveries under recent contracts.

DECISION

Gray Graphics Corporation protests the award of a contract to McDonald & Eudy Printers, Inc. under an invitation for bids (IFB) designated as Program 645-S, issued by the Government Printing Office (GPO) for printing services. Gray Graphics contends that GPO improperly found it nonresponsible, and thus ineligible for award.

We deny the protest.

Program 645-S contemplated the award of a 1-year requirements contract, with 1 option year, for the procurement of printing services for Government Accountability Office (GAO) reports (commonly referred to as "GAO Bluebooks"). The solicitation called for the contractor to publish approximately 20 to 45 reports per month, with the reports being approximately 8 to 500 pages long, and the time for production and delivery of the reports ranging from 1 to 3 workdays. Both Gray and McDonald submitted responsive bids; Gray bid \$393,735 and McDonald bid \$455,807. Because Gray's bid was low, the contracting officer (CO) investigated its past performance to assess its responsibility. The CO found that Gray recently had delivered several projects late and, on this basis, determined that Gray was nonresponsible. After determining that McDonald, the incumbent, was responsible,

the agency made award to that firm. Gray challenged the CO's finding of nonresponsibility in an agency-level protest, which GPO denied, and then filed this protest with our Office.

Gray principally alleges that the agency's nonresponsibility determination lacked a reasonable basis because its performance history--specifically, the number of delinquencies on its prior contracts--was not so deficient that its ability to satisfactorily perform the contract was in question.

A contracting agency has broad discretion in making responsibility determinations, since it must bear the brunt of difficulties experienced in obtaining the required performance. Molly Maquires, B-278056, Dec. 22, 1997, 97-2 CPD ¶ 169 at 3. Thus, a contracting officer has the discretion to determine the weight to be accorded the information he or she receives concerning a bidder's past performance, that is, to determine whether that past performance indicates there will be problems on the contract to be awarded. Mine Safety Appliances Co., B-266025, Jan. 17, 1996, 96-1 CPD ¶ 86 at 25. Although responsibility determinations must be based on fact, and reached in good faith, they are of necessity a matter of business judgment. Molly Maquires, *supra*, at 3. We will not question a nonresponsibility determination absent a showing of bad faith on the part of agency officials, or that the determination has no reasonable basis. EPCo Assocs., B-238015, Apr. 13, 1990, 90-1 CPD ¶ 388 at 5.

The nonresponsibility determination here was reasonable. The record shows that, at the time the CO made her determination, Gray had performed late on 7 of 215 orders for the previous 3 ½ months, for a 3 percent delinquency rate. While, as the protester notes, this is not a large number in absolute terms, the agency took a practical view of the delinquencies; it notes that, had the protester been performing the GAO contract during the previous year--in which there were 337 orders--its delinquency rate would have resulted in 11 late orders. Agency Report (AR), Tab 2, Denial of Agency-Level Protest, at 2. Moreover, the agency was concerned that Gray's performance history demonstrated a recent upward trend in late deliveries.¹ AR, Tab 6, Findings and Determination. In this regard, of the recent late jobs, Gray was late on 2 of 70 jobs, or 3 percent, in July, 4 of 75 jobs, or 5 percent, in September, and 1 of 10 jobs, or 10 percent, for the first half of October. AR, Tab 5. Considering that

¹ Gray maintains that the single October delinquency did not provide a reasonable basis for finding an upward trend in late performance, asserting that "such an anomalous statistic is obviously skewed by the short time frame involved and cannot provide a reasonable basis for determining nonresponsibility." Protest at 9. However, the CO states that she fully considered the short time frame and, because the total number of October jobs was small (10), nevertheless concluded that the delinquency was significant, since it showed that, even with a small number of jobs, Gray had been unable to provide timely delivery. CO's Statement at 2. We conclude that the CO reasonably factored this delinquency into her determination.

GAO Bluebooks are time critical in nature, with “an extremely tight schedule with a 2 to 3 day turnaround,” the agency determined that Gray’s recent record of delinquencies brought its ability to timely perform all jobs under this contract into question. AR, Tab 6, Findings and Determination. We find no basis for objecting to this determination.

Gray alleges that McDonald’s delinquency rate was similar to its own, and concludes that the agency unfairly applied a different, more stringent standard in assessing Gray’s responsibility. This argument is without merit. While the awardee indeed had a recent record of delinquencies similar to Gray’s, the agency considered McDonald’s perfect record of timely performance as the incumbent GAO Bluebook contractor to be more probative of its ability to perform the new contract than its performance of other, unrelated contracts. We find nothing unreasonable in the agency’s according determinative weight to McDonald’s performance of the same requirement as that under the IFB. Neither did this constitute application of a different standard; rather, the different responsibility determinations resulted from the fact that the two firms were not similarly situated with regard to past performance.

Gray Maintains that the agency improperly made a comparative, “best value” award, since it was essentially based on a comparison of Gray’s and McDonald’s performance histories. This argument, too, is without merit. The record shows that the CO was fully aware of the comparative performance histories of Gray and McDonald, and she referred to this comparative information in her denial of Gray’s agency-level protest. AR, Tab 2, Denial of Agency-Level Protest, at 2. However, the record nevertheless supports the conclusion that her nonresponsibility determination was based on her finding, not that McDonald’s past performance was superior to Gray’s, but, as discussed above, that Gray’s recent delinquencies brought into question that firm’s ability to perform the GAO Bluebook contract without delinquencies. In this regard, the Findings and Determination justifying the CO’s determination that Gray was nonresponsible cites as support only the protester’s own delinquency problems. AR, Tab 6. Accordingly, this argument does not provide a basis for questioning the determination that Gray was nonresponsible.

Gray maintains that six of the seven jobs cited by the agency in fact were not delinquent, since the delivery dates on those jobs were extended. The record shows that, while the protester is correct that the delivery dates were extended, the extensions were approved only after the CO had made her nonresponsibility finding on October 15. AR, Tabs 27-33. Our review of a responsibility determination is limited to considering whether the determination was reasonable when it was made,

given the information the agency had before it at the time. Downtown Legal Copies, B-289432, Jan. 7, 2002, 2002 CPD ¶ 16 at 5. Thus, the after-the-fact extensions have no bearing on the reasonableness of the agency's determination.²

Gray alleges that, prior to making the nonresponsibility determination, the CO should have informed it which jobs were considered late, in order to confirm the protester's delivery record. However, GPO was not required to do this; a contracting officer may base a negative determination of responsibility on evidence in the record, without affording offerors the opportunity to explain or otherwise defend against the evidence. Victor Graphics, Inc., B-249297, Oct. 19, 1992, 92-2 CPD ¶ 252 at 3-4.

The protest is denied.

Anthony H. Gamboa
General Counsel

² Gray asserts that these jobs nevertheless should not be considered late because it submitted its modification requests before the nonresponsibility determination was made, information of which the agency would have been aware if it had properly verified Gray's delivery record. However, the record shows that the agency investigated each of the late deliveries by contacting knowledgeable agency officials connected with the contracts prior to making its nonresponsibility determination. Since this information confirmed that deliveries on seven contracts were late, the agency's determination based on this information was reasonable. AR, Tab 18. Any dispute as to whether the late deliveries were excusable is a matter outside of our jurisdiction. Shelf Stable Foods, Inc., B-226111, B-226112, Apr. 10, 1987, 87-2 CPD ¶ 400 at 2-3.