

investigation and the D&F's conclusions with respect to the second and third MacDill AFB contracts. It did not challenge the conclusions about the Facility 7 project. Specifically, Spencer complained that it had identified for the FSO four individuals as references on six construction projects at MacDill, including at least two of the projects identified in the D&F, but that none had been contacted in connection with the determination of nonresponsibility. Of the six projects, Spencer said four were completed and occupied and two had also been completed, but had unresolved claims or litigation.

Spencer blamed its problems on the MacDill contracts on factors beyond its control, specifically: contract drawings with numerous design errors, gross incompetence of government personnel, inaccurate directions given, reversal of directions given, government's delay and non-responsiveness on change orders and a pre-existing leaking roof at the work site of one project.

Spencer furnished letters on the two projects from Spencer's president to MacDill's Contracting Division and to the Corps of Engineers, which provide some support for four of Spencer's assertions, that there were minor design errors in some drawings, some government instructions or decisions were reversed and may have thereby caused delays, some delay was related to change orders, although the delay was not clearly all attributable to the government, and a pre-existing roof leak caused minor damage to new work on the Facility 49 project.

In further support of its contention that it is a responsible contractor, Spencer lists in its protest a number of other completed projects, including some postal contracts. Among those identified is the Hillsborough County School Board. The contracting officer has submitted copies of correspondence and documents from the files of the architect for a Hillsborough County junior high school project for some \$740,000 cited by Spencer as an example of satisfactory performance. The documents reflect the failure of some plumbing, HVAC, electrical and masonry work and materials to meet contract specifications, the contractor's failure to meet the contract schedule, and the contractor's careless handling of materials and damage to existing equipment. The brick work was rated "poor," and problems with the foundation block work were so pervasive that it was rejected.

Spencer responded to this correspondence with a letter stating that on August 18, Spencer was awarded another contract by the school board, suggesting that the contracting officer contact two school board officials, and requesting a meeting. Spencer's letter does not address the problems raised by the school board correspondence.

If information obtained in the course of a pre-award evaluation of an apparent low bidder does not indicate clearly that the prospective contractor is responsible, it is the contracting officer's obligation to make a determination of nonresponsibility. PCM 1-902. Under the PCM's minimum standards of responsibility, the prospective contractor must:

[h]ave a satisfactory record of performance (contractors who are seriously deficient in current contract performance, when the number of contracts and the extent of deficiency of each are considered, shall, in the absence

of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to meet this requirement). Past unsatisfactory performance, due to failure to apply necessary tenacity or perseverance to do an acceptable job, shall be sufficient to justify a finding of nonresponsibility.

PCM 1-903.1 (iii).

This office's standard for review of nonresponsibility determinations is well established as stated in Craft Products Company, P.S. Protest No. 80-41, February 9, 1981:

A responsibility determination is a business judgment which involves balancing the contracting officer's conception of the requirement with available information about the contractor's resources and record. We well recognize the necessity of allowing the contracting officer considerable discretion in making such a subjective evaluation. Accordingly, we will not disturb a contracting officer's determination that a prospective contractor is nonresponsible, unless the decision is arbitrary, capricious, or not reasonably based on substantial information.

(Cited with approval in Marine & Industrial Insulators, Inc., P.S. Protest No. 87-31, July 1, 1987.)

The circumstances of Spencer's past performance cited by the contracting officer suggest its lack of the "necessary tenacity and perseverance to do an acceptable job." a criterion for responsibility. H & M Leasing, P.S. Protest No. 81-55, December 30, 1981. "What is required to sustain a determination of nonresponsibility for lack of tenacity and perseverance to do an acceptable job is a clear showing that a prospective contractor did not diligently or aggressively take whatever action was necessary to solve its problems." Mesa Constructors, P.S. Protest No. 83-39, September 20, 1983. Consolidated Airborne Systems, Inc., 55 Comp. Gen. 571, 576 (1975), citing Alton Iron Works, Inc., Comp. Gen. Dec. B-170224(2), October 8, 1970. "We are concerned not with whether a firm has or can acquire the capability to perform, but whether a firm that is deemed to possess adequate capability applies it in a sufficient measure to insure satisfactory completion of the contract. Id., citing 51 Comp. Gen. 288 (1971).

In this case, there is substantial evidence to support the contracting officer's determination that Spencer lacks a satisfactory record of performance and the necessary tenacity and perseverance to do an acceptable job.

Spencer does not contest the contracting officer's finding that the contract for alterations to Building 49 was terminated for default. The items cited by Spencer as contributing to its delay are the ordinary problems of executing construction alteration contracts and do not explain or exonerate Spencer's inability to perform.

Spencer submitted some correspondence referring to problems with the corrosion control facility. A letter dated July 7, 1987, from Spencer to the Corps involved the government's initial rejection and ultimate acceptance of water heaters Spencer had

installed. Spencer apparently relies on the letter to support its assertion that delays in progress on the contract were attributable to government personnel. The D&F identified problems of extreme delay with that contract, which was scheduled for completion in March 1987, but was not yet complete in early July. The water heater problem was not brought to Spencer's attention until late March, and was resolved in early May, leaving unexplained delays before and after that incident.

Although the letters Spencer submitted suggest that some delays were not of its doing, they do not amount to an exonerative explanation for deficient performance and do not address the Facility 7 deficiencies. See Craft Products Company, supra. Moreover, Spencer's response to the Hillsborough County correspondence fails to explain or contradict the serious recent failures in quality and timeliness of work on a project similar to the post office expansion. See United Converters and Printers, P.S. Protest No. 80-19, July 24, 1980.^{1/} Spencer's continuing and recent past unsatisfactory performance is a reasonable basis for a finding of nonresponsibility, in the absence of justification or proof of ability to perform at the time of award. M. L. Hatcher Pickup and Delivery Services, Inc., P.S. Protest No. 80-36, July 16, 1980. Finally, Spencer's assertions that it has suspended its bid program in anticipation of award of this contract and that it is ready and able to furnish the required bonds do not constitute evidence of present capability to perform sufficient to overcome the facts on which the D&F is based.^{1/}

The protest is denied.

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[Compared to original 3/12/93 WJJ]

^{1/} There is no requirement that the contracting officer contact the particular persons named by the bidder as references. It is evident from Spencer's correspondence that the persons from whom the contracting officer obtained information were appropriately knowledgeable about the contracts in question.

^{2/} The contracting officer's determination also considered alleged labor violations of Spencer on other jobs. A pattern of previous violations of statutes and regulations administered by the Labor Department may be sufficient to support a determination of nonresponsibility (General Painting Company, Inc., Comp. Gen. Dec. B-219449, November 8, 1985, 85-2 CPD & 530). In the present case, the contracting officer relied on assertions of unspecified statutory violations, lacking documentary support, and a report of an ongoing, and therefore presumably incomplete, investigation of other violations. Because the record contains virtually no supported facts on the question of labor violations, that issue has not been considered in reaching this decision.