



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Becker and Schwindenhammer, GmbH

File: B-225396

Date: March 2, 1987

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### DIGEST

1. Contracting officer's nonresponsibility determination is reasonable where based on preaward survey reports that cite an Army Criminal Investigation Division report of improper substitution of materials under a recent contract and include documented instances of deficient performance under recent contracts. The contracting officer has no duty to conduct an independent investigation to substantiate the accuracy of the reports.

2. Nonresponsibility determinations may be based upon the contracting agency's reasonable perception of inadequate performance even where the contractor disputes the agency's interpretation of the facts and the agency did not terminate the prior contracts for default.

3. Multiple nonresponsibility determinations under contemporaneous procurements do not constitute de facto suspension or debarment where they are based on the current available information reasonably showing recent deficient performance under prior contracts.

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### DECISION

Becker and Schwindenhammer, GmbH (B&S) protests the Army's determination that B&S was not a responsible contractor under request for proposals No. DAJA76-86-R-0318, issued by the U.S. Army Regional Contracting Office, Frankfurt, Federal Republic of Germany. B&S contends that the nonresponsibility determination was faulty because it was based on unsubstantiated accusations that B&S lacked integrity, and the contracting officer failed to make a reasonable effort to confirm the accusations or to obtain current information. B&S further argues that the agency's rejection of its offers under three other contracts for the same reasons constituted a de facto debarment.

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We deny the protest.

The RFP--for repair, maintenance and installation work on a building at the Army's Kastel Storage Facility--was issued on July 29, 1986. The closing date for receipt of proposals was August 29. B&S timely submitted the lowest-priced proposal. In early September, the contracting officer requested a preaward survey of B&S for this and another RFP for a similar project.

The initial preaward survey report concluded that B&S was capable of performing the contract, but cited problems with B&S's past performance, specifically mentioning contract No. DAJA76-85-C-0065 (contract 0065) for repair work on a hangar building. Documents in the report indicate that the basic problem involved performance delays; in addition, there were allegations of poor workmanship and the unauthorized substitution of flooring material. The final recommendation, however, was contingent upon a preaward survey review board (PASRB) decision.

The PASRB, on September 18, recommended no award to B&S. The PASRB minutes cited an investigation by the Army Criminal Investigations Division (CID) that found B&S had in July 1986 improperly substituted materials under contract No. DAJA76-85-C-0688 for the renovation of the American Arms Hotel operated by the U.S. Government in Wiesbaden. The PASRB minutes also noted performance problems under the same contract. Lastly, the minutes recounted statements by the Chief, Contracts Management Division, Director of Engineering and Housing (DEH) Office, Wiesbaden, that B&S had objected when requested to present required documentation for final invoices, and by the Inspector, DEH, that B&S had provided late performance in various instances.

The contracting officer requested a preaward survey for a similar solicitation, DAJA76-86-R-0337, on September 22, and on the next day the PASRB recommended no award based on the previous findings. The contracting officer, in a statement contained in the Army's protest report, states that he relied on the two preaward survey reports and PASRB's actions in determining B&S nonresponsible under the solicitation which is the subject of this protest. Further, the contracting officer states he confirmed the performance problems under contract 0065 and contacted the Chief of the Regional Contracting Office, Frankfurt who asserted that B&S had refused to furnish required inspection reports for contracts in Wiesbaden and Mainz.

The contracting officer's written nonresponsibility determination dated September 30 was based upon three factors: (1) the first PASRB's recommendation of no award, citing the CID finding of improper substitution of materials under the American Arms Hotel contract; (2) the second PASRB's recommendation, citing the issuance of a show cause notice under contract 0065 due to performance delays (also referred to in the first preaward survey report); and (3) the statement of the Chief, Regional Contracting Office, Frankfurt that B&S had refused to furnish required inspection reports.

The protester contends that at the time the contracting officer made the nonresponsibility determination, current information was available indicating that B&S had not committed any substantial wrongdoing under the American Arms Hotel contract and that differing site conditions caused the delays under contract 0065. B&S argues that the contracting officer had a duty to ascertain the current status of these contracts and to confirm allegations of improper substitutions of materials before determining B&S nonresponsible. B&S characterizes the third factor--B&S's refusal to furnish required inspection reports--as minor.

B&S points out that the CID investigation was conducted in July 1986, and did not result in the prosecution of B&S. The protester alleges that one of its employees mistakenly took from B&S's storage facility the incorrect material for the American Arms Hotel's window moldings and that B&S itself discovered and corrected the improperly incorporated material at no cost to the government.

Further, B&S alludes to a dispute under contract 0065 regarding whether B&S could remove the existing concrete in the hangar building down to 50 centimeters as specified in the contract. During performance B&S uncovered concrete foundation piers that were not identified in the RFP. B&S refused to remove the piers, stating that removal might damage the structure of the building. Although a show cause notice was issued in July, the government did not terminate the contract for default, and it appears that the contract was at least substantially completed by September 30.

The regulations provide that contracts shall be awarded to responsible contractors only, and list several standards that a prospective contractor must meet. Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 9.103 and 9.104-1 (1986). Those standards include a satisfactory performance record, a satisfactory record of integrity and business ethics, and the necessary quality assurance measures. FAR, 48 C.F.R. § 9.104-1. The regulations place the burden on a prospective contractor to affirmatively demonstrate its responsibility, FAR, 48 C.F.R. § 9.103(c), and dictate that in the absence of

information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility. FAR, 48 C.F.R. § 9.103(b). Concerning past performance, the regulations provide that a prospective contractor that is or recently has been seriously deficient in contract performance shall be presumed to be nonresponsive, unless the contracting officer determines that the circumstances were properly beyond the contractor's control or that the contractor has taken appropriate corrective action. 48 C.F.R. § 9.104-3(c).

The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. We therefore will not question a nonresponsibility determination unless the protester shows bad faith on the part of contracting officials or that the determination lacks a reasonable basis. See, e.g., American Bank Note Co., B-222589, Sept. 18, 1986, 86-2 CPD ¶ 316. B&S has not made the requisite showing in this case. Rather, we find that the record provides a reasonable basis for the contracting officer's decision.

It is true, as the protester contends, that to be reasonable, the nonresponsibility determination should be based on current information. Mayfair Construction Co., B-192023, Sept. 11, 1978, 78-2 CPD ¶ 187. A current preaward survey report detailing performance deficiencies in recent contracts or including a criminal investigating agency's report of misconduct in the performance of recent contracts satisfies this requirement. See Decker & Co., et al., B-220807 et al., Jan. 28, 1986, 86-1 CPD ¶ 100. There is no requirement that the contracting officer independently conduct an inquiry to substantiate the accuracy of the documents. Decker & Co., B-220807 et al., supra. In this case, the PASRB minutes and the preaward survey reports detailed deficiencies in recent contracts all of which had occurred within the prior 3 months. We think that the contracting officer acted properly on this information in the report. See Mayfair Construction Co., B-192023, supra.

The protester states that the nonresponsibility determination was in fact based on a lack of integrity or business ethics and argues that determinations concerning integrity or ethics must be based on substantial evidence. The contracting officer's reliance on criminal investigating agency's reports generally provides a sufficient basis for a nonresponsibility determination.

See Americana de Comestibles S.A., B-210390, Mar. 13, 1984, 84-1 CPD ¶ 289 (involving a CID investigation); Speco Corp., B-211353, Apr. 26, 1983, 83-1 CPD ¶ 458. This is so regardless of whether the report results in conviction, or even prosecution. Id.

Here, however, the record shows that the contracting officer considered the CID report to raise doubts about the ability of B&S to implement effective quality assurance measures and management, without regard to B&S's integrity. The information available to him reasonably supported his doubts. See Martin Widerker, Engineer, B-219872 et al., Nov. 20, 1985, 85-2 CPD ¶ 571 (where the basis of nonresponsibility was prior inadequate performance notwithstanding an ongoing criminal investigation).

Further, regarding the CID report, B&S argues that the American Arms Hotel contract was not properly considered in determining its responsibility since it was not a contract with the U.S. Government. The Army explains that the contract was for its benefit although the actual contract was between the host nation and B&S. Regardless of government involvement, however, a responsibility review is not limited to obtaining information from government sources. See FAR, 48 C.F.R. § 9.105-1(c)(5). The Army therefore properly considered B&S's recent performance of the American Arms Hotel contract.

The remaining two factors of the contracting officer's determination also involved concerns about B&S's quality assurance capabilities based on prior inadequate performance under contract 0065 and the firm's refusal to submit inspection reports under other contracts. The performance deficiencies under contract 0065 were documented in the preaward survey reports, and included not only the delays attributable to the dispute about the foundation, but also delays in delivering replacement hangar doors, poor workmanship in repairing the roof, and the unauthorized substitution of flooring materials. Moreover, the contracting officer confirmed the deficient performance by contacting procurement officials involved with the contract. B&S on the other hand argues that none of the problems were its fault and points out that the contract was not in fact terminated.

The question of whether B&S's deficiencies were excusable or beyond the contractor's control is a matter of contract administration, not for consideration by our Office. 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. See The Aeronetics Division of AAR Brooks & Perkins, B-222516 et al., Aug. 5, 1986, 86-2 CPD ¶ 151. 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 and the agency did not terminate the prior contract for default.

We therefore view the record as providing a reasonable basis for the contracting officer's determination that B&S's performance deficiencies under contract 0065 raised doubt about its ability to provide sufficient quality assurance under the contract. Further, we do not agree with the protester that its refusal to submit required inspection reports was minor. By itself it might be, but in conjunction with the other cited factors the refusal to submit inspection reports casts further doubt on B&S's ability and willingness to provide quality assurance.

Finally, the protester argues that the determination of nonresponsibility, in conjunction with two other nonresponsibility determinations on the same bases, constituted a de facto suspension or debarment. We have recognized that a firm can only be debarred or suspended from competing for government contracts for just cause through the procedures set forth in FAR, 48 C.F.R. subpart 9.4, providing for procedural due process. Thus, it is improper for a contracting agency to exclude a firm from contracting with it without following the procedures for suspension or debarment by making repeated determinations of nonresponsibility, or even a single determination of nonresponsibility if it is part of long-term disqualification attempt. Deloitte Haskins & Sells, B-222747, July 24, 1986, 86-2 CPD ¶ 107.

This, however, is not a case of de facto suspension or debarment, because the nonresponsibility determinations involved practically contemporaneous procurements of similar construction services and were based on current information indicating B&S's lack of responsibility. See The Aeronetics Division AAR Brooks & Perkins, B-222516 et al., supra. The contracting officer stated in the agency report that any future responsibility determinations regarding B&S would be made independently on the basis of information available at that time. In fact, the protester points out that on January 26, 1987, the contracting officer awarded B&S a contract for similar construction services. The protester

nonresponsibility determinations. See United Aircraft & Turbine Corp., B-210710, Aug. 29, 1983, 83-2 CPD ¶ 267.

We find that the record as a whole contains sufficient evidence upon which the contracting officer could reasonably base his nonresponsibility determination.

The protest is denied.

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General Counsel