148577
H. Wray

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

Decision

Matter of: L & M Mercadeo Internacional, S.A.

File: B-250637

Date: February 11, 1993

Armando Lyma-Young for the protester.
Albert J. Joyce, Esq., Panama Canal Commission, for the agency.
Lorna MacLeod, Esq. and Rachel DeMarcus, Esq., Office of General Counsel, GAO, participated in the preparation of the decision.

DIGEST

The General Accounting Office (GAO) will not reverse a contracting officer's determination that a bidder who proposes to subcontract most work to a company that failed to perform under an earlier government contract is nonresponsible unless the officer made the determination without any reasonable basis or in bad faith.

The settlement of an earlier contract dispute did not preclude the contracting officer from finding a bidder nonresponsible for using the subcontractor who had caused the earlier non performance.

DECISION

L & M Mercadeo Internacional, S.A. (L&M) protests the rejection of its bid under Panama Canal Commission Solicitation No. CSI-873850-05, based on a determination that a subcontractor it proposed to use was nonresponsible. L&M contends that the Panama Canal Commission improperly determined it to be nonresponsible for the procurement and, therefore, ineligible for the award. We deny the protest.

The solicitation called for the supply of electrical devices to be used in a towing locomotive. L&M submitted a bid to the Panama Canal Commission on August 5, 1992, which identified Vanco Products Inc. as the intended supplier. The Commission, by letter dated September 16, 1992, informed L&M that its bid had not been accepted because the contracting officer had determined Vanco nonresponsible.

The reason for the nonresponsibility determination was Vanco's failure to supply conforming parts under an earlier

government contract. The earlier contract, which also involved Vanco as L&M's supplier, obligated L&M to supply the Commission insulators and mica washers for use in towing locomotives. The Commission, on January 2, 1992, approximately 1 week after the established delivery date, notified L&M that the insulators it proposed to use contained asbestos, which was prohibited under the solicitation's specifications. Vanco responded to the Commission's notification by proposing to supply a certain nonasbestos material that it identified as NAD 11. The Commission, after examining the physical properties of NAD 11, concluded that the material failed to meet essential requirements of the specifications.

The Commission notified L&M of its findings on NAD 11 and inquired into whether it would be able to supply insulators that met the contract's specifications. L&M replied by offering to reduce the contract price by 10 percent if the Commission would accept NAD 11 in the insulation. The Commission, on January 30, 1992, informed L&M that its offer was unacceptable and that the portion of the contract relating to the insulators would be terminated for default.

L&M and the Commission settled a dispute arising from the contract termination on September 28, 1992. As part of the settlement, the Commission agreed that the termination would not, by itself, be a basis for a future determination of nonresponsibility.

GAO will not question a determination of nonresponsibility unless a protester demonstrates the lack of any reasonable basis for the determination or bad faith on the part of the contracting agency. See Marathon Watch Company, Ltd., B-247043, Apr. 23, 1992, 92-1 CPD ¶ 384. Because the record in this case contains sufficient evidence to support the contracting officer's determination, and L&M has not presented any evidence that the contracting agency acted in bad faith, the protest is denied.

The contracting officer properly considered Vanco's performance record in making a determination that L&M was nonresponsible. A contracting officer must make an affirmative determination that a prospective prime contractor is responsible before awarding a contract. Federal Acquisition Regulation (FAR) § 9.103(b). The quality of the subcontractors that a prospective prime contractor designates may influence the contracting officer's determination. FAR § 9.104-4(a). While a prospective prime contractor generally determines the responsibility of its subcontractors, federal regulations authorize a contracting officer directly to determine a subcontractor's responsibility when a contract involves substantial subcontracting. FAR § 9.104-4(b);

See also Mico Phototype, Inc., B-223756, Oct. 9, 1986, 86-2 CPD ¶ 413. The contracting officer uses the same standards to determine the responsibility of a prospective subcontractor as that of a prospective prime contractor. Id.

A contracting officer must presume that a contractor whose performance under a recent government contract was seriously deficient is nonresponsible unless the deficiency was beyond the contractor's control or has since been rectified by appropriate corrective action. FAR § 9.104-3(c). The failure to meet quality requirements of a contract is a significant factor in evaluating a contractor's performance record. Id.

In this case, Vanco, less than 7 months before the bid at issue, failed to perform under a government contract, causing its prime contractor, L&M, partially to default. The nature of Vanco's deficiency, failing to meet the contract's quality requirements for purchased goods, is the kind of problem that would lead to a presumption of nonresponsibility. The record does not contain any evidence that would rebut the presumption. It does not contain any evidence that the failure to supply conforming parts was beyond Vanco's control. Nor does it suggest that Vanco has taken any step to prevent a similar deficiency. Therefore, the contracting officer had a reasonable basis for determining Vanco nonresponsible and refusing to accept a bid in which Vanco would substantially participate.[1]

L&M asserts that the settlement of the dispute arising out of the prior contract precludes the contracting officer from considering Vanco's performance under the contract in determining its responsibility for future contracts. L&M reads too much into the language of the settlement agreement. We will not imply a condition to a settlement that is not clearly set out in the language of the settlement agreement. See Automaker, Inc., B-249477, Nov. 24, 1992, 92-2 CPD ¶ 372. The agreement settling the dispute between the Commission and L&M stated only that L&M would not be assessed reprocurement costs and that the partial termination of the contract would not be used, by itself, as the basis for a future nonresponsibility determination. The agreement does not make any representation about disregarding the subcontractor's performance under the contract. Therefore, the agreement did not prevent the contracting officer from considering

[1]Vanco's failure to perform under the prior contract is sufficient to support the contracting officer's nonresponsibility determination. Therefore, we need not examine the Commission's argument that Vanco was associated with Van Berg Manufacturing, another nonperforming supplier.

Vanco's prior deficiency in assessing whether L&M had selected a responsible supplier.

Finally, L&M asserts that the contracting agency evinced bad faith by failing to inform it of Vanco's poor performance record. However, the record shows that the Commission did inform L&M of Vanco's performance problems in January 1992, when, under the prior contract, it reported to L&M that its supplier, Vanco, intended to furnish non conforming goods. Because the evidence refutes L&M's claim that the Commission acted in bad faith, we find no reason to overturn the contracting officer's determination.

The protest is denied.

James F. Hinchman
General Counsel