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The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: The Aeronetics Division of AAR Brooks & Perkins

File: B-222516; B-222791

Date: August 5, 1986

DIGEST

1. Nonresponsibility determination may be based upon agency's reasonable perception of inadequate prior and current performance, even where the contracts in question have not been terminated for default and the contractor disputes the agency's characterization of them as delinquent or has filed a claim for an equitable adjustment.

2. Protester fails to carry its burden of demonstrating that a nonresponsibility determination was unreasonable or made in bad faith where the contracting officer reasonably determines that (1) the protester is seriously deficient in performing current contracts for the same or related goods; (2) the deficiencies were not beyond the protester's control; and (3) award should not be made until the protester has taken corrective action and proven its effectiveness.

3. The fact that a firm has been found responsible and successfully performed on other contracts does not demonstrate the unreasonableness of a determination that a division of that firm has not performed satisfactorily on contracts for the same items as those currently being procured. Responsibility determinations are based upon the circumstances of each procurement and are inherently judgmental.

4. Nonresponsibility determinations do not constitute a de facto debarment from government contracting where the record indicates that the determinations were based upon the protester's current lack of capability, and that future determinations will be based on capability at the time of the procurement.

DECISION

The Aeronetics Division of AAR Brooks & Perkins Corporation protests the rejection of its bids under invitations for bids Nos. DAAB07-85-B-F012 and DAAB07-85-B-F080. Aeronetics asserts that the United States Army Communications-Electronics Command (CECOM) improperly determined that it was nonresponsible. We deny the protests.

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Solicitation No. -F012, issued on January 14, 1985, solicited bids for a quantity of 213 gyromagnetic compass sets, of which one component is a CN-998 directional gyroscope. After lower bidders were found nonresponsible, the Defense Contract Administration Services Management Area (DCASMA) office in Chicago, Illinois, conducted a preaward survey on Aeronetics. This was the first of three surveys at issue here.

The survey report, dated September 30, recommended award to Aeronetics despite the firm's problems with prior and existing contracts. Specifically, the survey noted that one contract administered by DCASMA had been "completed delinquent" because of a quality assurance failure that held up production. In addition, the survey indicated that DCASMA currently administered three other gyroscope contracts, of which two were deliquent.1/ The survey found that the delays had been caused by lack of training and understanding of government contracts and by problems with soldering.

DCASMA recommended award to Aeronetics, explaining that (1) the problems with soldering had been corrected and Aeronetics was taking all necessary action required to overcome other manufacturing problems; (2) Aeronetics' current contract for CN-998 gyroscopes was on schedule; and (3) Aeronetics was manufacturing navigation, flight instrumentation, and other avionics systems for both commercial and military aviation. One of the two CECOM representatives on the survey team also recommended award, concluding that Aeronetics had addressed its problems in producing the CN-998 gyroscope in a responsible manner.

At CECOM's request, however, DCASMA undertook a second preaward survey. Although the survey report, dated December 12, found Aeronetics by then to be deliquent on all three of the contracts, it again recommended award, since DCASMA continued to believe that Aeronetics was taking all necessary action to overcome manufacturing problems.

DCASMA recognized that CECOM, in addition to questioning Aeronetics' performance history, had expressed concern that the firm had not prepared either to make or buy the other components of the gyromagnetic compass sets, i.e., the transmitter and compensator. DCASMA, however, found that not only had Aeronetics recently received an updated quotation from a major manufacturer to supply the items, but that, in addition, most of the major production equipment would be commercially available, so as not to delay performance. DCASMA also found that sufficient time was available for construction of a required test facility.

Meanwhile, on August 5, 1985, CECOM had issued IFB No. -F080 for a quantity of 611 CN-811 displacement gyroscopes. Although Aeronetics

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1/ These contracts were No. DAAB07-83-C-F010, for CN-998 gyroscopes, and Nos. DAAB07-83-C-F019 and DAAB07-84-C-F089, for CN-811 gyroscopes.

submitted the apparent low bid, CECOM's technical experts recommended against award on the grounds that the firm had failed to pass a first article test and was delinquent on its two existing contracts for identical gyroscopes. In addition, CECOM found Aeronetics' bid price unrealistically low.

DCASMA subsequently conducted a third preaward survey, this one in connection with IFB No. -F080 and, on January 27, 1986, recommended against award to Aeronetics. The survey confirmed that Aeronetics remained delinquent on the two contracts for the CN-811 gyroscopes, as well as on the contract for the CN-998 gyroscopes. The survey of Aeronetics' quality assurance program referenced a test by the Sacramento Army Depot in which CN-998 gyroscopes that had been delivered failed to pass the soldering requirements. The survey attributed the majority of defects to poor workmanship by untrained operators. DCASMA found that Aeronetics' overall unsatisfactory record precluded the likelihood of timely delivery, concluding that:

> "The bidder's executive management has established and documented procedures that should overcome the problems that contributed to the high delinquency rate. All of these procedures have been written, but not all have been implemented. Until all procedures are completely implemented and history is established, there is no way to determine whether the corrective action will have a positive effect on this proposed award. It is, therefore, recommended that no award be made to Aeronetics until all procedures are in effect and have proven to overcome the current causes of delinquency."

The contracting officer, in a memorandum dated January 15, acknowledged that the "quality of [Aeronetics'] workmanship and soldering has improved greatly." He concluded, however, that in view of Aeronetics' prior unsatisfactory performance, additional awards would not be in the best interest of the government until such time as substantive evidence of performance was available. Accordingly, after reviewing the preaward surveys, he found the firm to be nonresponsible under both solicitations. Aeronetics thereupon filed these protests with our Office. CECOM has not made any award under IFB No. -F012; it has ordered Guidance Technology, Inc., the awardee under IFB No. -F080, to stay performance pending our decision.

BURDEN OF PROOF and STANDARD OF REVIEW

Aeronetics maintains that when a contracting officer restricts competition by making a determination of nonresponsibility, he must provide "specific, uncontraverted evidence of unsatisfactory performance." The firm cites our decisions in Simpson Electric Co.--Reconsideration, B-218530.2, Aug. 2, 1985, 85-2 CPD ¶ 124, and Dyneteria, Inc., B-211525, Dec. 7, 1983, 83-2 CPD ¶ 654, for this proposition.

Aeronetics argues that the contracting officer here failed to prove nonresponsibility, but rather based his determination on general, unsupported, and inaccurate reports of delinquency.

Aeronetics is attempting to shift the burden of proof of nonresponsibility. The Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103(c) (1985), however, requires a prospective contractor affirmatively to demonstrate its responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must make a determination of nonresponsibility. FAR § 9.103(b).

Aeronetics' reliance on the cited decisions is misplaced. In Simpson, we sustained a protest against a nonresponsibility determination where the only relevant evidence was an evaluation summary with a one-line reference to delinquency rates; the agency failed to support the statistics, and the protester submitted substantial documentation showing that they were erroneous. In Dyneteria, we found the preaward survey team's conclusions to be unreasonable or unsupported in many of the areas that the agency relied upon for the determination of nonresponsibility. In neither decision did our Office indicate any requirement for uncontraverted evidence of unsatisfactory performance. Further, unlike the agency in Simpson, CECOM here submitted to our Office substantial documentation concerning deficiencies in Aeronetics' prior contracts.

In order to be determined responsible, a prospective contractor must have a satisfactory performance record. FAR, § 9.104(c). In particular, a prospective contractor that is or recently has been seriously deficient in contract performance must be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. FAR, § 9.104-3(c); cf. Fujinon, Inc., B-221815, Jan. 30, 1986, 86-1 CPD ¶ 112 (recent unsatisfactory performance does not require a nonresponsibility determination; the question is whether it indicates problems will be encountered in the contract about to be awarded).

In our review of nonresponsibility determinations in which prior performance deficiencies were a factor, we will not decide whether the deficiencies were properly beyond the contractor's control, since this is a matter of contract administration, not for resolution under our Bid Protest Regulations. 4 C.F.R. § 21.3(f)(1) (1986). Rather, the only question for our review is whether the contracting officer's nonresponsibility determination was reasonably based on the information available at the time it was made. Decker and Co., et al., B-220807, et al., Jan. 28, 1986, 86-1 CPD ¶ 100. A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the contractor disputes the agency's interpretation of the facts or where the contractor has appealed a

a contracting officer's adverse determination. See Pauline James & Assoc., B-220152, et al., Nov. 20, 1985, 85-2 CPD ¶ 573; Martin Widerker, Engineer, B-219872, et al., Nov. 20, 1985, 85-2 CPD ¶ 571; S.A.F.E. Export Corp., B-209491, et al., Aug. 2, 1983, 83-2 CPD ¶ 153.

PRIOR PERFORMANCE DEFICIENCIES

Aeronetics emphasizes that CECOM has not terminated for default any of the three contracts characterized as delinquent in the final preaward survey. It denies that it is delinquent on these contracts, indicating that the government has modified them to preclude delinquency. Moreover, Aeronetics denies that it is responsible for the delays in performance; it has filed a claim for an equitable adjustment under the contract for CN-998 gyroscopes, alleging that defective specifications and a lack of government cooperation caused the delays. Aeronetics further asserts that the government has improperly refused to approve a revised first article test plan that the firm submitted under one of the delinquent contracts for CN-811 gyroscopes. Aeronetics suggests that CECOM's recent rejection of a new first article test report resulted from a desire for "extra-contractual testing to ensure that the corrective action is sufficient." These actions, Aeronetics indicates, also demonstrate that the government has contributed to any deliquencies.

The fact that CECOM has not yet terminated Aeronetics' current contracts for default does not preclude consideration of the firm's performance under them in determining its responsibility in connection with the protested solicitations. A decision to terminate may involve considerations beyond whether a contractor has met its obligations under the contract. It is clear from the record in this case that CECOM has encountered significant problems and delays under the current contracts. While the contract for CN-998 gyroscopes orginally required final delivery by October 1985, that date has now been extended to April 1987. Further, CECOM reports that 279 of the first 368 units delivered have been declared unsuitable. CECOM also states that failures occurred in 1984, during first article testing under the initial contract for CN-811 gyroscopes,[2/] and the agency has extended the final delivery date for them from September 1984 to December 1986. Moreover, in a "cure letter" dated May 30, 1986, CECOM rejected Aeronetics' new first article test report and afforded the firm the opportunity to show why the failure was beyond its control and why the contract for CN-811 gyroscopes should not be terminated.

[2/] The agency has waived the first article test requirement under Aeronetics' other contract for CN-811 gyroscopes. This is a follow-on contract, and no work has yet been performed under it. The due date for the initial deliveries under this remaining contract has been extended from September 1985 to January 1987.

We conclude that the contracting officer had reasonable basis for determining that prior performance deficiencies were not entirely beyond Aeronetics' control. DCASMA consistently attributed Aeronetics' delays to a lack of training and understanding of government contracts. The report of the Sacramento Army Depot on the failure of the gyroscopes to meet soldering standards noted problems in workmanship, while the third DCASMA preaward survey similarly pointed to poor workmanship by untrained operators. Thus, the record supports the reasonableness of the nonresponsibility determinations.

AERONETICS' CORRECTIVE ACTION

Aeronetics maintains that it "took extraordinary corrective actions to overcome performance problems to which . . . CECOM contributed." The presumption of nonresponsibility for contractors who have been seriously deficient in contract performance applies, however, unless (1) the circumstances were beyond the contractor's control or (2) the contractor has "taken appropriate action." (Emphasis added.) FAR, § 9.104-3(c). DCASMA stated in the third preaward survey that there was no way to establish whether the corrective action that Aeronetics was undertaking would actually overcome the causes of Aeronetics' delinquency, i.e., no way to establish whether it was "appropriate action," since the proposed procedures had not yet been fully implemented.

Under these circumstances, we find it reasonable for DCASMA to recommend and the contracting officer to adopt the recommendation that award should not be made until Aeronetics had fully implemented the new procedures and proved that they were effective. The failure of the CN-998 gyroscopes tested by the Sacramento Army Depot in November 1985, which is fully documented in the record, suggests a need for caution; Aeronetics' continuing problems during first article testing also suggests that caution is appropriate. See NJCT Corp., 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342, upholding a nonresponsibility determination where, despite possible improvement in performance, there remained a substantial risk that the proposed contractor would be unable to meet the delivery schedule.

OTHER PROCUREMENTS

Aeronetics contrasts its relationship with CECOM with its relationship with other agencies, alleging that AAR Brooks & Perkins has successfully performed on numerous other government contracts during fiscal year 1985.

The fact that AAR Brooks & Perkins was found responsible and has successfully performed other contracts does not demonstrate the unreasonableness of the nonresponsibility determinations here. The determinations here were based upon detailed information concerning the recent unsatisfactory performance by the division that would perform any new contract for the same gyroscopes. Responsibility determinations are based upon circumstances at the time of award; they are inherently

judgemental, and the fact that different contracting officers may reach different conclusions as to a firm's responsibility does not demonstrate unreasonableness or bad faith. See NJCT Corp., supra; Products Research and Chemical Corp., B-214293, July 30, 1984, 84-2 CPD ¶ 122.

BAD FAITH

Aeronetics attributes the nonresponsibility determinations here to retaliation against Aeronetics for filing the claim for an equitable adjustment under the initial contract for the CN-811 gyroscopes; to an unsubstantiated allegation of fraud on its part; and to bias on the part of several government officials. In support of its allegation of bad faith, Aeronetics notes that a project leader on the CECOM team investigating Aeronetics' responsibility stated that:

> "DCASMA, Chicago does not share CECOM's Project Leader's opinion and has accused the project leader of being extremely biased against Aeronetics."

Aeronetics has also submitted to our Office two memorandums by an Aeronetics employee, detailing purported conversations with a CECOM contract specialist in which the latter allegedly declared that the government has "persecuted and victimized" Aeronetics.

A protester alleging bad faith on the part of government officials bears a very heavy burden. It must offer virtually irrefutable proof, not mere inference or supposition, that the agency acted with a specific and malicious intent to injure the protester. See NJCT Corp., supra; The Big Picture Co., Inc., B-220859.2, Mar. 4, 1986, 86-1 CPD ¶ 218; Inter Systems, Inc., B-220056.2, Jan. 23, 1986, 86-1 CPD ¶ 77.

In an affidavit, the CECOM contract specialist characterizes Aeronetics' memorandums as "completely untrue." A protester does not meet its burden of proving its case where the only evidence on an issue of fact is the conflicting statements of the protester and the contracting agency. See Inter Systems, Inc., supra. Thus, Aeronetics has failed to carry its burden of proof here. Further, while one or more DCASMA employees may have at one time accused one of CECOM's contracting officials of being biased against Aeronetics, we find no evidence of this. DCASMA's view, as expressed in the preaward surveys, was based on the fact of contract delinquencies that were attributed to Aeronetics' lack of training and understanding of government contracts.

DE FACTO DEBARMENT

Aeronetics claims that the nonresponsibility determinations amounted to a de facto debarment, imposed without due process or regard for the procedures set forth in FAR Subpart 9.4 governing debarment and suspension.

Aeronetics alleges that the nonresponsibility determinations were the equivalent of the government action in Old Dominion Dairy v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980). The court found in the cited case that where government action effectively bars a contractor from virtually all government work due to charges that it lacks honesty or integrity, the contractor should be afforded notice and an opportunity to respond.

Aeronetics, in our opinion, has failed to demonstrate that the nonresponsibility determinations amounted to an exclusion from government contracting and subcontracting. See FAR, § 9.403. CECOM states that in the future, determinations of Aeronetics' responsibility will be governed by its capability at the time of the procurement, rather than by past determinations. Moreover, the record indicates that the determinations were based on Aeronetics' lack of responsibility at the time of the pre-award surveys. These clearly focused on Aeronetics' current capability, as shown by recent unsatisfactory performance on contracts for the same or similar gyroscopes, and on the fact that the effectiveness of corrective action being undertaken by Aeronetics was not yet proven. See Omneco, Inc., et. al., B-218343, et al., June 10, 1985, 85-1 CPD ¶ 660; see also John Carlo, Inc. v. Corps of Engineers, 539 F. Supp. 1075, 1080 (N.D. Tex. 1982) (possible stigmatizing effect of nonresponsibility determination must be assessed in light of the fact that basis for finding is subject to rectification); cf. Pauline James & Assoc., supra, (responsibility determinations are administrative in nature and do not require such procedural due process as notice and an opportunity to comment). In any case, we note that Aeronetics had notice of the basis for the nonresponsibility determinations no later than November 12, 1985, when it responded by writing CECOM, offering information and arguments in rebuttal. Cf. System Development Corp., B-212624, Dec. 5, 1983, 83-2 CPD ¶ 644; FAR, § 9.406-3(c).

The protests are denied.

for Seymour Efros
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General Counsel