Maeder

Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Frank Cain & Sons, Inc.--Request for Reconsideration

File: B-236893.2

Date: June 1, 1990

Dennis J. Riley, Esq., Kenneth A. Martin, Esq., and Andrew B. Katz, Esq., Spriggs & Hollingsworth, for the protester.
Jacqueline Maeder, Esq., Paul Lieberman, Esq., and John F. Mitchell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Prior decision holding that agency did not violate protester's procedural due process rights when the agency found the protester nonresponsible based on an unsatisfactory record of integrity is affirmed where protester has not shown that the decision was based on an error of law.

DECISION

Frank Cain & Sons, Inc. requests reconsideration of our decision, Frank Cain & Sons, Inc., B-236893, Jan. 11, 1990, 90-1 CPD ¶ 44, in which we denied Cain's protest against the Army's determination that Cain was nonresponsible under invitation for bids (IFB) No. DAHC92-89-B-0191 because of Cain's unsatisfactory record of integrity.

We affirm our prior decision.

The Army rejected Cain as nonresponsible based on an interim U.S. Army Criminal Investigation Division (CID) report. The Army had not provided Cain with an opportunity to respond before rejecting Cain as nonresponsible, and had redacted the CID report in Cain's copy of the agency's subsequent report filed with our Office in response to Cain's protest. In its protest to our Office, Cain alleged that the nonresponsibility determination lacked a rational basis and was "an arbitrary and capricious infringement" of Cain's constitutionally protected due process rights, citing Old Dominion Dairy Prods., Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980).

In Old Dominion, the court held that where a de facto debarment results from an agency's determination that a contractor lacks integrity, the due process guarantees under the Fifth Amendment require that notice of the charges be given to the contractor as soon as possible so that the contractor could present its side of the story before adverse action was taken. Old Dominion, 631 F. 2d at 968. In our initial decision, we pointed out that in Old Dominion and its progeny1/ the courts have found that certain nonresponsibility determinations for lack of integrity which involve more than one procurement may constitute de facto debarment or suspension where the procedural due process guarantees of notice and an opportunity to be heard obtain. The Cain protest, however, involved only one procurement and the protester had not argued that it had been deprived of other contracts. Where a contractor is deprived of an award in only a single procurement, there is no basis for a finding of constructive or de facto debarment unless there are specific facts warranting such a conclusion. Energy Management Corp., B-234727, July 12, 1989, 89-2 CPD ¶ 38. Since there was nothing in the record warranting such a conclusion, we could not find that Cain had been subjected to an actual or de facto debarment or suspension and, therefore, Cain was not entitled to notice and an opportunity to be heard prior to the contracting officer's final determination.

We also rejected Cain's claim that the nonresponsibility determination lacked a rational basis. We found that there was no evidence of government bad faith and that the CID report concerning Cain's employees' conduct under recent government procurements contained information from which the contracting officer reasonably could conclude that Cain lacked integrity. We pointed out that such CID report information may be used as the basis of a nonresponsibility determination without the conduct of an independent investigation by the contracting officer to substantiate the accuracy of the report. Energy Management Corp., B-234727, supra; Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235 and Americana de Comestibles S.A., B-210390, Mar. 13, 1984, 84-1 CPD ¶ 289.

In its reconsideration request, Cain again argues that the Army denied Cain its due process rights by determining Cain nonresponsible for lack of integrity without giving Cain notice of the specific facts leading to that determination and an opportunity to respond. In reiterating the arguments

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1/ ATL, Inc. v. United States, 3 Cl. Ct. 259 (1983); Viktoria-Schaefer Inter. v. U.S. Dept. of the Army, 659 F. Supp. 85 (D.D.C. 1987).

made in its original protest, Cain asserts that we disregarded Cubic Corp. v. Cheney et al., Civ. Act. No. 89-1617 (D.D.C. Aug. 8, 1989), an unpublished decision cited by the protester, and, therefore, our holding was based on an error of law.

In Cubic Corp., Cubic had been determined nonresponsible by the Air Force on the basis of an affidavit obtained during the course of a criminal investigation of the firm. Cubic alleged that the determination was unlawful and that it should have been awarded the contract. The court found, however, that the nonresponsibility determination was rational and in accordance with law. The court also found that Cubic was afforded all of the procedural due process rights to which it could possibly be entitled because the Air Force notified Cubic of its nonresponsibility determination immediately after the determination was made and delayed awarding the contract until after the agency reaffirmed the nonresponsibility determination.

Cain points out that the Cubic decision quotes the following language from Old Dominion:

> "The denial of a government contract on the basis that the prospective contractor lacks integrity deprives the contractor of a liberty interest within the meaning of the due process clause."

See Cubic, slip opinion at 20. From this, the protester asserts that ". . . Cubic interprets Old Dominion to mean that a contractor stands entitled to due process where the government deprives a contractor of a contract on the basis of a nonresponsibility determination relating to a contractor's perceived lack of integrity."

Apparently the protester believes that "due process" necessarily includes such procedures as notice and an opportunity to be heard. "Due process" is not a technical consideration with a fixed content, rather it is flexible and calls for such procedural protection as the particular situation demands. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Thus, the resolution of whether the agency procedures followed satisfy the constitutional requirements for due process varies depending on the governmental and private interests that are affected. Mathews v. Eldridge, 424 U.S. 319, 334 (1976). A single nonresponsibility determination is administrative in nature, is largely dependent on the business judgment and discretion of the contracting officer, and provides minimal impingement on the contractor's interests since such determinations properly can and do vary from contract to contract. Accordingly, the procedural requirements of notice and an

opportunity to be heard need not be provided to the affected contractor. The Aeronetics Div. of AAR Brooks & Perkins, B-222516; B-222791, Aug. 5, 1986, 86-2 CPD ¶ 151; Pauline James & Assocs., B-220152; B-220152.2, Nov. 20, 1985, 85-2 CPD ¶ 573.

In our view, the only procedural requirements for a single nonresponsibility determination are those set forth in Federal Acquisition Regulation (FAR) § 9.105. These include the requirement for the contracting officer to make, sign, and place in the contract file a determination of nonresponsibility which states the basis for the determination. FAR § 9.105-2(a). To the extent that the unpublished Cubic decision may be interpreted to suggest that additional procedures are constitutionally compelled in these circumstances, in particular the right to notice and an opportunity to be heard, we know of no sound basis for this conclusion. A single nonresponsibility determination does not, at least in these circumstances, constitute a de facto debarment. Technical Ordnance, Inc., B-236873, Jan. 19, 1990, 90-1 CPD ¶ 73; Energy Management Corp., B-234727, supra. Consequently, we find no error of law in our initial decision.

The prior decision is affirmed.

James F. Hinchman
General Counsel