



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Seaward International, Inc.

File: B-224497

Date: October 31, 1986

DIGEST

1. General Accounting Office will not take exception to a contracting officer's affirmative responsibility determination where there has been no showing that definitive responsibility criteria may not have been met, and there is no showing of fraud or bad faith on the part of contracting officials, or of conduct which is so arbitrary and capricious as to be tantamount to bad faith.

2. Protest that contracting officer's affirmative responsibility determination was made in bad faith is denied where the record does not support the protester's assertion that such determination was made in complete disregard of the contractor's alleged prior history of poor performance. The record shows that the agency thoroughly investigated the protester's allegations concerning the contractor's responsibility and found them to be without merit, and the protester's disagreement with the outcome of this investigation does not suffice to show bad faith.

3. General Accounting Office will not invoke its independent audit authority and conduct an investigation into protest allegations where the record shows that they already have been thoroughly investigated by the contracting agency.

DECISION

Seaward International, Inc. protests the Department of the Navy's contract award to Intertrade Industries, Ltd. under invitation for bids (IFB) No. N00189-86-B-0009, for marine fenders.^{1/} Seaward asserts that the contracting officer's

^{1/} Marine fenders consist of an energy-absorbing foam core covered by a coating or "shell" of polyurethane elastomer, encased in a chain and wire netting. They are used between two ships or between a ship and a dock to protect ships from damage while being docked or while moored.

affirmative determination of Intertrade's responsibility was made in bad faith. We deny the protest.

STANDARD OF REVIEW

The determination of whether a firm can and will meet its legal obligations if its bid is accepted (i.e., that the firm is "responsible") necessarily is a subjective business judgment for the procuring officials, who must bear the consequences of contract performance deficiencies, and thus is not readily susceptible to our review. J. F. Barton Contracting Co., B-210663, Feb. 22, 1983, 83-1 CPD ¶ 177. We therefore will not take exception to an affirmative responsibility determination unless, as pertains here,^{2/} the protester makes a showing of fraud or bad faith on the part of procuring officials. Information Systems & Networks Corp., B-218642, July 3, 1985, 85-2 CPD ¶ 25. To make this showing, the protester has a heavy burden of proof; it must demonstrate by virtually irrefutable proof that the procuring officials had a specific and malicious intent to injure the protester. Id.

Seaward contends that our imposition of this burden of proof is inconsistent with the standard applied by the Court of Claims, now the United States Claims Court. Citing Keco Industries, Inc. v. United States, 492 F.2d 1200, 1204 (Ct. Cl. 1974), Seaward argues that arbitrary and capricious conduct by procurement officials long has been equated with bad faith and is grounds for relief. Seaward asserts that we should adopt this standard.

In fact, the burden of proof we have required in order to establish bad faith on the part of contracting officials is based on the standard applied by the Court of Claims in Kalvar Corp. v. United States, 543 F.2d 1298 (Ct. Cl. 1976). See e.g., Bradford National Corp., B-194789, Mar. 10, 1980, 80-1 CPD ¶ 183. In Kalvar, the court stated that any analysis of a question of governmental bad faith must begin with the presumption that public officials act conscientiously in the conduct of their duties and that it requires "well-nigh irrefragable proof" to induce the court to abandon this presumption of good faith dealing. The court also stated

^{2/} We also will review protests of affirmative responsibility determinations where there is a showing that the solicitation contained definitive responsibility criteria that may not have been met. See Nations, Inc., B-220935.2, Feb. 26, 1986, 86-1 CPD ¶ 203. This exception does not apply here, however.

that in cases where the court has considered allegations of bad faith, the necessary "irrefragable proof" has been equated with evidence of some specific intent to injure the plaintiff, such as actions which are motivated alone by malice. Kalvar Corp. v. United States, supra at 1301-1302. The Claims Court has applied the Kalvar standard as recently as 1984 to allegations of bad faith on the part of contracting officials. See Harris Systems International, Inc. v. United States, 5 Cl. Ct. 253, 262 (1984).

Further, we note that while the court in Keco did state that courts often equate wholly unreasonable action with conduct motivated by subjective bad faith, the statement appears in dicta. See Keco Industries, Inc. v. United States, supra at 1204. Unlike Kalvar and Harris, Keco did not involve a specific allegation of bad faith on the part of procuring officials. Therefore, we do not agree with Seaward that our standard of proof is inconsistent with that applied by the Claims Court.

Nevertheless, we agree with Seaward that circumstances may arise where the conduct of procuring officials is so arbitrary and capricious that it is tantamount to bad faith. After thoroughly reviewing the record in this case, however, we conclude that such circumstances do not exist here.

POSITIONS OF PROTESTER AND AGENCY

Seaward's allegations regarding Intertrade's responsibility are based on Intertrade's record of prior performance of Navy marine fender contracts. Seaward asserts that this record demonstrates that Intertrade lacks the capability to perform the work under the protested IFB and lacks the integrity to be a government contractor. Seaward essentially argues that the contracting officer's affirmative responsibility determination was made in such disregard of this evidence as to constitute bad faith.

Seaward specifically cites Intertrade's performance under Navy contract No. N00189-85-C-0558, the most recent Navy marine fender procurement prior to the protested one. Seaward asserts that Intertrade wilfully misrepresented to the Navy the type of polyurethane elastomer it would use to produce the shells for the fenders. Seaward alleges that for purposes of the contract's first article test requirement, Intertrade provided polyurethane elastomer test samples consisting of elastomer manufactured by the American Cyanamid Company that had been cast in a mold. Seaward contends that the shells on the fenders actually supplied by Intertrade,

however, were produced by using a spray process to apply the elastomer. This is significant, according to Seaward, because the American Cyanamid elastomer cannot be applied by spraying and has different, superior performance characteristics than elastomer which can be so applied. Therefore, Seaward concludes that in order to pass the first article test, Intertrade wilfully misrepresented the performance characteristics of the elastomer shells it would supply to the Navy.

In addition, Seaward contends that the foam core of the fenders supplied by Intertrade under contract No. N00189-85-C-0558 did not comply with certain of the contract specifications. Seaward alleges that based on its knowledge of foam costs, and considering Intertrade's bid price for the fenders, it is highly unlikely that Intertrade actually used foam that met the specifications. Seaward asserts that since it brought this, as well as Intertrade's alleged misrepresentation of the material used in the fender shells, to the contracting officer's attention prior to award of the protested contract, the contracting officer could not in good faith have found Intertrade responsible.

Seaward also cites a series of marine fender contracts going back to 1978 under which the Navy allegedly has experienced poor performance of fenders manufactured by Intertrade. To substantiate its position, Seaward has submitted a series of internal Navy deficiency reports (obtained through a Freedom of Information Act request) on the performance of Intertrade marine fenders. The protester argues that these reports show that Intertrade has consistently provided fenders that do not meet contract specifications, and that the contracting officer also could not make a good faith affirmative responsibility determination in light of this information.

The Navy states that it has thoroughly investigated Seaward's allegations and has concluded that they are without merit. With respect to Seaward's allegations concerning Intertrade's performance under contract No. N00189-85-C-0558, the Navy states that its investigation revealed that Intertrade in fact used the same process and polyurethane elastomer to produce the first article test samples as it later used for the fender shells actually supplied under the contract. The Navy also asserts that the process Intertrade uses is not a "spray" process, but has withheld any further details of the process from Seaward as it is deemed to be proprietary to Intertrade. (The agency has, however, released to our Office the full results of its investigations including further details about Intertrade's process.) The Navy also states that as a result of its investigation, it has concluded that the foam supplied by Intertrade complies with the contract specifications.

With respect to Seaward's assertions that Intertrade has a history of supplying substandard marine fenders to the Navy, the agency first points out that the fenders for which the deficiency reports were issued are 2 by 3 foot fenders that are manufactured under specifications very different than those applicable to the 6 by 12 foot fenders to be supplied under the protested solicitation (and which were supplied under contract No. N00189-85-C-0558). Further, the Navy states that the cover letter accompanying the deficiency reports, when they were released to Seaward, specifically qualifies the reports because some were never validated and others were not identified to a particular contractor.

The Navy also asserts that the fact that the reported fenders failed does not necessarily show that they did not meet contract specifications. The Navy states that the fenders in question were built to a variety of designs and specifications, portions of which were themselves weak and thus may be responsible for the fender failures. In addition, the Navy asserts that the fenders are frequently abused and subjected to overloads which they were not designed to sustain. Also, the Navy reports that the end users who submit the deficiency reports often are not actually aware of the type of fender used or its manufacturer so that the reports issued by the users are often subject to misstatements of facts or faulty conclusions. The Navy asserts that under these circumstances, it cannot reasonably conclude that Intertrade has a history of supplying defective fenders to the Navy.

Seaward responds to the Navy's position on contract No. N00189-85-C-0558 by arguing that if Intertrade is using a cast (rather than a spray) process to produce the fender shells, it must have altered the ratio of the components used to produce the polyurethane elastomer for the shell and that this would also alter the physical properties of the shell itself, which then would not meet the contract specifications. The protester alleges that under these circumstances, Intertrade could not in good faith have represented in its first article certification that its product complied with the specifications, and that the Navy is equally blameworthy because it obviously failed to conduct adequate inspection and testing of Intertrade's first article. In addition, Seaward notes that while the Navy has asserted that its investigation resulted in a conclusion that Intertrade's fenders met the contract's foam specifications, the Navy has recently relaxed the foam specifications by amending the current (protested) contract.

Seaward also disputes the Navy's position regarding Intertrade's alleged history of supplying substandard fenders. The protester asserts that it is obvious the agency has not conducted an adequate investigation of these matters since it admits that its own deficiency reports have not been validated. Seaward also argues that even though the specifications for the 2 by 3 foot fenders are different than those for the 6 by 12 foot fenders being procured under the protested contract, the production processes and basic materials used in their construction are the same.

The protester questions the Navy's position that at least some of the fender failures are due to inadequate specifications and asserts that Navy employees whom Seaward has contacted believe that Intertrade's fenders are defective and do not conform to the specifications. Seaward also contends that even if the small fender specifications were weak, Seaward's own fenders supplied under the same specifications have performed satisfactorily, as evidenced by the fact that only one deficiency report has been issued against it.

ANALYSIS

At the outset, we reiterate that the scope of our review of protests against affirmative responsibility determinations, such as this, is limited to insuring that such determinations are made in good faith. This scope of review does not include determining whether a contractor's prior performance under any particular contract in fact was adequate or in compliance with contract specifications. Nor does it include an examination of the adequacy of the agency's contract management responsibilities. These are matters of contract administration that simply are not encompassed by our bid protest function. See Fugro Inter, Inc.--Reconsideration, B-219323.2, Dec. 13, 1985, 85-2 CPD ¶ 654; Xtek, Inc., B-213166, Mar. 5, 1984, 84-1 CPD ¶ 264. Furthermore, the basis for our review of affirmative responsibility determinations does not include possible fraud or bad faith on the contractor's part. Rather, our concern is with the possibility of such conduct on the part of contracting officials in making responsibility determinations.

Accordingly, the issue before us in this case is whether the contracting officer's affirmative responsibility determination was made in such disregard of Intertrade's record of prior performance as to constitute bad faith. We find that it was not.

In so far as Seaward's allegations concerning Intertrade's performance under contract No. N00189-85-C-0558 are concerned, these allegations primarily relate either to alleged fraud or bad faith on Intertrade's part (the alleged misrepresentation of the composition and properties of the fender shell) or to contract administration (the Navy's alleged failure to properly test and inspect the fenders and enforce the shell and foam specifications). None of these allegations suffices to show bad faith on the contracting officer's part in making the affirmative determination of Intertrade's responsibility here. While the allegations might support such a conclusion had it been shown that Intertrade in fact willfully misrepresented that its fenders met the contract specifications, and that the contracting officer was aware of this fact, no such showing has been made.

The agency has investigated Seaward's allegations concerning Intertrade and found them without merit.^{3/} Our review of the investigative reports generally substantiates the agency's position. For example, as the Navy has indicated, the investigators concluded that the process Intertrade uses to make the fender shells is not a spray process, and that there was no misrepresentation of the composition or physical properties of the elastomer or fender shells.^{4/} While there is, as the Navy acknowledges, evidence of some deficiencies in Intertrade's performance, there is nothing that provides any basis for questioning the contracting officer's good faith in finding Intertrade responsible.

We note in this connection that recent unsatisfactory performance does not require a determination that a contractor is nonresponsible. See GAVCO Corp.--Request for Reconsideration, B-207846.2, Sept. 20, 1982, 82-2 CPD ¶ 242. Rather, it is simply one of several factors the contracting officer should take into account in considering a prospective

^{3/} In fact, the Navy has conducted two investigations as a result of Seaward's allegations. The first was performed before Seaward filed its protest here, in response to a series of letters Seaward sent to various government offices and officials. The second was performed after Seaward filed its protest.

^{4/} We are constrained in our discussion of the investigative reports as the Navy has determined that they are not releasable outside the government. See Raytheon Support Services Co., B-219389.2, Oct. 31, 1985, 85-2 CPD ¶ 495.

contractor's responsibility. See Turbine Engine Services-- Request for Reconsideration, 64 Comp. Gen. 639 (1985), 85-1 CPD ¶ 721. Here, the contracting officer determined that the performance deficiencies under contract No. N00189-85-C-0558 did not warrant a determination of nonresponsibility, and we find no evidence that this judgment resulted from bad faith.

We turn then to Seaward's assertion that Intertrade has a history of supplying substandard Marine fenders to the Navy and that in light of this, the affirmative determination of Intertrade's responsibility was made in bad faith. As stated previously, the Navy argues that the deficiency reports relied on by Seaward to substantiate this allegation relate to small 2 by 3 foot fenders built to different specifications than those that are the subject of the protested procurement. In addition, the agency notes that some of the reports have not been validated; that is, that there is no showing that the poor performance of the fenders is attributable to contractor fault. In this connection, the agency has indicated that there were weaknesses in some of the specifications under which the small fenders were built. The agency also states that the remaining deficiency reports do not support Seaward's position as the fenders have not been identified to a specific contractor.

Under these circumstances, we find no basis to question the good faith of the contracting officer in finding Intertrade responsible. The agency has offered a reasonable explanation for the conclusion that the deficiency reports cited by Seaward do not require, or even support, a nonresponsibility determination here. Although Seaward clearly disagrees with the agency's position concerning the impact of those reports on Intertrade's responsibility, this disagreement does not suffice to show bad faith. See Information Systems & Network Corp., B-218642, supra.

Furthermore, we are not persuaded by Seaward's assertion that the performance of Intertrade's smaller 2 by 3 foot fenders cannot be discounted by the agency on the basis of specification differences, since the basic manufacturing processes and materials nevertheless are the same for the small and large fenders. Nor are we persuaded by Seaward's assertion that some Navy employees have told Seaward they believe Intertrade's small fenders do not conform to contract specifications. Seaward has not shown that the differences in the contract specifications for the small and large fenders have no affect on product performance, nor has it shown why the alleged belief of certain Navy employees should be adequate to overcome the presumption that the contracting officer acted in good faith. Similarly, Seaward's contention that

its own small fenders have been the subject of only one deficiency report is not sufficient to overcome this presumption. Even if Seaward's fenders in fact have a superior performance record, it does not necessarily follow that Intertrade's fenders do not meet contract specifications. Accordingly, we find that none of these contentions is sufficient to prove that the contracting officer's affirmative responsibility determination was made in bad faith.

OIL CONTAINMENT BOOM LITIGATION

Seaward also relies on a case now pending before the Armed Services Board of Contract Appeals (ASBCA) involving a dispute between Intertrade and the Navy over the type of polyurethane elastomer required for use in producing an oil containment boom under Navy contract No. N62472-79-C-1651.^{5/} Seaward essentially contends that this litigation demonstrates that, as here, Intertrade misrepresented the type of polyurethane elastomer it would use in performing the contract. Seaward contends that this further supports its assertions that Intertrade is nonresponsible.

Based on our review of the supporting documentation supplied by Seaward, we again find nothing to substantiate a finding that the contracting officer's affirmative responsibility determination was made in bad faith here. Beyond this, it clearly is inappropriate for us to consider further what the documentation may or may not show, as these matters are the subject of the litigation before the ASBCA. See Analytics Communications System, B-222402, Apr. 10, 1986, 86-1 CPD ¶ 356.

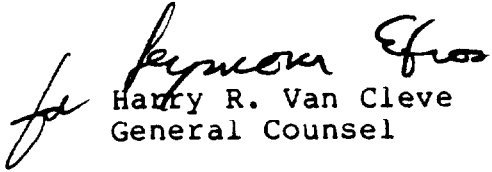
REQUEST FOR INVESTIGATION

Seaward also has alleged that the Navy did not adequately investigate Seaward's allegations, and has requested that we invoke our independent audit powers and conduct our own investigation of this matter. Based on our review of the record, we believe the Navy in fact has conducted a thorough and fair review of Seaward's allegations. We therefore do not find that any further investigation of these allegations by our Office is necessary or warranted.

^{5/} An oil containment boom is a "floating fence" used to contain or divert oil spills.

CONCLUSION

We find no merit to Seaward's assertion that the contracting officer's affirmative responsibility determination was made in such disregard of Intertrade's record of prior performance as to constitute bad faith. Therefore, the protest is denied.


Harry R. Van Cleve
General Counsel