



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Automated Datatron Incorporated

File: B-232048

Date: November 16, 1988

DIGEST

1. An agency is not required to conduct a preaward survey if the information on hand or readily available is sufficient to allow the contracting officer to make a determination of responsibility.
2. Prior default determinations are proper matters for consideration in determining a contractor's responsibility despite pending appeals to a board of contract appeals.
3. Fact that no other agency has found protester nonresponsible is not evidence of bad faith on the part of the present agency as agencies may reach opposite results based on similar facts because responsibility determinations are inherently judgmental.
4. To show bad faith, protester must submit virtually irrefutable proof that procurement officials had a specific and malicious intent to harm the protester.

DECISION

Automated Datatron Incorporated (ADI) protests the rejection of its bid under invitation for bids (IFB) No. B551-S issued by the Government Printing Office (GPO) for microfiche.

The protest is denied.

ADI asserts that GPO's determination that ADI was nonresponsible because ADI had not shown satisfactory quality assurance capabilities for certain quality standards was inappropriate because the solicitation did not refer to those quality standards but only to lesser quality standards. ADI states that no preaward survey was conducted

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to assess ADI's responsibility and no objective criteria were used to measure ADI's capability. ADI contends that the nonresponsibility finding is in effect a de facto debarment of ADI.

GPO reports that this solicitation is a reprocurement necessitated by ADI's default on GPO's earlier microfiche contract, program B154-S. GPO states that ADI was defaulted under that program because of its inability to meet the contract quality standards and delivery schedules and its refusal to remanufacture approximately 1,800 defective print orders. GPO also refers to program B613-S in which ADI was again defaulted, even though it was favorably rated on a preaward survey, for poor contract performance. The contracting officer, noting these prior problems, found ADI nonresponsible on July 7, 1988, and on July 8, GPO's Contract Review Board concurred in this finding.

GPO states that ADI was orally informed of the nonresponsibility determination on two occasions by a contract specialist, but due to a clerical error ADI did not receive written notification of the determination. On July 18, ADI requested written confirmation of the nonresponsibility determination and the contract specialist then sent a letter incorrectly informing ADI that the determination was based on ADI's failure to meet Quality Level III standards. The contracting officer subsequently retracted this letter and informed ADI that it was found nonresponsible for failure to meet the schedule and quality requirements on past microfiche contracts.

ADI contends that GPO should not be allowed to raise a new basis for ADI's alleged nonresponsibility. ADI contends that certain GPO officials are motivated by bad faith and that it has never been found nonresponsible by any other government agency. ADI alleges that its problems with GPO began after it filed a protest on another procurement. ADI states that it has appealed the termination for default under B154-S and this appeal is presently before GPO's Board of Contract Appeals. ADI contends that it is reasonable to conclude that its termination under B154-S was premature and taken in bad faith and the termination should not be used as evidence to justify GPO's present determination of nonresponsibility.

A contracting agency has broad discretion in making responsibility determinations, which is of necessity a matter of business judgment. Costec Associates, B-215827, Dec. 5, 1984, 84-2 CPD ¶ 626. Such judgments must, of course, be based on fact and reached in good faith; however, such decisions generally are within the discretion of the

agency since the agency must bear the brunt of difficulties experienced in obtaining the required performance. Urban Masonry Corp., B-213196, Jan. 3, 1984, 84-1 CPD ¶ 48. Therefore, we will not question a nonresponsibility determination unless the protester demonstrates bad faith by the agency or the lack of any reasonable basis for the determination. Tek-Wave, Inc., B-228453.3, Apr. 26, 1988, 88-1 CPD ¶ 402. We do not think that ADI has made such a showing here as it appears from ADI's past contract performance that GPO had adequate justification for finding ADI nonresponsible.

With regard to ADI's contention that GPO should have conducted a preaward survey, we have held that an agency is not required to conduct a preaward survey if the information on hand or readily available is sufficient to allow the contracting officer to make a determination of responsibility. Kirk Bros. Mechanical Contractors, Inc., B-228603, Nov. 12, 1987, 87-2 CPD ¶ 479. In this case, the contracting officer relied on the fact that ADI had been terminated for failing to perform essentially the same work under a prior contract and again recently had been terminated for poor quality work under another microfiche contract. We do not find such reliance unreasonable.

The fact that the GPO contracting specialist originally provided ADI with the wrong basis for which ADI was found nonresponsible was not prejudicial to ADI since the contracting officer had earlier made and documented his decision for valid reasons. In this connection, we have held that prior default terminations are proper matters for consideration in determining a contractor's responsibility despite pending appeals to a board of contract appeals. SAFE Export Corp., B-209491, B-209492, Aug. 2, 1983, 83-2 CPD ¶ 153. Moreover, the fact that no other agency has found ADI nonresponsible does not evidence bad faith. See Kirk Bros. Mechanical Contractors, Inc., B-228603, *supra*, in which we found that determinations of responsibility are inherently judgmental and, as such, contracting activities can reach opposite conclusions as to a firm's responsibility based on similar facts, neither having acted in bad faith. Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually irrefutable proof that they had a specific and

malicious intent to harm the protester. Ingram Barge Co., B-230672, June 28, 1988, 88-1 CPD ¶ 614. In view of the contracting officer's reasonable reliance on ADI's recent poor performance on microfiche contracts, ADI has not shown that the agency acted in bad faith.

The protest is denied.



James F. Hinchman
General Counsel