



Comptroller General
of the United States

Washington, D.C. 20548

1012116

Decision

Matter of: Bernard Johnson Incorporated

File: B-252481

Date: June 21, 1993

Gregg W. Young, and James D. Hobbs, Jr., Esq., Robert D. Sokolove, Esq., and David E. Boelzner, Esq., Wright, Robinson, McCammon, Osthimer & Tatum, for the protester. Gary F. Davis, Esq., and Rebecca L. Kehoe, Esq., General Services Administration, for the agency. Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Contracting officer reasonably determined that protester lacked the financial resources for performance and was therefore nonresponsible where protester's financial statements reflected a lack of available working capital, deficit retained earnings, negative net worth, and a large volume of past due payments, and where protester failed to furnish references from a financial institution confirming the availability of a line of credit.
2. Contracting officer need not reconsider a determination of nonresponsibility where there has been no material change in a principal factor on which the initial determination was based.

DECISION

Bernard Johnson Incorporated (BJI) protests the decision of the General Services Administration (GSA) not to negotiate an architect-engineer (A-E) contract with it under solicitation No. GS11P92EGD0011 for the preparation of building evaluation reports. The agency decided not to pursue negotiations with BJI, which had been selected as most qualified, after determining it nonresponsible. BJI asserts that the agency's nonresponsibility determination was based on information that was "incomplete, inaccurate, outdated, and erroneous."

We deny the protest.

The procurement was conducted under the selection procedures set forth in the Brooks Act, as amended, 40 U.S.C. §§ 541 et seq. (1988), and its implementing regulations, Federal Acquisition Regulation (FAR) part 36.6. Under these procedures, after publicly announcing a requirement, the contracting agency must establish an evaluation board to evaluate performance data and statements of qualifications submitted by firms that wish to be considered. The evaluation board then conducts interviews with no less than three firms, ranks them, and submits the firms' qualifications to a selection official who selects the most highly qualified offeror; negotiations are then conducted with that offeror. If the agency is unable to negotiate a satisfactory contract at a reasonable price with the preferred offeror, the agency enters into negotiations with the next ranked firm, and so on.

In accordance with these procedures, GSA published an announcement in the Commerce Business Daily (CBD) on February 26, 1992, stating that it intended to award an A-E contract for the preparation of building evaluation reports. The CBD notice listed the evaluation criteria for selection and invited interested firms to submit Standard Forms 254 and 255.

Forty firms responded to the CBD notice. After reviewing the qualifications statements submitted, the evaluation board selected five firms for interviews. Upon completion of the interviews, the board ranked the five in order of preference; BJI was ranked first. By letter dated August 5, the contracting officer notified BJI that it had been selected for negotiations and requested that it submit pricing information.

While GSA's internal audit division was reviewing the pricing proposal and other documents that BJI had furnished, the contracting officer initiated his investigation into the prospective contractor's responsibility by requesting that BJI complete GSA Form 527 (Contractor's Qualifications and Financial Information). This form asks prospective contractors for a current balance sheet and income statement and for information concerning their owners (e.g., shareholders), principal suppliers, financial arrangements, any indebtedness to the U.S. Government, past due accounts, ongoing contracts, and recently completed jobs. After receiving the protester's Form 527, the contracting officer requested a Dun & Bradstreet report on BJI. At the same time, he asked the GSA Credit and Finance Section to perform a pre-award survey of the firm. In late November, the pre-award survey team completed its investigation and recommended to the contracting officer that no award be

made to BJI due to the firm's "highly marginal" financial condition.¹

By letter dated December 1, 1992, GSA notified BJI that the pre-award survey team had determined its financial condition to be unsatisfactory and requested additional information "to clear up certain questions." The items requested included a letter or notarized statement of authority to bind the firm and sign the contract; an updated Form 527 explaining the factoring arrangement that it intended to rely on for financing and its Internal Revenue Service (IRS) debt (who owed it, who would pay, and when); a copy of its corporate charter to demonstrate who owned and controlled the firm; and letters from its bank(s) covering current lines of credit and financial reserves.

BJI responded by furnishing an updated Form 527 and a copy of a memorandum from BJI's new chairman (and principal stockholder), which briefly explained the company's factoring arrangement (the sale of invoices to a financial institution for cash); stated the amount of the IRS debt, that a payment schedule had been agreed upon, and that the debt would be fully liquidated within 11 months; and noted, in response to the request for a copy of amendments to its corporate charter, that no amendments were--or are-- necessary to demonstrate ownership and control. BJI did not furnish a letter or notarized statement of authority to bind the firm, as requested by GSA, although the memorandum did state that senior vice-presidents and above had the authority to bind the firm and sign contracts with GSA. The protester also did not furnish letters from its banks, as requested by the contracting officer, although the memorandum noted that its present line of credit was in the 7-figure range, of which a substantial portion had not been drawn upon.

¹According to the pre-award survey report, BJI's financial statements revealed a highly marginal condition, with working capital and net worth both negative low, 7-figure amounts; a net operating loss of six figures for the first 7 months of the year; and debt in the multiple 7-figure range. In addition, the pre-award survey noted that Dun & Bradstreet had identified numerous slow or past due trade accounts and that it listed several lawsuits against the company.

On January 12, 1993, the contracting officer requested a second pre-award survey; GSA Finance responded on February 1, again recommending against award.²

On February 8, the contracting officer determined BJI to be nonresponsible, noting that the firm had demonstrated neither that it possessed nor that it could obtain sufficient financial resources for performance; that BJI had failed to furnish a formal (i.e., signed) delegation of authority to bind the firm; and that BJI had failed to furnish a copy of amendments to its corporate charter reflecting changes in its corporate officers. The contracting officer then notified the second-ranked firm, Wisnewski, Blair & Associates, that it had been selected for negotiations.

By letter dated February 12, BJI asked the contracting officer to reconsider his determination of nonresponsibility. In support of its request, BJI submitted a more detailed response to the contracting officer's letter of December 1, including a notarized delegation of authority to bind the firm; a statement from KBK Financial, Inc., the financial institution with which BJI had entered into a factoring arrangement, confirming the availability of a line of credit; an updated balance sheet and income statement; and a copy of its corporate charter. On February 18, in response to the protester's request, the contracting officer met with representatives of BJI and informed them that GSA would not reconsider its determination and that the agency had initiated negotiations with the second-ranked firm.

On February 24, after receiving copies of the pre-award surveys, BJI again requested that GSA reconsider its determination of nonresponsibility. By letter dated February 25, the contracting officer declined to reconsider his decision, whereupon BJI protested to our Office.

The protester complains that the information relied upon by the agency in finding it nonresponsible was incomplete, outdated, and erroneous, and that the agency did not give it sufficient opportunity to clarify and provide fully updated and accurate information. In particular, the protester challenges the accuracy of the information relied upon by

²The findings of the second pre-award survey are discussed infra.

the contracting officer in determining that it lacked the financial capability for performance.³

In order to be found responsible, a firm must, among other things, affirmatively demonstrate that it has sufficient financial resources to perform the contract, or the ability to obtain them. FAR §§ 9.104-1 and 9.104-3(b). Absent such a showing, the FAR requires the contracting officer to determine a firm nonresponsible. FAR § 9.103(b). In making a responsibility determination, a contracting officer has considerable discretion, which we will not question absent a showing that the agency has acted in bad faith or that its determination lacked a reasonable basis. Capitol Contractors, Inc. and Baker Roofing Co., B-248944; B-248944.2, Oct. 22, 1992, 92-2 CPD ¶ 267. Further, in making a responsibility determination, a contracting officer may rely on the findings of the pre-award survey team, provided these findings are based on accurate information. Thus, our Office will consider the accuracy of the pre-award survey information in judging whether a negative determination of responsibility was reasonable. BMV, Div. of Harasco Corp., B-233081; B-233081.2, Jan. 24, 1989, 89-1 CPD ¶ 67.

In reaching his conclusion that BJI lacked the financial resources to guarantee contract performance and had not demonstrated the ability to obtain them, the contracting officer relied primarily on the findings of the pre-award survey team, which reported that:

-- BJI's July 31, 1992 financial statements showed a 7-figure deficit working capital, a 7-figure deficit net worth, a 7-figure deficit retained earnings, a 6-figure net loss, and a material reduction in the company's asset base from its December 1990 financial statements;

-- Although BJI had mentioned a 7-figure line of credit, it had submitted no references confirming the availability of funds;

³The protester also challenges the contracting officer's determination that it was nonresponsible for failing to submit a signed delegation of authority or a copy of any amendments to its corporate charter. Since, in our view, as will be explained infra, the contracting officer was justified in finding BJI nonresponsible based on his concerns regarding its financial capability, we need not consider whether BJI's failure to submit the other two items would separately have furnished a basis for a finding of nonresponsibility.

-- Dun & Bradstreet reported numerous slow payments, past due accounts, and two pending lawsuits; although the protester claimed the lawsuits had been settled, it had submitted no supporting documentation;

-- The protester reported a high 6-figure tax debt and stated that a repayment schedule had been established, but furnished no supporting documentation.

The protester challenges these findings, arguing that the pre-award survey team failed to consider the most current financial information that it had furnished. The protester contends that although on December 16 it submitted financial data current through October 31, 1992, the pre-award survey team ignored this updated information and instead relied on the July 31, 1992, financial statements that it had previously provided.

The financial information that BJI submitted on December 16 consisted of an updated Form 527 and an income statement current through October 31; it did not include an updated balance sheet. Thus, the July 31 balance sheet was the most current source of information available to the pre-award survey team regarding BJI's working capital, net worth, and retained earnings; accordingly, we do not see how the pre-award survey team can be faulted for relying on it. Further, although the pre-award survey report did not discuss the October income statement, we do not think that this necessarily implies that the survey team failed to consider it. The survey team was clearly aware that BJI had submitted the additional financial information since it refers in its report to the "new information" provided for its evaluation. Also, it is clear that the pre-award survey team was aware the BJI had reduced the amount of its debt to the IRS (which was listed on the July Form 527 as a 7-figure amount) since it refers to a "high 6-figure IRS tax lien."

BJI also argues that the pre-award survey team unfairly faulted it for failing to furnish a copy of the repayment schedule for its tax debt. The protester contends that the agency asked only when the debt would be fully repaid and not when the payments would be made.

In his letter of December 1, the contracting officer asked BJI to "explain [its] IRS debt, as to who owes that, and who will pay IRS and when." Thus, contrary to the protester's assertion, the agency did request that BJI furnish information as to its payment schedule; we therefore see nothing unfair in the agency's holding BJI responsible for failing to submit that information.

The protester further asserts that the pre-award survey team should not have relied on information contained in Dun & Bradstreet reports concerning its payment record and outstanding lawsuits that conflicted with information furnished by BJI itself. The protester contends that since Dun & Bradstreet gathers its data through inquiries directed at third party sources and representatives of the company being investigated, the information is frequently unreliable.

We see no reason that either the pre-award survey team or the contracting officer should have questioned the information in the Dun & Bradstreet report concerning BJI's payment record given that the protester itself acknowledged on its Form 527 more than \$1 million in past due accounts payable. Further, although we agree with the protester that the agency should not have discounted its representations concerning settlement of the lawsuits simply because Dun & Bradstreet, whose information had clearly not been recently updated, continued to list them as pending, we see no reason to think that the contracting officer's conclusions regarding BJI's financial capability would have been any different had he known the suits had been settled.⁴

In our view, the protester has not demonstrated that the information relied upon by the pre-award survey team or the contracting officer in judging its financial capability was inaccurate or that the agency did not furnish it sufficient opportunity to submit information responding to its concerns. Further, given its lack of available working capital, deficit retained earnings, negative net worth, large volume of past due payments, and its failure to furnish references from the financial institution extending credit to it, it has not shown that the contracting officer lacked a reasonable basis for finding it financially incapable of performing. See Capitol Contractors, Inc. and Baker Roofing Co., supra.

Finally, BJI argues that the contracting officer should have reconsidered his nonresponsibility determination in light of the additional information that it furnished on

⁴One of the suits concerned ownership of the firm's stock; thus, its settlement would not have affected the firm's financial status. The other suit was brought against BJI for breach of note; its settlement would therefore not have generated revenue for the firm.

February 12.⁵ The protester contends that it could--and would--have furnished this information sooner had the contracting officer explained why he wanted the items and informed it of the gravity of the situation (i.e., that the pre-award survey team had recommended against award to it and that it might be determined nonresponsible).

First, with regard to the protester's argument that because the contracting officer never informed it of the negative recommendation of the pre-award survey team, he is somehow responsible for its failure to respond to his requests for additional information in a timely fashion, we note that the contracting officer explicitly stated in his letter to the protester dated December 1 that its financial condition had been found unsatisfactory.⁶ Since the protester must have known that its financial condition would have to be found satisfactory for it to be determined responsible, we do not see how it can argue that the agency failed to apprise it that it was at risk of being determined nonresponsible. Furthermore, the agency was under no obligation to discuss the findings and recommendation of the pre-award survey team with the protester. While the FAR allows the contracting officer to discuss pre-award survey information with the prospective contractor, such discussions are not required. FAR § 9.105-3(b); BMY, Div. of Harasco Corp., supra.

Second, with regard to the protester's argument that the contracting officer should have reconsidered his determination, a contracting officer may and should reconsider a finding of nonresponsibility where two conditions are present: (1) there is ample time for the review; and (2) there occurred a material change in a principal factor on which

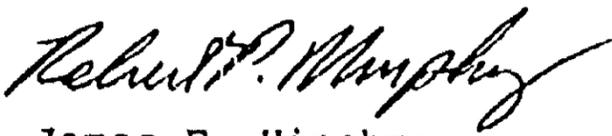
⁵As previously noted, this information included a notarized delegation of authority to bind the firm; a statement from the financial institution with which BJI had entered into a factoring arrangement, confirming the availability of a line of credit; an updated income statement and balance sheet; and a copy of its corporate charter.

⁶In addition, the agency reports that the contracting officer's representative notified BJI by telephone on November 25 that GSA Finance had recommended "No Award." The protester confirms that it received a telephone call that day, but denies that it was informed of the "No Award" recommendation during the conversation. The agency has furnished us with a copy of its record of the call, but it is impossible to determine from it whether the "No Award" recommendation was discussed. (The record notes only that BJI was "informed about [its] credit check.")

the initial determination was based. BMV, Div. of Harasco Corp., supra.

Here, although the updated financial statements demonstrated improvement in BJI's financial condition (i.e., a current profit as opposed to loss, an increase in net worth, and a reduction in deficit retained earnings), they did not demonstrate a material change in the firm's financial status (i.e., there continued to be a lack of available working capital; the firm's net worth remained negative; and there continued to be a significant deficit in retained earnings). Thus, there occurred no material change in the principal factor on which the initial determination was based; consequently, the contracting officer was not required to reconsider his determination of nonresponsibility.

The protest is denied.


for James F. Hinchman
General Counsel