The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Applied Power Technology Company and Contract Services Company, Inc.--A Joint Venture

File: B-227888

Date: October 20, 1987

DIGEST

1. Nonresponsibility determination is reasonable where based on information showing prior unsatisfactory performance, even though there also is some indication of recent improvement in performance.

2. Regulation requiring agency to give prospective contractor opportunity to "cure" factors leading to nonresponsibility determination does not apply where nonresponsibility determination is based on unsatisfactory overall prior performance, a deficiency that cannot be cured.

DECISION

A joint venture comprised of Applied Power Technology Company and Contract Services Company, Inc. (APTCO-CSC), protests the determination of the General Services Administration (GSA) that APTCO-CSC was nonresponsible, and thus ineligible for award, under invitation for bids (IFB) No. GS-07-P-87-HT-C-0098/7SB, for operation and maintenance services at the Denver Federal Center in Denver, Colorado. The agency found that APTCO-CSC lacks a satisfactory performance record and adequate financial capability. We deny the protest.

The solicitation invited sealed bids to operate, maintain and repair building, mechanical, electrical and utility systems and equipment at the center. The IFB was issued as part of a cost comparison, pursuant to Office of Management and Budget Circular A-76, to determine whether it would be more economical to contract for the services or to continue to have the services performed with in-house personnel.

Based on a comparison of APTCO-CSC's bid with the in-house estimate, GSA determined that the cost of contracting with the firm would be less than continuing performance in-house. An ensuing preaward survey of APTCO-CSC's financial

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responsibility, however, found that the joint venturers carried heavy debts, had recently suffered significant financial losses, and had submitted insufficient financial information to verify the existence of lines of credit. The survey therefore recommended against award. In addition, contracting authorities concluded that CSC's performance on prior contracts was unsatisfactory. Accordingly, the contracting officer rejected APTCO-CSC as nonresponsible. APTCO-CSC thereupon filed this protest, arguing primarily that GSA's characterization of its performance record was based on inaccurate information and failed to take into consideration recent improvements in the firms' performance ratings.

In evaluating CSC's performance record, the contracting officer contacted contracting officials familiar with CSC's performance under eight contracts with the government, including all four of the CSC contracts cited by the joint venture in its offer as relevant prior experience. Contracting officials reported that CSC's performance under four contracts for the maintenance of government vehicles was unsatisfactory, characterized by a failure to perform required preventative maintenance, to repair vehicles on a timely basis, or to make adequate repairs.

The contracting officer for a fifth vehicle maintenance contract characterized CSC's performance as "marginal" or "unsatisfactory." Dissatisfaction with CSC's performance under these contracts led to the issuance of contract deficiency notices, deductions, consideration of terminating two of the contracts, and decisions not exercise options in four of the contracts.

One of the two contracting officials contacted concerning a sixth contract for the maintenance of grounds, roads and vehicles reported that the activity would not contract with CSC again because of the number of deficiency reports issued under the contract; he described CSC's performance as merely marginal, characterized by a failure to meet the requirements for timely performance. Moreover, although CSC's overall performance under two other contracts for the maintenance of vehicles was viewed as good or satisfactory, GSA received reports of violations of labor laws under those two contracts and four of the other six contracts. In addition, GSA received documentation concerning a finding of nonresponsibility under an IFB for the operation and maintenance of the Chesapeake and Delaware Canal; CSC's bid under that solicitation was rejected because of concerns regarding its performance record and a lack of experience and personnel.

APTCO-CSC questions the accuracy and reliability of the adverse reports on CSC's performance. The protester attributes the reported deficiencies in CSC's performance under two of the contracts to differing interpretations of the specifications, noting that claims filed by CSC under these contracts currently are before the Armed Services Board of Contract Appeals. APTCO-CSC further points out that a claim filed under another contract was settled shortly before the nonresponsibility determination, with the government agreeing to a partial payment of the claim and deletion of negative performance evaluation ratings from the contract file. In addition, the protester denies that its performance under a fourth contract was unsatisfactory; it states that the agency exercised options for two additional years and that a contracting official familiar with the contract in fact advised GSA that CSC had performed satisfactorily.

The Federal Acquisition Regulation (FAR), 48 C.F.R. § 9.103 (1986), provides that contracts shall be awarded only to responsible prospective contractors; in order to be found responsible, a prospective contractor must have a satisfactory performance record. FAR, 48 C.F.R. § 9.104-1(c). In particular, a prospective contractor that is or recently has been seriously deficient in contract performance shall 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, 48 C.F.R. § 9.104-3(c).

A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts or has appealed a contracting officer's adverse determination. See Becker and Schwindenhammer, GmbH, B-225396, supra; Firm Reis GmbH, B-224544 et al., Jan. 20, 1987, 87-1 CPD ¶ 72. This is largely the situation here. In our review of nonresponsibility determinations, we will consider only whether the contracting officer's nonresponsibility determination was reasonably based on the information available at the time it was made. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235. Applying this standard here, we find GSA's determination unobjectionable.

Although contracting officials recognized that inadequate specifications may have contributed to the disputes under certain contracts here, it is clear that they nevertheless viewed CSC's performance as basically deficient and its interpretation of the specifications as unreasonable. For

example, one CSC claim for reimbursement of deductions taken for nonperformance was settled, but CSC was allowed only $18,083 of the total $603,053 claim. Although under the above-mentioned recent settlement under another contract the agency agreed to deletion of the negative performance evaluations, favorable evaluations were not substituted and less than 20 percent of CSC's $437,575 claim was allowed. The fact that CSC has appealed the partial denial of its claim under this and other contracts does not establish the validity of the claim or the unreasonableness of GSA's subsequent reliance upon reports of unsatisfactory performance under the contracts. See Becker and Schwindhammer GmbH, B-225396, supra; The Aeronetics Division of AAR Brooks & Perkins, B-222516 et al., Aug. 5, 1986, 86-2 CPD ¶ 151.

Although the record indicates that options were exercised under one of the contracts in question, the record also indicates that two officials of the contracting activity reported to GSA that CSC's performance was unsatisfactory, characterized by many deficiencies which were not subsequently corrected and by a failure to perform required vehicle maintenance. The mere fact that the agency, for whatever reasons, ultimately exercised the options does not preclude GSA's reference to this performance information in making its responsibility determination.

In addition to questioning the accuracy of the information considered by GSA, APTCO-CSC questions the contracts chosen for consideration, arguing that GSA acted improperly in relying more on its performance under contracts completed in 1983 to 1985 rather than on CSC's performance under more recent contracts. We disagree. Although the deciding question in a responsibility determination is whether a prospective contractor possesses the current ability to perform, performance under older, but recent, similar contracts is not irrelevant, especially where more recent performance is mixed. In this regard, we note that GSA received reports of marginal or unsatisfactory performance under three of the most recent five contracts under which significant work has occurred; labor law violations under all five contracts; and a negative responsibility determination, based in part on an unsatisfactory performance record, under a 1986 solicitation. GSA also explains that it did not consider CSC's performance under a 1987 contract to be relevant because CSC had been performing for only 3 months when it evaluated CSC's performance record; the agency viewed this as an insufficient period from which to draw conclusions concerning APTCO-CSC's ability to perform.

Finally, APTCO-CSC challenges GSA's failure to afford it an opportunity to respond to, and correct, the alleged errors in the evaluation of its performance history. The protester maintains it was entitled to such an opportunity under the GSA Acquisition Regulation (GSAR), 48 C.F.R. § 509.105-3 (1986). This regulation only requires, however, that the contracting officer notify the offeror of the basis for rejection so the offeror will have the opportunity, "where applicable," to cure the factors that led to the nonresponsibility determination. We do not interpret this regulation as affording a firm an opportunity to persuade the contracting agency that certain performance information best reflects its capabilities. Rather, the provision is "applicable," in our view, only to give an offeror a chance to eliminate a correctable deficiency. APTCO-CSC's performance under prior contracts is not correctable. In any case, APTCO-CSC has had an opportunity to make its arguments in presenting its protest here, and we have found the firm's position unpersuasive; APTCO-CSC has not raised substantial doubts as to the accuracy or the relevance of the prior performance information relied upon by GSA.

We conclude that the prior performance information relied upon by GSA reasonably supported a finding that APTCO-CSC's overall prior performance was unsatisfactory, and that GSA therefore reasonably determined, based on this information, that APTCO-CSC was not a responsible prospective contractor. As GSA reports that prior performance was the principal basis for the determination, we need not consider GSA's further finding that the firm lacked the financial capability to perform.

The protest is denied.

for Seymour Efros
James F. Hinchman
General Counsel