Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mine Safety Appliances Company

File: B-266025

Date: January 17, 1996

J. Eric André, Esq., Howrey & Simon, for the protester.
Kenneth B. Weckstein, Esq., and Shlomo D. Katz, Esq., Epstein, Becker & Green, for The Canadian Commercial Corporation/Racal Filter Technologies, Limited, an interested party.
Joseph M. Pichiotti, Esq., and Jeffrey I. Kessler, Esq., Department of the Army, for the agency.
Tania L. Calhoun, Esq., and Ralph O. White, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that contracting officer's affirmative determination of responsibility was made with such willful disregard of the prospective awardee's record of prior performance as to constitute bad faith is denied where the record does not support this allegation.

DECISION

Mine Safety Appliances Company (MSA) protests the award of a contract to The Canadian Commercial Corporation/Racal Filter Technologies, Limited under invitation for bids (IFB) No. DAAE20-95-B-0247, issued by the Department of the Army for the production and delivery of gas mask filter canisters. MSA alleges that the Army's affirmative determination of Racal's responsibility was made in bad faith.

We deny the protest.

The Army issued this solicitation on May 22, 1995, to acquire 472,038 C-2A1 filter canisters for M43 series gas masks. MSA and Racal have been the only providers of these canisters to the Army under the eight contracts awarded since 1989. The most recent contracts have been awarded to Racal, with the last one awarded on June 8, 1992. Racal and MSA were the only firms submitting bids in response to this solicitation, and Racal was the apparent low bidder. After the contracting officer determined that the firm was responsible, Racal was awarded the contract on August 25. This protest followed.

MSA contends that Racal has a recent history of seriously deficient contract performance under its prior contracts for these canisters which, the protester

asserts, gives rise to a presumption of nonresponsibility under Federal Acquisition Regulation (FAR) § 9.104-3(c) that cannot be overcome in good faith.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. FAR § 9.103(b). This determination rests principally within the broad discretion of the contracting officer, who, in making that determination, must of necessity rely on his or her business judgment. Tutor-Saliba Corp., Perini Corp., Buckley & Co., Inc., and O & G Indus., Inc., A Joint Venture, B-255756.2, Apr. 20, 1994, 94-1 CPD ¶ 268; Pan Am Aero, B-220486, Oct. 4, 1985, 85-2 CPD ¶ 382. We will review an affirmative responsibility determination where it is shown that it may have been made fraudulently or in bad faith. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1995).

An affirmative determination of responsibility in the light of unfavorable information on the prior performance history of a bidder, in some instances, may reflect on a contracting officer's business judgment, but is not itself evidence of bad faith per se. Gayston Corp.--Recon., B-223090.2, July 25, 1986, 86-2 CPD ¶ 115. While a contracting officer must consider deficiencies in past performance when making a responsibility determination, FAR § 9.104-1(c), recent unsatisfactory performance does not automatically require a nonresponsibility determination. Jay Fran Corp., B-217145, Jan. 2, 1985, 85-1 CPD ¶ 8. Performance history is but one of several factors the contracting officer should take into account when considering a prospective contractor's responsibility. FAR § 9.104-1; Turbine Engine Servs.--Recon., 64 Comp. Gen. 639 (1985), 85-1 CPD ¶ 721. In each case, the contracting officer must make a business judgment as to whether the prior unsatisfactory performance indicates such problems will also be encountered during performance of the contract to be awarded. Fujinon, Inc., B-221815, Jan. 30, 1986, 86-1 CPD ¶ 112; Pan Am Aero, supra; Jay Fran Corp., supra. In this regard, the presumption of nonresponsibility in cases where a prospective awardee has recently been "seriously deficient" in contract performance may be rebutted where the contracting officer finds that corrective action has been taken. FAR § 9.104-3(c); see Clyde G. Steagall, Inc. d/b/a Mid Valley Elec., B-237184 et al., Jan. 10, 1990, 90-1 CPD ¶ 43; Fujinon, Inc., supra.

Where, as here, the protester alleges that the awardee has a history of seriously deficient contract performance concerning the items being procured, the issue before us is whether the contracting officer's affirmative determination of responsibility was made with such willful disregard of the awardee's record of prior performance as to constitute bad faith. William Dixon Co., B-235241, Aug. 8, 1989, 89-2 CPD ¶ 114; HLJ Management Group, Inc., B-225843.6, Mar. 24, 1989, 89-1 CPD ¶ 299. The protester in such cases bears a heavy burden of proof. Contracting officials are presumed to act in good faith, William Dixon Co., supra, and we will

not attribute bad faith to contracting officials absent evidence that they had an intent to harm the protester. Gayston Corp.--Recon., supra.

In our view, MSA has not met this burden. While it is undeniable that Racal's prior performance history includes providing defective canisters to the Army, there is no support for the proposition that the contracting officer's affirmative determination of Racal's responsibility willfully disregarded this prior performance history.

In 1992, the Army began receiving reports of nonconformances and deficiencies within the C-2 canister[1] stockpile and commenced a serviceability test of both MSA and Racal canisters produced between 1988 and 1992. One of the reports it received about Racal canisters, from MSA, spurred an Army visit to Racal's facilities, where an inspection confirmed that various nonconformances pointed out by MSA did, in fact, exist. The Army obtained a list of the corrective actions proposed by Racal and ordered immediate testing of a sample group of MSA and Racal canisters. The results of this testing showed that both firms had produced canisters with various nonconformances, none of which were considered to be life-threatening.

During Racal's subsequent first article testing under its most recent contract, the Army discovered that the nonconformances it had previously identified had not been corrected and extracted a verbal agreement from Racal to take the necessary corrective actions. Racal's first article test was rejected, and the Army issued the firm a cure notice under a prior contract in which it again pointed out these uncorrected nonconformances. Racal responded with a detailed account of the corrective actions it had taken and would take to rectify these problems. During Racal's February 1993 new first article testing, the Army noted that the corrective actions had been taken. Racal passed this first article testing, but the Army asked the Defense Contract Management Area Operations (DCMAO) office in Ottawa to more closely scrutinize the firm's operations.

On November 2, 1993, the Department of Defense Inspector General (DOD IG) issued an audit report on the procurement of these canisters in response to a congressional request. The DOD IG concluded, among other things, that the Army had responded appropriately to MSA's concerns. The DOD IG referred to the ongoing serviceability tests, but did not discuss their results because testing had not concluded. These test results, issued November 30, showed that both firms had produced canisters with nonconformances. Of interest here,[2] a canister from one

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[1]The C-2A1 filter canister being procured here is the successor to the C-2 canister.

[2]Both firms had produced packing cans which leaked and canisters which had
(continued...)

Racal lot leaked when tested for protective capacity against dioctylphthalate (DOP)--a particulate penetrant. This was considered to be a critical defect. In addition, sample canisters from five Racal lots showed a gas-life degradation below the 30-minute minimum when tested for protective capacity against cyanogen chloride (CK)--a blood agent. The Army suspended all six Racal lots and recommended continued surveillance testing.

In December 1994 and May 1995, MSA representatives contacted the Secretary of the Army and two successive Acting Deputy Assistant Secretaries of the Army for Procurement to reiterate their concerns with Racal's canisters. Each time, the respective Assistant Secretary was fully briefed on the issues, and, each time, the respective Assistant Secretary concluded that the Army had acted appropriately and conveyed that information to MSA. The last briefing indicated that testing had continued and was continuing, and that there had been no failures since the initial suspensions discussed above. Moreover, both manufacturers' canisters were averaging a similar CK gas-life degradation rate. In August, MSA asked the DOD IG to incorporate the test results in its audit report, but the DOD IG team's subsequent outbrief on the investigation revealed no major new findings.

The record shows that the affirmative determination of Racal's responsibility was based on an informal contractor review, conducted by a government industrial specialist and approved by the contracting officer. The review found that Racal was not on the debarred contractor list, the contractor alert list, or the contractors requiring special attention list; its quality assurance rating was 90 percent based upon one open and four closed contracts, and the quality assurance representative at Racal's plant stated that there were no problems with the firm's quality; the firm had no contract delinquencies in the past year, no financial problems, and an apparent production capability; the firm's business ethics and integrity were in good standing; and DCMAO-Ottawa personnel had indicated no problems. The specialist recommended a finding of responsibility. The contracting officer states that, prior to award, he examined the specialist's review and concluded that there was no basis to disagree with his recommendation that Racal be determined responsible. "Based on [his] review of all the circumstances, including the detailed [performance] history discussed above, [he] determined that Racal was in fact responsible for award."

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[2](...continued)
undersized threads. In addition, MSA had produced canisters with broken keys, partial tears on key strips, and burn marks, and Racal had produced canisters with paint overspray.

The contracting officer states that it was and is his determination that Racal was not seriously deficient in contract performance in light of the corrective action it had taken. See FAR § 9.104-3(c). The record shows that Army testing has not uncovered any failures since the initial Racal suspensions; that corrective actions were taken; and that the nonconformances revealed by various testing are not life-threatening. Moreover, as discussed above, recent unsatisfactory performance does not automatically require a nonresponsibility determination, see Jay Fran Corp, supra, and MSA does not raise any other considerations of responsibility such as those noted by the specialist. We see no basis for concluding that the Army unreasonably found that Racal could meet the contract requirements, much less that the Army acted in bad faith in making award to Racal. William Dixon Co., supra.

MSA alleges that the contracting officer willfully failed to consider the facts of Racal's "seriously deficient performance" at the time of the responsibility determination by relying upon the informal contractor review and not a pre-award survey.

A pre-award survey is not a legal prerequisite to an affirmative determination of responsibility; contracting officials have broad discretion concerning whether to conduct such surveys and may use, as was done here, other information available to them concerning a firm's responsibility. Zeiders Enters. Inc., B-251628, Apr. 2, 1993, 93-1 CPD ¶ 291. The determination not to request a pre-award survey does not establish any impropriety on the agency's part. Id. Here, the protester's arguments rest upon its characterization of Racal's past performance as "seriously deficient," a characterization not shared by the Army, as well as its belief that the contracting officer did not have sufficient information concerning Racal's prior performance, a belief belied by the contracting officer's own statement. When the contracting officer's statement is taken together with the additional information in the informal contractor review, we see no basis to conclude that the contracting officer improperly decided not to request a pre-award survey. Id. Finally, MSA's failure to produce any evidence of an Army intent to harm the protester, in the face of a record which affords ample evidence to the contrary, underscores our conclusion that the contracting officer's affirmative determination of responsibility here was not made in bad faith. See William Dixon Corp., supra.

The protest is denied.

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