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**DECISION**



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

**FILE:** B-209491; B-209492

**DATE:** August 2, 1983

**MATTER OF:** S.A.F.E. Export Corporation

**DIGEST:**

1. Fact that terminations for default had been appealed to Armed Services Board of Contract Appeals does not eliminate such determinations as evidence of a proposed contractor's nonresponsibility.
2. Firm's failure to demonstrate that it possessed adequate financial resources and adequate personnel and facilities is a proper ground for a nonresponsibility determination.
3. Although pre-award survey used by contracting officer pertained to a different procurement for different equipment, the nature and extent to which such a survey is to be used is a matter for the contracting officer's judgment, and GAO finds nothing objectionable in its use here as one of the grounds for a nonresponsibility determination.

S.A.F.E. Export Corporation protests the rejection of its offers under requests for proposals (RFP) Nos. DAJA76-82-R-0370 (0370) and DAJA76-82-R-0953 (0953) issued by the United States Army Contracting Agency, Europe for the installation of a fire alarm system and a television monitoring system, respectively. S.A.F.E. alleges that the Army acted improperly in determining it to be nonresponsible under both solicitations. We deny the protests.

RFP-0370 was issued on August 11, 1982, to replace a fire alarm system at the United States Air Force Hospital in Wiesbaden, Federal Republic of Germany. Although S.A.F.E. was the low offeror, the contracting officer

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determined S.A.F.E. to be nonresponsible because of unsatisfactory past performance and a lack of adequate financial resources, personnel and facilities. This determination was based on the fact that four of S.A.F.E.'s prior contracts had been terminated for default, and also on a recent pre-award survey, conducted in connection with another procurement, recommending against award to S.A.F.E. The survey stated that S.A.F.E. was unable to submit any current financial data and noted that the data supplied from 1976 was unaudited. The survey also noted that S.A.F.E. did not have any facilities or employees and did not provide any agreements regarding the work it intended to subcontract. Further, the agency points out that S.A.F.E. was unable to produce information requested by the agency regarding the equipment S.A.F.E. intended to install. The Army thus awarded the contract on September 30 to Siemens Aktiengesellschaft, the second low offeror.

RFP-0953 was issued on September 1, 1982, for the installation of a television monitoring system at the Army's Frankfurt Commissary. Although S.A.F.E. was again the low offeror, the contracting officer determined the firm to be nonresponsible due to its prior performance record, and accordingly made award on September 29 to Geutebrueck Videotechnik, GmbH, the second low offeror.

In sum, S.A.F.E. was determined to be nonresponsible under RFP-0370 because of the four prior default terminations and the recent pre-award survey. The firm was found nonresponsible under RFP-0953 because of the same prior default terminations cited under RFP-0370. The record does not indicate that the pre-award survey was a factor in the determination under RFP-0953.

S.A.F.E. argues that the nonresponsibility determinations under both solicitations were unreasonable because terminations for default by themselves are not necessarily an adequate basis for rejecting a firm as nonresponsible. The protester also argues that both contracting officers failed to consider that each of the four default terminations cited had been appealed to the Armed Services Board of Contract Appeals (ASBCA) and that the contracting officers ignored the positive aspects of S.A.F.E.'s past performance record. S.A.F.E. further notes that it has

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been found responsible for other procurements despite the existence of these prior default terminations. In addition, S.A.F.E. complains that it was not treated fairly during the pre-award survey cited in connection with RFP-0370 in that it was not given sufficient time to provide documentation regarding its financial condition. Also in connection with the survey, the protester states that it is entitled to subcontract the work and not use its employees to perform the contract and notes that it was never requested to produce its subcontract agreements. Finally, S.A.F.E. maintains that the pre-award survey was of little use as it pertained to a different procurement.

The determination of a prospective contractor's responsibility is the duty of the contracting officer. In making the determination, he is vested with a wide degree of discretion and business judgment. Generally, we will not question a nonresponsibility determination unless the protester can demonstrate bad faith by the agency or a lack of any reasonable basis for the determination. See AMCO Tool & Die Company, B-207191, February 28, 1983, 62 Comp. Gen. \_\_\_, 83-1 CPD 246. Here, we find that in both instances the contracting officer had a reasonable basis for his determination.

While we agree with S.A.F.E. that prior default terminations do not necessarily require rejection of a firm as nonresponsible, such terminations are proper matters for consideration in determining a contractor's responsibility despite pending appeals with ASBCA. S.A.F.E. Export Corporation, B-208744, April 22, 1983, 83-1 CPD 437; affirmed on reconsideration, B-208744.2, July 14, 1983, 83-2 CPD \_\_\_. Further, although S.A.F.E. contends that it has a positive performance record on other procurements, that fact does not necessarily mean that the determination here was unreasonable. The firm does not dispute that four of its contracts were terminated for default, and while some of the evidence supplied to the contracting officer may have been favorable to S.A.F.E., it is clear that there was sufficient evidence for the contracting officer to conclude that S.A.F.E. had a history of performance problems.

We also point out that the fact that S.A.F.E. had been found responsible for other procurements has no bearing

upon the nonresponsibility determinations in issue. As such determinations are inherently judgmental, different contracting officers can reach opposite conclusions on the same facts, without either determination being unreasonable or the result of bad faith. S.A.F.E. Export Corporation, supra; GAVCO Corporation--Request for Reconsideration, B-207846.3, September 20, 1982, 82-2 CPD 242. Thus, we conclude that the four recent default terminations cited by the agency as evidence of S.A.F.E.'s poor performance record were sufficient to support the nonresponsibility determination under RFP-0953.

The nonresponsibility determination under RFP-0370 also cited the results of a recent pre-award survey. Although S.A.F.E. complains that it was given only 24 hours in which to obtain financial data for the survey, that fact is not significant as the record shows that S.A.F.E. would have been unable to obtain more current data regardless of the time allowed. We believe that the contracting officer could reasonably conclude that the data furnished, which was unaudited and out-of-date, failed to demonstrate that S.A.F.E. had adequate financial resources. S.A.F.E. Export Corporation, B-203346, January 15, 1982, 82-1 CPD 35. Regarding S.A.F.E.'s complaint on the subcontracting issue, although S.A.F.E. correctly states that it would be entitled to subcontract the work, and further notes that it was never requested to produce its subcontract agreements, the fact remains that the contracting officer reasonably relied upon the pre-award survey which indicated that the firm lacked adequate personnel and facilities. While that survey pertained to a different procurement, its subject matter was the same as the subject procurement: fire alarm equipment. The nature and extent to which a pre-award survey is used in a particular procurement is a matter for the contracting officer's judgment, and here we see nothing objectionable in its use as one of the grounds for the non-responsibility determination. See Freund Precision, Inc., B-208455, August 18, 1982, 82-2 CPD 155.

Finally, S.A.F.E. complains that it was unfairly penalized because it was unable to satisfy the agency's requests for data regarding the equipment it intended to install. We agree with the protester that its offer to supply the brand name equipment noted in the RFP at its original price should have cured any problems that may have

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existed because of S.A.F.E.'s inability to provide adequate information describing the alternate equipment it had originally offered. Nevertheless, we believe that the four default terminations along with the negative pre-award survey provided a sufficient basis for the Army's non-responsibility determination under RFP-0370.

We deny the protests.

*Milton J. Fowler*  
for Comptroller General  
of the United States