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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-185430

DATE: November 1, 1976

MATTER OF: Universal American Enterprises, Inc.

DIGEST:

1. Protest of nonresponsibility determination which was allegedly erroneously based on past unsatisfactory performance by contractor as opposed to consideration of contractor's current satisfactory performance is denied. Record of continual unsatisfactory performance by contractor which resulted in increased Government administrative burden reasonably supports agency's determination of nonresponsibility based on failure to apply necessary tenacity and perseverance.
2. Satisfactory performance ratings awarded to protester throughout life of previous contract which are at variance with record of deficient performance create conflict in record which should have been resolved by contracting officer prior to determination of nonresponsibility.
3. Protester's record of recent (1-year period ending approximately 3 months prior to contemplated award) unsatisfactory performance was properly for consideration by contracting officer in nonresponsibility determination, since ASPR does not limit determination solely to consideration of "current" (3 months prior to contemplated award) performance.
4. Doubt about contractor's past performance which cannot be resolved affirmatively, whether or not resulting in default termination, requires determination of nonresponsibility.

Universal American Enterprises, Inc. (UAE), protests the award of a contract to Kentron Hawaii, Ltd. (Kentron), for maintenance and repair of the intrusion detection alarm system (IDA), Osan Air Base, Korea, under request for proposals (RFP) DAJB03-76-R-3024, issued by the U.S. Army Korea Procurement Agency. UAE had previously performed similar services under contract F62087-75-G-0005 (hereinafter 0005) at both Osan and Kunsan Air Bases, Korea.

Best and final offers due November 17, 1975, from UAE and Kentron were \$9,350, and \$16,125, respectively. After a negative preaward survey, the contracting officer determined UAE to be a nonresponsible contractor and on December 1, 1975, award was made to Kentron.

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UAE's disagreement with the contracting officer's determination of nonresponsibility forms the basis of the protest. Submissions by UAE and the Army have raised numerous areas of disagreement between the parties. However, these areas of disagreement can for the most part be segregated into relatively few major issues. Therefore, although we have considered the entire record, our decision will reflect our consideration of only those major issues necessary to resolve the protest.

The first issue raised by UAE is that the contracting officer, in making his determination of nonresponsibility, improperly failed to consider UAE's alleged satisfactory record of performance on the Osan portion of contract 0005. Specifically, UAE contends that the contracting officer considered only UAE's allegedly deficient past performance (which UAE characterizes as based on unevaluated and erroneous criticism) at Kunsan Air Base while ignoring and suppressing evidence of alleged satisfactory current performance at Osan Air Base, thus violating the provisions of Armed Services Procurement Regulation (ASPR) § 1-905 (1975 ed.).

Further, it is UAE's position that significant differences existed between the Osan and Kunsan portions of contract 0005; therefore, past performance at Kunsan should not have been used to project its ability to render future performance at Osan. For example, UAE points out that its corporate headquarters is located at Osan Air Base which is approximately 4 hours' driving time from Kunsan Air Base, and that the IDA systems at Osan and Kunsan are technically dissimilar, with the Osan system in a better state of repair at the time UAE began performance under contract 0005. In support of these contentions, UAE alleges that it received satisfactory performance ratings at Osan and Kunsan for every month of performance under contract 0005 which the contracting officer ignored and suppressed.

It is the Army's position that UAE's deficient performance under contract 0005, as documented in the agency report to our Office on the protest and the negative preaward survey, raised serious doubts as to the ability of UAE to perform and justified the contracting officer's determination of nonresponsibility. Specifically, the Army maintains that on several occasions, at both Osan and Kunsan, UAE's technicians failed to respond to service and emergency calls within the time limits specified in the contract and failed to adequately correct malfunctions in the IDA systems.

With regard to the determination of a prospective contractor's responsibility, ASPR § 1-902 (1975 ed.) in pertinent part provides:

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"* * * The contracting officer shall make a determination of nonresponsibility if, after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly [emphasis supplied] that the prospective contractor is responsible. Recent unsatisfactory performance, in either quality or timeliness of delivery, whether or not default proceedings were instituted, is an example of a problem which the contracting officer must consider and resolve as to its impact on the current procurement prior to making an affirmative determination of responsibility. * * *"

ASPR § 1-905.1(b) (1975 ed.) in pertinent part provides: "Maximum practicable use shall be made of currently valid information * * *." Further, ASPR § 1-903.1(1)(i) (1975 ed.) in pertinent part provides that prospective contractors must:

"have a satisfactory record of performance (contractors who are seriously deficient in current contract performance, when the number of contracts and the extent of deficiency each are considered, shall, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to meet this requirement). Past unsatisfactory performance, due to failure to apply necessary tenacity or perseverance to do an acceptable job, shall be sufficient to justify a finding of non-responsibility."

We have examined the documentation contained in the record of UAE's performance at Osan and Kunsan Air Bases under contract 0005 which ran from September 14, 1974, to August 31, 1975, with an extension of 3 months to November 30, 1975, for the Osan portion only. Throughout the term of UAE's performance at Kunsan, the technical representative of the contracting officer (TRCO) and other Air Force officials on numerous occasions documented complaints about UAE's poor reaction time to emergency and service calls, poor workmanship in maintaining and repairing the IDA system, and unavailability of UAE maintenance personnel during normal duty and off-duty hours. For example, the following Air Force contemporaneous memoranda quoted in pertinent part are illustrative of the complaints documented for the Kunsan portion of the contract.

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The first memorandum dated March 1975 evaluates UAE's Kunsan performance from January 7 to March 10, 1975, and in pertinent part states:

"Since 7 Jan 75 Mr Palmer of United American Enterprises (UAE) has made five (5) visits to Kunsan AB, Korea. These visits are as follows:

"A. Mr Palmer's first visit, a response to a request for maintenance on 30 Dec 74, was from 15 Jan 75 to 18 Jan 75. The following faults were present when he arrived and when he departed:

(1) Intercom phones do not work on battery power.

(2) Bldg 2535 Cell 8 and Bldg 2532 Cell 3 no audio when structure is in access and silence button is depressed.

(3) No red light Bldg 2532 Cell 4

"B. Mr Palmer's second visit was from 24 Jan 75 to 30 Jan 75.

When Mr Palmer departed the faults left outstanding at the conclusion of [first] visit were still present plus the following:

(1) No duress alarm at the officer's club

(2) 2537 Cell 1 and Cell 4 when system is in access lowering the door activates an alarm

(3) 2537 Cell 3 delayed alarm

(4) IDA duress alarm panel Bldg 1416 marginally operational.

"C. Mr Palmer's third visit was from 5 Feb 75 to 6 Feb 75.

This was a response to a request for maintenance on the IDA duress system. He corrected

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those faults; one at the bank the other at the post office. All faults pending on 30 Jan 75 were still present.

"D. Mr Palmer's fourth visit was from 11 Feb 75 to 21 Feb 75.

This visit ended with the following discrepancies outstanding:

- (1) 2532 Cell 4 pulled out of service
- (2) 2536 Zone 1 module pulled out of service
- (3) No duress alarm in officer's club
- (4) IDA duress panel Bldg 1416 marginally operational
- (5) 2537 Cell 8 no amber light at CSC panel

"E. From 3 March to 5 March 75 Mr Palmer made a fifth visit to Kunsan. Mr Palmer brought some component parts to make up some CFS 200 modules however he did not get the right relay hence the modules did not work. All of the discrepancies that were present at the conclusion of visit [fourth] are still present."

Another Air Force memorandum dated May 6, 1975, on the subject of UAE's "Non-Compliance" with contract 0005, signed by the TRCO-Kunsan states:

"1. Paragraph 1-14a of the contract specifically states that the contractor will maintain a location at which he or a competent employee can be reached. During non duty hours this location will be given to the Civil Engineering Service Call Desk. During normal duty hours the contracting officer shall know this location.

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"2. On 26 April [1975] we experienced an emergency at area 12, Mr Palmer, UAE's representative could not be reached nor could any other employee of UAE. Calls were made to UAE's office but were unanswered. We tried the Security Police Law Enforcement Desk, per Mr Palmer's instructions but the Security Police were unable to locate him, nor were they able to tell me how to get in touch with any other employee of UAE. The CE Service Call Desk at Osan were equally uninformed by UAE.

"3. Paragraph 1-14a also states that before leaving Kunsan the contractor shall effect a temporary repair. To date the contractor has yet to leave Kunsan without something still being done. During April UAE visited Kunsan on the following dates and left with the following faults outstanding:

| | |
|-------|--|
| 2-3 | 2537 cell 6 will not hold secure 2537 cell 8 no access light |
| 10-12 | 2537 cell 6 inoperative line supervision inoperative |
| 16-19 | 2537 cell 8 no access light on remote 2532 cell 7 intermittent alarms, will not hold secure |
| 25-29 | line supervision no secure light on main board or at remote (CSC) 2532 cell 1 will not reset from secure to access no audio 2537 cell 6 inoperative 2536 cell 2 inoperative |

"4. Addendum 1 para 1-13 of the contract states
'The contractor will respond to a service call

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within six hours of each request at Kunsan AB during normal duty hours.'

"Addendum 1 para 1-14 states, 'In answering an emergency call the contractor will, as quickly as possible, without loss of time and within four hours of receiving the call, arrive at the work site at Kunsan AB.'

"5. On May 5, 75 at 0500 UAE was notified of a maintenance problem at area 12. They did not respond to this call within the six hours required for a service call. They hope to be able to respond to this call Thursday 8 May 75.

"6. Hence because the contractor did not effect necessary repairs and because he did not respond in the required time his performance is deemed unsatisfactory."

Although these complaints did not result in a default termination, the record shows that a 10-day cure notice was issued to UAE on January 17, 1975, that UAE was notified by letter dated June 23, 1975, to take "immediate actions" to improve its response to service calls, and that meetings were held between Air Force officials and representatives of the contractor on more than one occasion because of the Air Force's dissatisfaction with UAE's performance at Kunsan.

With regard to the Osan portion of contract 0005, the following correspondence and memoranda, quoted in pertinent part, are illustrative of complaints documented in the record. A memorandum dated June 1975, signed by the Chief, Security Police, states:

"During the period of 1 March through 28 April 1975, Universal American Enterprises Inc., did not provide service called for in the current Intrusion Detector Alarm Monitors contract. On seven separate occasions the contractor was unable to be contacted or failed to respond in the allotted time after being notified. On one occasion the contractor flatly stated that he was taking the day off."

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Additionally, correspondence from the contracting officer to UAE dated June 23, 1975, states:

"This office is in receipt of additional information from the Technical Representatives of the Contracting Officer, U.S. Army Korea Procurement Agency Technical Inspectors and the using agency on Osan Air Base concerning failure to respond to service calls in the allotted time as specified in the contract and difficulties involved in locating the repairman in case of emergency calls. According to the reports received by this office, difficulties in locating the repairman for emergency services were experienced more seriously after normal duty hours.

"The Government considers the discrepancies as indicated above a violation of Paragraph 1-14, as modified, and a factor which should be corrected immediately.

"You are hereby notified to take such immediate actions as are required to improve responses to our service calls within the specified time frame and method of communication to locate the repairman in accordance with Paragraph 1-14, specification, with a written reply to this office indicating corrective actions taken."

Also, a memorandum for the record signed by the contracting officer dated August 26, 1975, states:

" * * * [The TRCO-Osan] stated that he was satisfied with the contractor's performance except the responses to emergency service calls. This portion had been a subject of disagreement between the contractor and the Government. * * *"

We note that the number of documented complaints in the record pertaining to the Osan portion of the contract is less than that for the Kunsan portion. The principal documented complaint for the Osan portion of the contract relates to poor responses to service

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and emergency calls whereas the principal complaints on the Kunsan portion relate to poor responses to emergency and service calls, poor workmanship in maintaining and repairing the IDA system, and unavailability of UAE maintenance personnel during duty and off-duty hours.

As noted above, UAE contends that the contracting officer ignored and suppressed other evidence of UAE's current satisfactory performance at Osan in making his determination of nonresponsibility. By "current satisfactory performance" UAE is apparently referring to the extension of the Osan portion of contract 0005 from September 1, 1975, to November 30, 1975--for this period directly precedes the award under the instant RFP. In support of this contention UAE has submitted the following documentation: Certificates of Performance for the months of September, October, and November 1975, a certification for payment for work performed over the same 3 months' period, and memorandum for the record signed by the contracting officer. Without exception, this evidence indicates that UAE performed satisfactorily at Osan from September 1, 1975 - November 30, 1975.

The record indicates that the contracting officer was aware of UAE's satisfactory performance ratings over the entire period of contract 0005 as extended, but attributed these ratings to: " * * * a lack of knowledge of the meaning and procedures for the writing of such ratings on the part of the TRCO, or even more likely, the feeling by the Air Force that UAE was the only contractor available to provide the services and as such they had to live with whatever services UAE felt like providing."

We have consistently recognized that the determination of a prospective contractor's responsibility is primarily a function of the procuring activity, and that this determination necessarily involves the exercise of a considerable degree of discretion on the part of the contracting officer. Columbia Loose-Leaf Corporation, B-181866, November 13, 1975, 75-2 CPD 300. Thus, we will not object to a contracting officer's determination of nonresponsibility based upon lack of tenacity and perseverance in past performance when the record provides a reasonable basis for that determination. M.C. & E Service & Support Co., Inc., B-184856, February 10, 1976, 76-1 CPD 84. We have also recognized that the cumulative effect of various minor deficiencies--which when

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taken together unduly increase the administrative burden on the Government--may support a finding of nonresponsibility based upon lack of tenacity and perseverance. Propserv Incorporated, B-184698, December 22, 1975, 75-2 CPD 405; M.C. & E Service & Support Co., Inc., supra.

It is true, as UAE points out, that criticism of UAE's current performance at Osan (current in this case meaning UAE's performance during the period in which the contract was extended) cannot be found in the record, and that the words "tenacity and perseverance" are not found per se in the contracting officer's determination of nonresponsibility. However, we believe that the quantum of documentary evidence of UAE's continual unsatisfactory performance (see quotations, supra) on contract 0005 (especially the Kunsan portion) resulted in an increased administrative burden on the Government, which reasonably supports a determination of nonresponsibility based upon past unsatisfactory performance due to the contract's failure to apply the necessary tenacity and perseverance. See Propserv Incorporated, supra. Although the contracting officer was technically incorrect in labeling UAE's deficiencies on contract 0005 as "current" as opposed to "past," from our review we do not believe that this detracts from the reasonableness of the ultimate determination of nonresponsibility.

We recognize that the satisfactory performance ratings awarded to UAE throughout contract 0005 are at variance with the criticisms advanced by Osan and Kunsan procurement officials during UAE's performance. Despite the contracting officer's speculation as to the reason for the satisfactory rating, we believe that a conflict existed which should have been resolved by the contracting officer prior to his determination of nonresponsibility. See 52 Comp. Gen. 977 (1973). However, even assuming the bona fide nature of these ratings, in light of the documentary evidence of UAE's past unsatisfactory performance we conclude that, taken as a whole, the record reasonably supports the contracting officer's determination of nonresponsibility.

As noted previously, UAE also argues that differences between the Kunsan portion of contract 0005 and the current Osan requirement rendered UAE's performance record at Kunsan useless in accurately projecting an ability to perform the new Osan requirement. A careful examination of the ASPR provisions cited supra

reveals that the contracting officer must consider "recent unsatisfactory performance" in making his responsibility determination and not recent unsatisfactory performance of exactly the same type of article or service being currently purchased, as UAE in effect contends. Moreover, both contract 0005 and the instant requirement are for the repair and maintenance of intrusion detection alarm systems, referred to by the contracting officer as "like identical services." Thus, we agree that UAE's record of performance at Kunsan under contract 0005 was properly for consideration by the contracting officer in determining UAE's responsibility.

UAE next questions the validity of the negative award recommendation of the preaward survey (PAS), dated November 17, 1975, conducted by the Korea Procurement Agency (KPA), Procurement Quality Assurance Division. Out of the eight factors to be investigated, the record shows that UAE received unsatisfactory ratings in two areas, "quality assurance capability" and "performance record." UAE argues that the unsatisfactory "quality assurance capability" rating contradicted the "Quality Assurance" section of the PAS, wherein UAE exclusively received satisfactory ratings. UAE further argues that the justification offered for the negative "quality assurance capability" rating relates to UAE's past performance at Kunsan, as opposed to the then current "quality assurance capability" at Osan.

With regard to the PAS narrative's explanation for the unsatisfactory "performance record" rating, UAE argues that the PAS ignored UAE's satisfactory performance ratings on contract 0005 and current satisfactory performance at Osan.

We agree with UAE that the quality assurance rating was based, in part at least, on negative past performance. However, the quality assurance section of the PAS clearly criticized UAE by stating: "* * * the company has no quality system to insure that discrepancies were corrected."

The record does not indicate that the PAS did not consider UAE's satisfactory performance ratings; rather, since the purpose of the PAS narrative is to detail the basis for an unsatisfactory performance rating, it is proper and reasonable for this section of the PAS to contain only the negative information upon which the unsatisfactory rating is based. Further, since this section of the PAS is concerned with UAE's "performance record" it was proper to consider UAE's past performance at Kunsan. Though UAE argues that consideration of past performance in this case violates ASPR § 1-905, supra, calling for consideration of "current" information, we believe

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that this section of the PAS and the relevant ASPR contemplate consideration of a prospective contractor's past performance as well as current performance. Thus, we do not agree with UAE's arguments questioning the validity of the PAS insofar as quality assurance and record of performance is concerned.

With further reference to the PAS, UAE alleges that the proximity of the KPA offices to that of the contracting officer (apparently they are located in the same building) compromised the objectivity of the PAS. However, UAE has offered no evidence to substantiate this allegation. Mere allegations by a protester will not suffice to prove charges of bias.

Finally, UAE contends that the PAS Board should have met to approve the "no award" recommendation. In this regard, our examination of the relevant ASPR provision (ASPR, Appendix K, § 304(c) (1975 ed.)) reveals that a meeting of the Board in circumstances such as these is not mandatory. Moreover, the PAS survey minutes reflect that the PAS was sent to Board members for their review and concurrence and although the individual members had the option to request a formal meeting such meeting was not requested "* * * because the basis of a recommendation for no award was clear and discussion was not anticipated." Thus, we do not agree with UAE that a Board meeting should have been held.

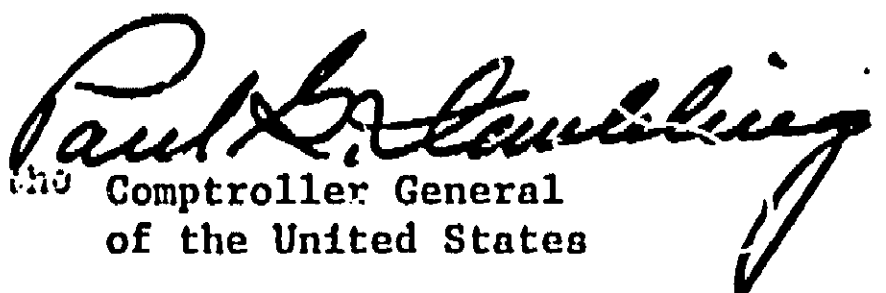
UAE next contends that both the contracting officer's determination of nonresponsibility and the negative preaward survey were based substantially upon "unevaluated" criticism. Specifically, UAE refers to criticism of its performance record by the TRCO, Kunsan as "unevaluated." Though UAE is unclear as to what is meant by "unevaluated" criticism, apparently, it is implying that had the PAS team and the contracting officer investigated further, the criticisms of the TRCO, Kunsan would not have been substantiated.

Our examination of the record reveals that criticism of UAE's record of performance emanated from and was substantiated by numerous sources. For example, the record contains adverse criticism of UAE's performance by, among others, the TRCO-Osan, the contracting officer, and a representative of the procurement quality assurance division. Further, the record shows that the contracting officer considered these sources in reaching his determination of nonresponsibility. In view of this, we do not find merit in UAE's contention.

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In conclusion, UAE argues that the lack of a default termination and payment in full by the Government under contract 0005 are evidence of satisfactory performance. We have held that any doubt about past performance which cannot be resolved affirmatively, whether or not resulting in a default termination, requires a determination of nonresponsibility. Contract Maintenance, Inc.; Merchants Building Maintenance Company, B-181581, October 8, 1974, 74-2 CPD 193. As the present record has raised serious doubts about UAE's past performance, we do not believe that lack of a default termination in the instant case, can be construed as affirmative evidence of UAE's satisfactory performance under contract 0005. Further, we believe that the same rationale should be applied with regard to the fact of payment in full by the Government to UAE. Such payment does not preclude a negative responsibility determination.

Accordingly, the protest is denied.


For the Comptroller General
of the United States