

October 29, 1993

P.S. Protest No. 93-14

A-1 TRANSMISSION

Solicitation No. 072368-93-A-0604

DIGEST

Protest against nonresponsibility determination is denied where protester failed to show that it was arbitrary, capricious, or not reasonably based on substantial information; a record of recent unsatisfactory performance on a postal contract can justify a finding of nonresponsibility even when that contract was not terminated for default; and a nonresponsibility determination for one solicitation does not amount to a *de facto* debarment.

DECISION

A-1 Transmission (A-1) timely protests the award to The Trans-Plant of a two-year requirements contract for the rebuilding of transmissions and torque converters for the Tacoma, WA, Vehicle Maintenance Facility (VMF). A-1, which had the previous contract for these services, challenges the contracting officer's determination that it is not responsible because of its unsatisfactory performance on that contract.

Solicitation No. 072368-93-A-0604 was issued by the Purchasing Service Center in Aurora, CO, on June 7, 1993, with an offer due date of June 29.¹ The solicitation provided that the contractor would furnish the labor and materials necessary for the work on an as-needed

¹ A-1's previous contract, which covered the period from April 16, 1991, through April 15, 1993, had been administered by a contracting officer in Seattle, WA.

basis, and that when orders were placed, the transmissions or converters would be picked up by the contractor and redelivered with the work completed within 72 hours. The solicitation had no provision explaining how offers would be evaluated for award. In the absence of price-related or other evaluation factors, award is to be made on the basis of price to the lowest responsible proposer. Procurement Manual (PM) 4.2.3.

Of three offers received, A-1's was the lowest-priced.² However, the contracting officer determined that A-1 was nonresponsible due to performance problems experienced on its previous contract, acceding to the Tacoma VMF Manager of Vehicle Service's request that A-1's proposal not be considered for the new contract because of the unsatisfactory overall quality of A-1's work. Award was made to The Trans-Plant on July 14.

The protester admits that "[d]eficiencies were noted" under the prior contract, but contends that it "took immediate corrective steps" concerning them and that the Postal Service subsequently "represented that all adequate corrective measures had been taken." The protester complains that the contracting officer failed to take into account the "consistent representations" to A-1 by postal representatives that its performance after it took those remedial steps was "satisfactory" and also failed to consider information from other sources about A-1's performance.³ The protester claims that these failures were contrary to PM 3.3.1 e.3.,⁴ constitute bad faith on the part of the contracting officer, and constitute an improper constructive debarment of the protester. The protester also states that "[a]fter two years of substantially satisfactory performance with recent affirmative representations" the Postal Service should have notified A-1 that its responsibility was at issue and contends that the failure to give such notice "constitutes a waiver on the part of the Postal Service."

Finally, the protester alleges that a Postal Service mechanic "has or appears to have an employment or other close relationship with Trans-Plant" that violates the Code of Ethical Conduct for Postal Employees, 39 C.F.R. Part 447, creating an employment conflict of interest which creates "at least the appearance of impropriety" and "improper favoritism."⁵

² The protester offered to perform the quantity of supplies and services estimated to be required by the solicitation for \$30,050.00; The Trans-Plant's next-lowest offer totalled \$37,498.02.

³ Specifically, the protester contends that the contracting officer should have considered information about a current contract with the General Services Administration which it states it is performing satisfactorily.

⁴ That PM section states:

Before making a determination of responsibility, the contracting officer must possess or obtain information sufficient to be satisfied that a prospective contractor currently meets applicable standards of responsibility.

The PM goes on to state that "[s]ources of information include" the list of debarred, suspended, and ineligible contractors; records and experience data; the prospective contractor itself; and other customers of the prospective contractor including other government agencies.

⁵ Thus, 39 C.F.R. 447.23(a) provides that no postal employee "shall accept employment . . . under circumstances in which acceptance may result in, or create the appearance of, a conflict of interest."

The protest states that it is "simply outrageous that a fully qualified . . . responsible small business concern can lose" to an offeror that is "twice as high."⁶

In reply to the protest, the contracting officer asserts that although A-1's was the lowest-priced proposal, "acceptance of A-1's offer is not in the best interest of the Postal Service" because A-1's performance of the previous contract employee was unsatisfactory. The contracting officer claims that he did review "all pertinent, current information" before determining that A-1 was nonresponsible.

The contracting officer stresses that A-1's overall performance was unsatisfactory, with "a number of delays and [resultant increases to] the Postal Service's operational costs." He cites various postal documents dated between August, 1991, and February, 1993, which detail performance problems involving A-1's inability to complete work within the 72-hour period required under the contract and about transmissions and converters failing while under warranty.⁷ The contracting officer states that he sought the opinion of the Manager

The Postal Service's Standards of Conduct were superseded February 3, 1993, by regulations issued by the U.S. Office of Government Ethics pursuant to the Ethics in Government Act which are codified at 5 C.F.R. Part 2635. Those regulations establish general principles of ethical conduct, including the principles that "[e]mployees shall not engage in outside employment or activities . . . that conflict with official Government duties and responsibilities" (5 C.F.R. 2635.101 (b)(10)) and that "[e]mployees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards set forth in this part. Whether particular circumstances create [such] an appearance . . . shall be determined from the perspective of a reasonable person with knowledge of the relevant facts." 5 C.F.R. 2635.101 (b)(14).

⁶ The protester does not explain how it arrives at this characterization of The Trans-Plant's price.

⁷ The record contains the following:

1) A performance report dated August 8, 1991, in which the Manager of Vehicle Services in Tacoma placed a check mark under "No" in answer to the following questions:

Does this vendor usually have items that you need in stock?

Are deliveries prompt?

Is the vendor helpful in obtaining unusual items?

Would you recommend this contractor for another arrangement of this type?

An attached memorandum details problems caused by A-1's late return of repaired vehicles on two occasions.

2) A memorandum written June 6, 1992, indicating that a seal "was installed wrong" on a transmission returned by A-1.

3) A memorandum dated June 25, 1992, indicating that a transmission had to be returned to A-1 for further servicing because a seal was leaking.

of Vehicle Services to help with the responsibility determination. In a memorandum dated July 13, 1993, that manager admitted that from January 4 through April 15, twelve of thirteen transmissions were returned on time. However, he went on to complain about the "overall quality of the work and the problems with warranty repairs and units failing in the field" which he stated "continued to present delay and fiscal problems throughout the majority of the contract." The manager described the problems as follows:

As outlined in previous letters. . . we had problems getting the transmissions repaired and returned. . . . When we had a problem with transmissions, A-1 would usually respond to pick up the vehicle, usually having it towed. However, they would often call, stating that there was nothing wrong with the transmission or that our installation was the cause of the problem and [would] want to charge us for the tow. We would continually be caught in the middle of arguments between the rebuilder (A-1) contending that the installation of the transmission was the problem and the installer claiming that the transmission was defective. Meanwhile, the vehicle was down.

The contracting officer states that he did not contact other sources regarding A-1's performance for them because he found deficiencies under the postal contract "so numerous that we could not make an affirmative determination of A-1's responsibility regardless of the quality of the work it performs for other[s]." The contracting officer observes that in its protest, A-1 stresses that its offer is significantly lower than the awardee's, and in reply, he states that during the performance of its contract, A-1's owner "complained that the prices he had agreed to were too low." The contracting officer concludes: "Given the circumstances, it would not be unreasonable to assume that A-1 did not adequately price its services and that perhaps that was one of the factors for its performance problems."⁸

4) A memorandum dated October 2, 1992, complaining that on September 22, A-1 picked up three transmissions for repair but had not returned them.

5) A memorandum dated December 31, 1992, complaining that two transmissions given to A-1 on December 9 and December 11 had not been returned.

6) A January 4, 1993, cure notice to A-1 stating that units were not being repaired and returned in a timely manner under the terms of the contract, and that some of the transmissions were failing while still under warranty. Attached was a log for the period April 21, 1992, through December 29, 1992, which indicated that A-1 had been late in completing work in 21 out of 29 instances.

7) Another performance report of February 9, 1993, in which the questions set out in 1) above were similarly answered in the negative, as was the question, "Are the products received from this company of an acceptable quality?" Comments on the form referred to "[d]ocumented problems with this contractor on quality of work-warranty work and timeliness of repair."

⁸ A-1's prices under the previous contract ranged from \$215.00 to \$270.00 per transmission. Its offered prices were from \$240.00 to \$295.00 per unit.

Regarding A-1's other allegations, the contracting officer denies that any postal is also an employee of The Trans-Plant and that the determination of nonresponsibility amounted to a constructive debarment of the protester. The contracting officer notes that the determination "is specific to the services requested in our contract" and "does not affect [A-1's] ability to submit offers for contracts with the U.S. Postal Service, other government agencies or companies." The contracting officer asks that the protest be denied.

Replying, the protester takes issue with the contracting officer's statement that he reviewed all pertinent data and complains that the contracting officer merely stated a conclusion about the protester's responsibility and did not support that conclusion in accordance with procurement regulations, in that "[t]he Contracting Officer's Statement does not include a current performance inquiry or a Preaward Survey or any summarization of findings with respect to the issue of responsibility. There is no identification of the standards used, no factual findings, no explanation of how A-1 failed to meet specific standards, and no attempt to gather current information as required by the . . . PM and . . . Procurement Handbook AS-707." The protester alleges that the statements about A-1's performance made to the contracting officer by the Manager of Vehicle Services were "false, fraudulent and made in bad faith." A-1 submits affidavits from its owner and its service manager to support its contention that "[a]t precisely the same time that [he] made this negative response and later when consulted by the Contracting Officer, [the Manager of Vehicle Services] was fraudulently and in bad faith representing to A-1 that A-1's performance had improved to the satisfaction of the Postal Service."⁹

The protester asks, if A-1's nonresponsibility was a "foregone conclusion," why A-1's contract was not terminated for default and restates its complaint that A-1 was not given an opportunity to respond to these "stigmatizing charges." The protester also alleges that the contracting officer's "uninformed assumptions" about the relationship of A-1's pricing

⁹ Specifically, A-1's service manager's statement contains the following:

On at least two separate occasions during February 1993 (on or about the second and fourth weeks) I contacted [the Manager of Vehicle Services] by telephone to inquire about the Postal Service's satisfaction with the current performance and to reassure [him] that A-1 Transmission would continue to perform well. On both occasions [the manager] (speaking for the Postal Service) plainly stated that he was satisfied with our current performance and assured me that we had fixed the problem.

At all times subsequent to these two conversations I believed that A-1 Transmission had satisfied all requirements of the Postal Service and that the problems were completely behind us.

Finally, A-1's manager states his understanding, from a telephone conversation in May, 1993, with the Manager of Vehicle Services, "that A-1 Transmission's bid would be considered and that the Postal Service had no remaining problems with A-1 Transmission's performance under the old contract."

A-1's owner similarly states that he was assured by the Manager of Vehicle Services on the telephone in February and March that the Postal Service was satisfied with its "current performance."

structure to its performance problems also indicate bad faith.

The protester restates its assertion that a postal employee works for the awardee, claiming that the fact that the individual in question is a neighbor of the owner of The Trans-Plant supports its allegations of impropriety. A-1 submits its owner's affidavit, which states that between Thanksgiving and Christmas of 1992 he visited The Trans-Plant's shop, and "recognized a man that I knew from the Postal facility there. . . . [T]his man was obviously taking orders and following instructions given by [an agent of The Trans-Plant]." The protester further alleges that a representative of The Trans-Plant had contact with the Postal Service's Manager of Vehicle Services months before the solicitation was issued about the "terms and conditions of the upcoming contract." The protester surmises that "there was some sort of collusion, inside dealing, bias, conspiracy or fraud extant within the bidding process." The protester also complains that the contracting officer relied on the "self-interested statements of one individual" without utilizing other "easily available sources of information."

In additional comments, the protester contends that it has received new information indicating that the delays in its performance were due to the non-performance of subcontractors, whose actions were beyond its control.¹⁰ The protester argues that "no consideration was given" to the possibility that A-1's delays in performance were excusable under its contract. The protester alleges that it provided "oral notices" to the Postal Service regarding its difficulties in obtaining specialized parts for converter core rebuilds from subcontractors. The protester also raises new issues revolving around the reasonableness of the solicitation's 72-hour service requirement, contending that delays in the rebuilding of converter cores were unavoidable and therefore excusable because there were a limited number of subcontractors in the area who performed that work and that "the same standards should have been applied to A-1 by the Contracting Officer in the Determination of Nonresponsibility."¹¹

In rebuttal, the contracting officer emphasizes that "our first and best method for determining [an] offeror's responsibility is to review performance" on a previous postal contract. He restates that A-1's performance deficiencies on its previous postal contract were so numerous as to preclude an affirmative determination of its responsibility. The contracting officer refers to an August 30 memorandum from the Manager of Vehicle Services which vigorously asserts that no impression was conveyed to A-1 that its overall performance was considered to be satisfactory. The memorandum includes the following:

The only occasion that I had contact with A-1 after the Jan. 4th letter was when [A-1's owner] contacted me after receiving the letter and stated they were going to improve and had changed service managers. The new service manager called and asked about the new contract and explained that the previous service manager had been let go. He asked if the service was

¹⁰ A-1 submits a letter from one of its subcontractor/suppliers, which takes responsibility for some of A-1's delays in performance.

¹¹ To the extent that the protester challenges the terms of this solicitation, its protest is untimely and not for consideration since it was not made before the time and date set for receipt of proposals. PM 4.5.4 b.

satisfactory. I advised that since the Jan. 4th letter to the expiration of the contract the service had improved as far as turn around time. We did discuss the previous problems and it is my feeling that the new service manager was aware of unsatisfactory performance during the majority of the contract. I did not convey to anyone at A-1, to the best of my knowledge, that the overall performance of the contract was satisfactory. To the contrary, I contacted [A-1's owner], his service manager and [the] Support Services Office during the contract period with specific problems. Numerous cases were not addressed pertaining to problems as there was a doubt as to whether problems were caused by defective parts or workmanship on the contractor's part or damage during shipping or installation at our VPOs [Vehicle Post Offices].

In summary, I feel that [neither] I nor anyone at the Tacoma VMF represented to [A-1's owner] or his shop that we were completely satisfied with the performance of the contract. We had consistent problems throughout the life of the contract with timely turnaround of repair. We had problems with transmissions failing and having to be returned for warranty work. We had problems with [A-1's staff] advising us that problems were either non existent or the fault of our mechanics or VPO contractors. I attempted to resolve these problems in good faith with [A-1] and through Support Services Office. I feel that the problems have not been resolved and not awarding the contract to A-1 is in the best interest of the Postal Service.

The contracting officer states that A-1 has provided no evidence in support of its allegations of pre-solicitation collusion. Finally, the contracting officer submits a written statement from the postal employee with whom the protester alleges the awardee has an improper relationship. The employee admits that he knows the owner of The Trans-Plant because they are neighbors but denies having any employment relationship with The Trans-Plant. The Trans-Plant also submitted a letter in which it denies the protester's allegations that a postal employee has an employment or other improper relationship with it.

In surrebuttal, A-1 complains that the contracting officer relied on "uninvestigated experience data" from "one man. . . whose veracity and motivation [are] squarely at issue in this protest." The protester claims that the contracting officer failed to follow regulations by neglecting to discharge what the protester terms his duty to base his determination on "sufficient sources of information " and "current performance with a view toward the ability of the bidder to perform on the new contract." A-1 again alleges misrepresentation and bias on the part of the Manager of Vehicle Services and asks this office to "engage in an independent fact finding where testimony is taken under oath." The protester also complains that the contracting officer did not address its contentions regarding the practicality of the 72-hour service turnaround requirement and regarding excusable delays. The protester repeats its allegation that a postal employee was seen at The Trans-Plant's shop and suggests that even if that employee does not "work" for The Trans-Plant it does not mean that "no form of consideration, of any kind has flowed between [them]." The protester alleges that the responsibility review process in this case "was not fair, did not follow regulations and standards, was not thorough and smacks of corruption."

DISCUSSION

The legal standard by which this office reviews a contracting officer's determination that an offeror is nonresponsible is well settled:

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 will 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.

T/F Trucking, P.S. Protest No. 92-65, October 22, 1992; see also *Fabricating Businesses*, P.S. Protest No. 92-77, December 16, 1992; *Lock Corporation of America*, P.S. Protest No. 89-14, March 10, 1989.

PM 3.3.1 a. sets forth the following general standards for determining whether a prospective contractor is responsible:

Contracts may be awarded only to responsible prospective contractors. The award of a contract based on price alone can be false economy if there is subsequent default, late delivery, or other unsatisfactory performance. To qualify for award, a prospective contractor must affirmatively demonstrate its responsibility. . . .

PM 3.1 b.3 states that to be determined responsible, a contractor must have a good performance record. As noted above, PM 3.3.1 e.3. requires that the contracting officer "possess or obtain information sufficient to be satisfied that a prospective contractor meets applicable standards of responsibility," and describes the sources from which that information may be obtained.

The protester appears to understand the requirement that a determination be reasonably based on substantial information to mean that the contracting officer must consider all possible information, rather than a relevant subset of that information. Such an interpretation is neither realistic nor reasonable. The PM lists several possible sources of information but does not require the contracting officer to consult any of them. PM 3.3.1 e.3; see footnote 4. Further, it is the 3 protester's burden to show that the contracting officer's determination was not supported by substantial evidence. *Lobar, Inc./Marroquin, Inc.*; *Benchmark/Hercules Limited*, P.S. Protest Nos. 92-49 and 53, October 14, 1992.

Here, the contracting officer based his determination upon a documented history of A-1's performance deficiencies during its prior contract. See footnote 7. That was substantial evidence. While the protester complains that the contracting officer improperly relies on the reports and evaluations of a single person, the Manager of Vehicle Services, in reaching that conclusion, it is not unreasonable for the contracting officer to rely on information received from the individual or individuals who had been directly involved with

A-1 and its contract.¹²

A-1 claims that the Manager of Vehicle Services acted in bad faith as evidenced by statements from both its owner and its sales manager that the Manager of Vehicle Services assured them that A-1's performance was completely satisfactory after the cure notice. As discussed above, the manager denies having made such assurances.¹³ The protester's evidence falls far short of meeting its stringent burden. As the Court of Federal Claims has noted in a similar context:

In the absence of clear evidence to the contrary, however, it must be presumed that the government acted in good faith Since good faith is presumed, the plaintiff bears an extremely heavy burden of proving the contrary, and the government is prevented only from engaging in actions motivated by a specific intent to harm the plaintiff. The difficult burden of proof for a plaintiff attempting to show 'government bad faith' has been outlined as follows:

[i]t requires 'well-nigh irrefragable proof' to induce the court to abandon the presumption of good faith dealing. In the cases where the court has considered allegations of bad faith, the necessary 'irrefragable proof' has been equated with evidence of some *specific intent to injure the plaintiff*. Thus, in *Gadsden v. United States*, 78 F.Supp. 126, 127, 111 Ct.Cl. 487, 489-90 (1948), the court compared bad faith to actions which are 'motivated alone by malice'. . . Similarly, the court in *Struck*

¹² The extent of the contracting officer's research was consistent with the requirements of PM 3.3.1 e.1. A pre-award survey is not required in every case. A pre-award survey must be performed only if available information does not provide an adequate basis for determining the responsibility or nonresponsibility of a prospective contractor." PM 3.3.1 e.5.(a). Here, available information provided that basis.

Further, the contracting officer's documentation of the determination of nonresponsibility met the requirements of PM 3.3.1 e.2.

¹³ We attribute no more weight to sworn statements than unsworn ones. *Carini's Inc.*, P.S. Protest No. 83-65, December 13, 1983, and thus consider the protester's affidavits as persuasive, but not conclusive, evidence. *Rickenbacker Port Authority and The Turner Corporation*, P.S. Protest No. 91-78, February 10, 1992. On the other hand, the contracting officer's statements are accorded a presumption of correctness which the protester must overcome. *Id.* "In a factual dispute we adopt the contracting officer's position absent sufficient evidence to overcome the presumption of correctness. . . ." *Cohlma Airline, Inc.*, P.S. Protest No. 87-118, April 13, 1988.

A-1 has repeatedly complained that the contracting officer improperly relied on one individual's unsworn statements, and has asked us to take testimony under oath. However, our office does not conduct independent factfinding investigations and we are not set up to conduct adversary proceedings; rather, we resolve protests based upon the written record supplied by the contracting officer, protester and interested parties. See *COR, Inc.*, P.S. Protest No. 90-16, June 22, 1990; *Cohlma, supra*.

Constr. Co. v. United States, 96 Ct.Cl. 186, 222 (1942) found bad faith when confronted by a course of Governmental conduct which was 'designedly oppressive.'

A-Transport Northwest Co., Inc., 27 Fed.Cl. 206, 220 (November 25, 1992), quoting *Kalvar Corp. v. United States*, 211 Ct.Cl. 192, 198-99, 543 F.2d 1298, 1301-02 (1976), *cert. denied*, 434 U.S. 830 (1977)(some citations omitted; emphasis in original).

Further, A-1's evidence that a postal employee works for The Trans-Plant consists solely of a statement from A-1's owner to the effect that he recognized a postal employee in The Trans-Plant's shop. The employee in question, the Manager of Vehicle Services, the contracting officer and The Trans-Plant itself have denied that the employee works for The Trans-Plant. A-1 would have us infer the existence of an improper relationship and collusion from the employee's presence and from the employee's acknowledgment that he knows The Trans-Plant's owner, his neighbor. Suspicion, assumptions and innuendo are not sufficient to justify such inferences; the protester must offer specific proof of allegations of bad faith, bias or unfairness, *Thermico, Inc.*, P.S. Protest No. 90-71, December 21, 1990, and, as discussed above, must prove that these officials intended to harm A-1. See also *JCI Environmental Services*, Comp. Gen. Dec. B-250752.3, April 7, 1993, 93-1 CPD 299. While A-1 believes that it has been treated unfairly and that "there was some sort of collusion, inside dealing, bias, conspiracy or fraud extant within the bidding process," it has clearly failed to justify that belief.¹⁴

The protester's contention that the Postal Service waived its opportunity to find it nonresponsible by failing to terminate its earlier contract for default is incorrect. "[A] record of recent unsatisfactory performance on a postal contract, even without a termination, can justify a finding of nonresponsibility." *Ron Garson d/b/a Ron's Trucking*, P.S. Protest No.

¹⁴ As noted at footnote 5, *supra*, the general standards of ethical conduct applicable to federal employees apply to the employee's conduct in this case, and those standards invoke the perspective of a "reasonable person" in their application. The record here establishes no more than an apparent friendship between a postal employee and TheTrans-Plant's owner resulting from their proximity. A-1 has failed to establish that the employee, a mechanic, had any involvement in the contracting process which occasioned the determination of A-1's nonresponsibility and TheTrans-Plant's selection, let alone that the employee's relationship with TheTrans-Plant was a "covered relationship" or one "likely to have a direct and predictable effect on the financial interest of a member of his household," so as to give rise to a reasonable question of his impartiality in any involvement he may have had in the matter. 5 C.F.R. 2635.502(a).

Similarly, no presumption of impropriety arises from any contact by TheTrans-Plant with the Postal Service to inquire about the upcoming contract. The Comptroller General has noted that even discussions initiated by an agency "with a prospective contractor concerning the firm's qualifications and interest in a project does not evidence bias or constitute an impropriety on the part of the agency" as long as the prospective contractor does not thereby gain access to information not available to other competitors. *Counseling Services Associates*, Comp. Gen. Dec. B-241349, February 4, 1991, 91-1 CPD 110. A-1 has complained only about TheTrans-Plant's inquiry, and has not identified any way in which The Trans-Plant benefitted or A-1 was disadvantaged by any information which may have been conveyed.

91-33, July 15, 1991; *Year-A-Round Corporation*, P.S. Protest No. 87-12, June 12, 1987 (failure of contractor to perform in timely manner under prior contract may be reasonable basis for nonresponsibility determination); *see also, Firm Erich Bernion GmbH*, Comp. Gen. Dec. B-233106, December 28, 1988, 88-2 CPD 632.¹⁵

A-1 apparently believes that the nonresponsibility determination is inconsistent with its improved evaluations during the last four months of its contract. We do not agree. That A-1 improved its performance during those months appears to have saved it from termination for default. However, that improvement does not negate evidence in the record that for the substantial duration of the contract A-1 did not perform as required by the contract. The failure to terminate it benefitted the protester but did not obligate the Postal Service to contract with A-1 again.¹⁶

Further, contrary to the protester's contention, there is no requirement that an offeror be given the opportunity to respond to a negative responsibility determination.

[S]ince responsibility determinations are administrative in nature, they do not

¹⁵ Performance within the last twelve months is "recent." *See Pamela J. Sutton*, P.S. Protest No. 87-110, February 9, 1988.

¹⁶ "A nonresponsibility determination may be based upon the contracting agency's reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default and the contractor disputes the agency's interpretation of the facts. . . ." *Applied Power Technology Company and Contract Services Company, Inc.*, Comp. Gen. Dec. B-227888, 87-2 CPD 376, October 20, 1987. In that case, the protester, a joint venture, claimed that in finding one jointventurer nonresponsible because of its unsatisfactory performance on prior contracts, the General Services Administration (GSA) did not take recent improvements in its performance into account. The Comptroller General concluded that "the prior performance information relied upon by GSA reasonably supported a finding that [the protester's] overall prior performance was unsatisfactory, and that GSA therefore reasonably determined, based on this information, that [the protester] was not a responsible prospective contractor." In denying the protester's request for reconsideration, the Comptroller General stated: "There is no indication. . . as the protester suggests . . . that the protester's improved performance ratings in more recent years were ignored; rather, the contracting officer simply was not satisfied that recent improvements in performance, to the exclusion of earlier performance history, were the best indication of [the protester's] overall current performance capability." *Applied Power Technology Company and Contract Services Company, Inc., Request for Reconsideration*, Comp. Gen. Dec. B-227888.2, 88-1 CPD 247, March 10, 1988.

The argument that the protester's unsatisfactory performance was due to subcontractors' delays also is unavailing. Such an issue is a matter of contract administration to be resolved outside the protest process. *See, e.g., Firm Erich Bernion GmbH, supra*. The determination of its subcontractor's responsibility is ordinarily made by the prospective contractor, PM 3.3.1 d., but a subcontractor's poor performance may be taken into account when considering the prime's responsibility. *See, e.g., CCP Manufacturing Corporation*, P.S. Protest No. 85-31, July 3, 1985. (This is not a case in which the contractor has proposed to use different subcontractors in performing the new work.) In any event, the contracting officer has cited sufficient grounds, other than the subcontractors' delays, to find A-1's performance unsatisfactory.

require the procedural due process, such as notice and an opportunity to comment, which is otherwise necessary in judicial proceedings. Accordingly, a contracting officer may base a determination of nonresponsibility upon the evidence of record without affording bidders an opportunity to explain or otherwise defend against the evidence, and there is no requirement that bidders be advised of the determination in advance of contract award.

Lithographic Publications, Inc., Comp. Gen. Dec. B-217263, March 27, 1985, 85-1 CPD 357, citations omitted; see also *CCP Manufacturing Corporation*, *supra*.

Finally, no constructive or *de facto* debarment has occurred. The contracting officer is correct that his determination applies only to the services solicited for this particular contract. The determination does not prevent A-1 from submitting offers to the Postal Service or other agencies in the future and thus does not amount to a debarment. *Campbell Industries*, Comp. Gen. Dec. B-238871, July 3, 1990, 90-2 CPD 5; *Firm Erich Bernion GmbH*, Comp. Gen. Dec. B-234680, B-234681, July 3, 1989, 89-2 CPD 1.

The protest is dismissed in part and denied in part.

William J. Jones
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Contract Protests and Policies