



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Harvard Interiors Manufacturing Co.

File: B-247400

Date: May 1, 1992

Nancy Baird, Esq., and Leonard Rawicz, Esq., Skadden, Arps, Slate, Meagher & Flom, for the protester.
Christy L. Gherlein, Esq., and Stuart Young, Esq., General Services Administration, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

A procuring agency's determination of nonresponsibility for a prospective contractor that has filed for bankruptcy is not unreasonable or made in bad faith when the determination relies on a pre-award survey that did not recommend the contractor for award because a review of the financial information submitted by the contractor and Dun and Bradstreet reports revealed substantial financial deficits and an uncertain financial future; the weight given to the effects of a proposed bankruptcy reorganization plan, which was unconfirmed as of the time of the nonresponsibility determination, is within the discretion of the agency.

DECISION

Harvard Interiors Manufacturing Co., a division of Harvard Industries, Inc.,¹ protests the award of a contract for upholstered style shell chairs issued by the National Furniture Center, General Services Administration (GSA), under request for proposals (RFQ) No. FCNO-91-JA01-N-10-115-91. Harvard claims that GSA incorrectly determined that Harvard was a nonresponsible offeror, based upon financial considerations.²

¹Harvard filed for protection under chapter 11 of the Bankruptcy Act, 11 U.S.C. §§ 1101-1174 (1988), in May 1991.

²Much of the financial data on Harvard appears to be proprietary and is not disclosed in this decision.

We deny the protest.

GSA issued the IREP on September 6, 1991, for a fixed-price requirements contract with an estimated value of \$13 million over the 2-year period of February 1, 1992, through January 31, 1994. Award was to be made to the responsible offeror whose proposal offered the greatest value to the government in terms of quality and price. Three offerors submitted proposals by the October 15 closing date. The contracting officer requested best and final offers (BAFO) in November. Harvard's BAFO, dated November 18, 1991, offered the lowest price and was in line for award on all items.³

The contracting officer requested pre-award surveys on all three offerors to ascertain their responsibility relative to their financial and production capacities. On December 5, the contracting officer sent Standard Form 1403 (SF 1403), "Preaward Survey of Prospective Contractor (General)," to the GSA Credit and Finance Section (GSA Finance) requesting that office to prepare a pre-award financial survey on Harvard. GSA Finance conducted this survey using financial information submitted by Harvard on November 18,⁴ and returned the SF 1403 to the contracting officer on December 6 recommending that no award be made to Harvard. GSA Finance provided a narrative explaining its adverse recommendation on the returned SF 1403. Based on his analysis of the pre-award financial survey, the contracting officer determined that Harvard was nonresponsible and informed Harvard of this determination in a letter dated January 16, 1992.

In a letter dated January 21, Harvard asked the contracting officer to reconsider his determination and offered to submit updated financial information. Harvard stated that its Corporate Vice President of Finance spoke with GSA Finance that day and discussed information necessary to receive a favorable determination. On January 22, the contracting officer contacted GSA Finance to discuss the

³GSA amended the IREP on January 6, 1992, to correct a quantity estimate for one of the items, and the contracting officer requested new BAFOs. Harvard responded on the same date that its BAFO would remain the same as originally submitted. Harvard remained in line for award.

⁴This financial information was submitted in response to a request by GSA Finance to conduct a pre-award survey on an IREP for stools and folding chairs. Harvard concedes that GSA's use of this information for the analysis of its responsibility for the shell chair IREP was permissible.

Harvard vice president's conversation. GSA Finance informed the contracting officer that, during the conversation, the Harvard official stated that the firm's financial status remained unchanged and that it did not have additional information different from the information originally submitted. Based on this conversation with GSA Finance, the contracting officer advised Harvard, in a letter dated January 23, that the original nonresponsibility determination would remain in effect. The contracting officer awarded the contract on January 24 to the offeror next in line for award.

Harvard protested the award to our Office on January 28. GSA suspended performance of the contract on January 30 in accordance with 4 C.F.R. § 21.4(b) (1992) and 31 U.S.C. § 3553(d) (1988). On March 20, GSA issued a Determination and Findings, pursuant to 4 C.F.R. § 21.4(b) and 31 U.S.C. § 3553(d)(2) (1988), permitting the awardee to continue with contract performance during this protest. On March 31, the U.S. District Court, Eastern District of Missouri, in response to Harvard's motion for a temporary restraining order, requested that our Office issue our decision on this protest no later than May 1, and put in abeyance the request for a temporary restraining order.

Harvard basically asserts that the contracting officer unreasonably determined it nonresponsible.

Contracts may only be awarded to responsible prospective contractors. Federal Acquisition Regulation (FAR) § 9.103(a) (FAC 90-8). To be determined responsible, a prospective contractor must have adequate financial resources to perform the contract, or the ability to obtain them. FAR § 9.104-1(a). In the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer must find the firm nonresponsible. FAR § 9.103(b). In making a responsibility determination, the contracting officer may rely on the results of a pre-award survey, but the determination is unreasonable if not based on accurate information and conclusions from the pre-award survey team. BNY, Div. of Haraco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 611. Where the contracting officer relies upon the pre-award survey, our Office will consider the accuracy of the survey information in judging whether a contracting officer's determination of nonresponsibility was reasonable. Id. Since the agency must bear the brunt of any difficulties experienced in obtaining the required performance, contracting officers have broad discretion and business judgment in reaching nonresponsibility determinations, and we will not question such a determination unless a protester

can establish that it lacked any reasonable basis or was made in bad faith. Diversified Cont. Servs., Inc., B-237209, Jan. 22, 1990, 90-1 CPD ¶ 84; Betakut USA Inc., B-234282, May 8, 1989, 89-1 CPD ¶ 432.

Here, GSA Finance used information submitted by Harvard, as well as Dun and Bradstreet reports dated March 31 and November 5, 1991, to conduct its analysis of Harvard's financial status and, based upon this analysis, concluded that Harvard should not be awarded the contract. The information submitted by Harvard included independently audited consolidated financial statements for the years ending September 30, 1989, and September 30, 1990, in which the auditor expressed "substantial doubt about [Harvard's] ability to continue as a going concern."

Also included in Harvard's submission to GSA Finance was a news release from Harvard announcing a conditional agreement with Harvard's debenture holders to reorganize the company and unaudited consolidated financial statements for the year ending September 30, 1991, and projecting the firm's financial status for the years ending September 30, 1991, through September 30, 1999. These projected statements were prepared under the assumption that the chapter 11 reorganization plan would be confirmed and approved by the Bankruptcy Court on or about October 1, 1991. In a cover letter included with this information, Harvard informed GSA Finance that court approval of the plan was expected to occur on or before December 31.

On the SF 1403 returned to the contracting officer, GSA Finance gave a description of the analysis supporting its "no award" recommendation of this \$13 million 2-year contract. This description noted nine-figure deficits in working capital and tangible net worth, an eight-figure net loss for the year ending September 30, 1991, and a summary of Dun and Bradstreet reports. Dun and Bradstreet reported Harvard's condition as "unbalanced," its trend as "down," and described a mixed trade payment history.⁵ The contracting officer followed the advice of GSA Finance and determined that Harvard lacked the requisite financial capability to be determined responsible.

Our review of the record before GSA at the time of the pre-award survey and the contracting officer's negative responsibility determination confirms the analysis described on the SF 1403. The troubled financial status indicated by Harvard's submitted information and GSA Finance's analysis

⁵Dun and Bradstreet did not give Harvard a rating because it had not received enough financial information from the firm to do so.

reasonably raised considerable doubt that Harvard had adequate financial resources to perform the contract, given its size and duration. While Harvard disputes the accuracy of the Dun and Bradstreet reports, we think GSA reasonably relied upon them, in the absence of countervailing evidence, since they were consistent with the other information submitted by Harvard.⁶

Harvard asserts that, since it had filed for reorganization under chapter 11, the pre-reorganization financial information relied upon by GSA is irrelevant to the issue of Harvard's ability to perform the contract. Harvard argues that, since GSA Finance did not mention the effects of the reorganization plan in the pre-award survey, GSA Finance did not consider the plan. Therefore, Harvard has challenged the completeness and reasonableness of the pre-award survey, and thus the reasonableness of the contracting officer's determination, because GSA did not give weight to Harvard's proposed plan of reorganization in evaluating the firm's financial capability.

The record as of the date of the pre-award survey shows that GSA Finance was cognizant of the alleged effects of Harvard's proposed reorganization plan.⁷ The fact that GSA

Harvard asserts that Dun and Bradstreet erred in reporting that Harvard had past-due accounts with its suppliers, and thus attempts to question the accuracy of the pre-award survey. Dun and Bradstreet is an independent reporting service that makes its reports available to the public for evaluating the financial positions of companies. Such reports are routinely used by contracting agencies in evaluating contractor responsibility. FAR § 9.105-1(c)(5); Oertzen & Co. GmbH, B-228537, Feb. 17, 1988, 88-1 ¶ 158. Here, GSA Finance merely informed the contracting officer that "[a] mixed trade payment history is reported" by Dun and Bradstreet. The reported trade payment history is consistent with the troubled financial position of the firm apparent from Harvard's financial statements, and Harvard had not submitted information to GSA that would indicate that the Dun and Bradstreet reports were inaccurate. Therefore, GSA had no reason to question the accuracy of the Dun and Bradstreet reports and, thus, no duty to independently verify the reports. It could reasonably rely upon the reports as a factor in making its responsibility determination.

GSA Finance used the unaudited financial statements for the year ending September 30, 1991, in assessing Harvard's financial capability. These statements filed with us and the Bankruptcy Court illustrate the alleged effect of the reorganization plan on Harvard if it were approved. Also,

Finance did not summarize the alleged effects of the proposed plan merely indicates that it gave the plan little or no weight in assessing Harvard's responsibility; this is supported by GSA's response to this protest as detailed below.

While GSA knew of the proposed reorganization and the projections of Harvard's future financial health based on an assumed approval of the plan, we cannot say, from the record before GSA, that GSA's decision to give little or no weight to Harvard's proposed reorganization plan was unreasonable. GSA explains that it properly did not give weight to the reorganization plan before court approval of the plan.⁹ In this regard, it was not apparent at either the time of the pre-award survey or the award when, or if, the court would approve the proposed plan.⁹ Therefore, the favorable financial projections in the proposed reorganization plan, and the projected unaudited financial statements, did not necessitate an affirmative responsibility determination because they did not, in themselves, resolve the concerns about Harvard's troubled financial position apparent from the other audited and unaudited financial statements.¹⁰

The current record also supports the reasonableness of GSA's decision to give the proposed plan little or no weight at the time of the responsibility determination. At that time, Harvard was awaiting approval of the plan by its creditors. The firm is still awaiting court approval of the plan.

the worksheets used by the financial analyst reflect his knowledge that Harvard expected approval of the plan by December 31, 1991.

⁹A reorganization plan does not become binding under the bankruptcy statutes until the plan is confirmed by the bankruptcy court. 11 U.S.C. § 1141(a) (1988).

⁹Harvard's submitted information showed that approval of the proposed plan was delayed from the originally anticipated October approval date to December 31 and had not yet been approved as of the time of award on January 24, 1992.

¹⁰Harvard's opinion that its pre-reorganization financial position is irrelevant and that the proposed reorganization plan must be given substantial weight in determining its responsibility is nothing more than a disagreement with GSA's conclusions and does not show that the nonresponsibility determination was unreasonable. See Firm Erich Bernion GmbH, B-234680; B-234681, July 3, 1989, 89-2 CPD ¶ 1 (two people reaching opposite conclusions from the same information does not show that a responsibility determination was unreasonable or made in bad faith).

Harvard notified our Office on April 8, 1992, that its debenture holders, lenders, and unsecured creditors tentatively approved Harvard's proposed reorganization plan on April 3, 1992--several months after award was made. Harvard filed this plan with the Bankruptcy Court on April 23, and stated that it expected the court to set a confirmation date at a hearing on June 8.

Harvard asserts that the time GSA Finance devoted to the pre-award survey (the contracting officer requested a survey on December 5 and the financial analyst made his recommendation on December 6) was insufficient to permit it to conduct a reasonable analysis. Our review of the pre-award survey, based on GSA Finance's narrative on the SF 1403 and its analysis documented on worksheets, reveals that GSA Finance conducted a detailed analysis of the financial data that supported its "no award" recommendation. Absent a showing that the analysis is flawed, the duration of a pre-award survey does not provide a basis to challenge the reasonableness of the survey. See American Sys. Corp., 68 Comp. Gen. 475 (1989), 89-1 CPD ¶ 537 (3-hour plant visit may be relied upon to make a nonresponsibility decision); Oertzen & Co. GmbH, supra (90-minute review of Dun and Bradstreet report may be relied upon to make a nonresponsibility determination).

Harvard also contends that the nonresponsibility determination should be overturned because GSA Finance did not complete the Standard Form 1407 (SF 1407) and submit it to the contracting officer as required by FAR § 9.106-4(a).¹¹ GSA concedes that GSA Finance did not complete the SF 1407, but asserts that GSA Finance did conduct and adequately document the analysis which the form would have provided. GSA explains that its practice is to conduct the analysis outlined by the SF 1407, and only to complete the form when a small business concern is involved because documentation of the analysis is sent to the Small Business Administration (SBA) in connection with SBA's consideration of a negative responsibility determination pursuant to FAR § 9.106-4(b).

¹¹FAR § 9.106-4(a) (FAC 90-9) states:

"The surveying activity shall complete the applicable parts of SF 1403, Preaward Survey of Prospective Contractor (General); . . . [and] SF 1407, Preaward Survey of Prospective Contractor--Financial Capability; . . . and provide a narrative discussion sufficient to support both the evaluation ratings and the recommendations."

Our review of the record confirms that GSA Finance's narrative on the SF 1403 sufficiently documented the basis for its recommendation and provided the contracting officer with a reasonable basis to support his nonresponsibility determination.

SF 1407 (REV. 9-88) is divided into seven parts: (1) the recommendation, which includes a narrative supporting the recommendation; (2) general information identifying the contractor; (3) a balance sheet/profit and loss statement; (4) information about the contractor's financial arrangements, including whether an independent analysis supports the financial position reflected in the financial statements; (5) financial aid currently obtained from the government; (6) business and financial reputation, including reports from such services as Dun and Bradstreet; and (7) sales, both backlogged and anticipated, extending through the next six quarters.

GSA Finance provided a narrative on the SF 1403 that it returned to the contracting officer describing the degree of deficits in working capital and tangible net worth, and the amount of loss for the period ending September 30, 1991. GSA Finance also explained that it reviewed Dun and Bradstreet reports, which stated that Harvard had filed for chapter 11 bankruptcy in May 1991, that Dun and Bradstreet lacked sufficient information to rate the firm, but that the condition was reported as "unbalanced" and the trend as "down," and that Harvard had a mixed trade payments history. GSA Finance concluded that, according to its analysis, it could not recommend Harvard for the 2-year contract to supply shell chairs.

The SF 1403 was signed by the financial analyst who prepared the survey and was dated December 6. The analyst's supervisor initialed and dated the form December 9. The record also shows that this same financial analyst prepared work sheets on November 21 in response to another contracting officer's request for a pre-award survey on Harvard. These worksheets were prepared using Harvard's audited financial statements and unaudited financial statements. They examined financial ratios and noted other relevant information, including an existing court case, and stated that confirmation of the reorganization plan was expected by December 31. Although the record does not show that items such as government financial aid and the six-quarter projections of backlogged and anticipated sales were evaluated, the record does indicate that GSA Finance

requested such information from Harvard prior to the pre-award survey, but that Harvard did not supply this information.¹²

Based on our review of the record, GSA Finance performed and documented the analysis outlined in SF 1407. Therefore, GSA Finance's failure to complete the SF 1407 provides no basis to sustain Harvard's protest.¹³

Harvard states that it previously had been found responsible in other GSA procurements, even though it was in bankruptcy. Responsibility determinations are based upon the circumstances of each procurement which exist at the time the contract is to be awarded and the nature of the procurement; these determinations are inherently judgmental and the fact that different conclusions may be reached as to a firm's responsibility does not demonstrate unreasonableness or bad faith. NJCT Corp., 64 Comp. Gen. 883 (1985), 85-2 CPD ¶ 342. Here, given the higher price and longer duration of this contract, as compared to other contract awards referenced by Harvard, it was reasonable, and thus within GSA's discretion and business judgment, to decide that Harvard lacked the requisite financial capability for the procurement in question here.

Harvard finally contends that it was impermissibly denied notice of the proposed adverse responsibility determination, that GSA did not request additional information, and that the contracting officer did not respond to its attempts to submit such information.

GSA reports that Harvard's Vice President of Finance telephoned the GSA financial analyst who conducted the pre-award survey after Harvard was notified of the nonresponsibility determination. GSA states, in its protest report, that the vice president told the financial analyst that the firm had

¹²Harvard claims that the financial statements satisfied GSA Finance's request for information. Our review of the record shows that Harvard either did not provide any information for some areas requested, or that the information it did provide in its financial statements was not detailed enough to complete items on SF 1407, such as comments on the firm's business reputation or the six-quarter projection of backlogged and anticipated sales figures.

¹³An agency violation of a procurement regulation is only a basis for our Office to sustain a protest where that violation prejudiced the protester, and our Office will not hold form over substance in determining whether a party in the procurement process has complied with a regulation. See J.R. Youngdale Constr. Co., Inc., B-219439, Oct. 28, 1985, 85-2 CPD ¶ 473.

no new information different from that already submitted. The January 21, 1992, letter from Harvard to the contracting officer acknowledges this conversation. In its comments on the agency report, Harvard does not specifically refute the financial analyst's version of the conversation.

It is incumbent upon the offeror to provide any additional information to establish responsibility, particularly when a nonresponsibility determination has already been made. RCI Mgmt., Inc., B-239938, Oct. 12, 1990, 90-2 CPD ¶ 283. Although the contracting officer may discuss pre-award survey information with the prospective contractor before making his determination, FAR § 9.105-3(b), such discussions are not required.¹⁴ Oertzen & Co. GmbH, supra.

Moreover, while FAR § 9.105-1(b)(3) states "information on financial resources and performance capability shall be obtained or updated on as current a basis as is feasible up to the date of award," the record here establishes that the information which GSA relied upon was current. The pre-award survey considered information that the protester submitted just 3 weeks prior to the survey; the survey was completed the month prior to the award of the contract; and the protester has not produced any information to indicate that the information it had submitted had changed significantly prior to award.


Where the information on file with the agency appears to reasonably reflect the position of a prospective contractor, the contracting officer may properly base a nonresponsibility determination on the evidence of record, without supplementing the evidence or affording the prospective contractor with an opportunity to explain or otherwise defend against the evidence. See Oertzen & Co. GmbH, supra; BMY, Div. of Harsco Corp., supra; Martin Elecs., Inc., B-221298, Mar. 13, 1986, 86-1 CPD ¶ 252. In addition, given that the contract was to commence on February 1, the contracting officer was not required to delay his determination or award when Harvard contacted GSA shortly before that date, so as to allow Harvard the opportunity to persuade GSA

¹⁴Harvard asserts that GSA internal policies required GSA to expressly solicit additional information before it could find a contractor nonresponsible. An agency's internal policies and regulations provide guidance for agency personnel and do not, in themselves, provide outside parties with any legal rights. Loral Fairchild Corp.--Recon., B-242957, Dec. 9, 1991, 91-2 CPD ¶ 524. In any event, Harvard has not submitted the additional information showing changed financial capability that it alleges it would have submitted at the time of the award.

to find it responsible.¹⁵ Nova Int'l, Inc., B-227696, Sept. 21, 1987, 87-2 CPD ¶ 284.

In sum, GSA reasonably exercised its business judgment in determining Harvard nonresponsible based upon its financial condition.¹⁶

The protest is denied.


for James F. Hinchman
General Counsel

¹⁵Harvard also asserts that GSA did not comply with General Services Acquisition Regulation § 509.105-3, which reads:

"When an offer is rejected because of a determination by the contracting officer that the prospective contractor is not responsible, the contracting officer shall notify the prospective contractor by letter of the basis for the rejection. This will provide the offeror with the opportunity to cure the factors that lead to the nonresponsibility determination prior to the submission of offers in response to future solicitations." 48 C.F.R. § 509.105-3 (1991).

It is apparent that this regulation pertains to Harvard's eligibility for future procurements and that GSA has advised Harvard of the reasons that it was found nonresponsible.

¹⁶During the course of this protest, both parties have addressed the issue of the quality of Harvard's performance under previous contracts. Although poor past performance may be an adequate basis for a nonresponsibility determination, FAR § 9.104-3(c), we need not consider this matter since GSA otherwise had a reasonable basis for finding Harvard nonresponsible based on its inadequate financial capability.