



Decision

Matter of: Hendry Corporation

File: B-400224.2

Date: August 25, 2008

Kent P. Smith, Esq., Smith Currie & Hancock LLP, for the protester.
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Wilbert Jones, Esq., U.S. Coast Guard, for the agency.
Kenneth Kilgour, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging contracting officer's affirmative determination of responsibility regarding the awardee is dismissed where the assertion on which the protest is based—failure to consider allegedly poor business performance by principal members of the awardee during their association with a previous firm—does not constitute the type of information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible, as required under Government Accountability Office (GAO) Bid Protest Regulations for GAO review of such a protest.

DECISION

Hendry Corporation protests the award of a contract to RiverHawk Marine, LLC by the Department of Homeland Security (DHS), U.S. Coast Guard under request for quotations No. HSCG80-08-Q-3FAD73 for dry-dock repairs to a Coast Guard cutter. Hendry challenges the agency's determination that RiverHawk is a responsible firm on two grounds. Hendry alleges that three founding members of RiverHawk "do not have a satisfactory record of performance, integrity, and business ethics," Protest at 3, because, during their course of employment at a previous firm, they took action that resulted in the bankruptcy of that company and default on two Coast Guard

vessel repair contracts, and because, in violation of a non-compete agreement, they made plans to form RiverHawk while affiliated with that other firm.¹

We dismiss the protest because, as filed with our Office, it does not establish a basis for our review of the agency's responsibility determination.

We will consider a protest of an affirmative determination of responsibility only where it is alleged that definitive responsibility criteria in the solicitation were not met, or where the protest identifies evidence raising serious concerns that, in reaching the responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation. Bid Protest Regulations, 4 C.F.R. § 21.5(c) (2008); T.F. Boyle Transp., Inc., B-310708.2, Jan. 29, 2008, 2008 CPD ¶ 52 at 5. The protest allegations here focus on the latter type of case. In that context, we will review a challenge to an agency's affirmative responsibility determination where the protester presents specific evidence that the contracting officer may have ignored information that, by its nature, would be expected to have a strong bearing on whether the awardee should be found responsible. Verestar Gov't Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4-5. We therefore have reviewed credible allegations that an agency failed to properly consider that a contractor committed fraud, FN Mfg., Inc., B-297172.2, Dec. 1, 2005, 2005 CPD ¶ 212 at 11-12, that principals of a contractor had criminal convictions, Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 5, or that a contractor engaged in improper financial practices and improperly reported earnings. Verestar Gov't Servs. Group, *supra*. In contrast, we will not review unsupported allegations of illegal action, such as insider trading, MD Helicopters, Inc.; AgustaWestland, Inc., B-298502 *et al.*, Oct. 23, 2006, 2006 CPD ¶ 164 at 41 n.40, or allegations concerning financial issues confronting a contractor, such as cash on hand and declining net worth. Advanced Tech. Sys., Inc., B-296493.6, Oct. 6, 2006, 2006 CPD ¶ 151 at 6 n.8.

Here, the allegation that the three RiverHawk principals took action that resulted in the bankruptcy of their former firm and its default on two Coast Guard vessel repair contracts is not a protest ground that we will review. As our cases noted above illustrate, the circumstances under which we will consider a challenge like Hendry's involve information that, by its nature, would be expected to have a bearing on whether the awardee should be found responsible--proven criminal conduct, for example, but not allegations of poor financial or business performance. Here, the protester alleges that, while the three founders of RiverHawk were affiliated with their previous employer, their performance was sufficiently poor to cause the bankruptcy of the firm and the contract default. Even if the principals of RiverHawk were responsible for their prior firm's bankruptcy or default, the nature of the

¹ While the protest alleges that all three of those individuals signed non-compete agreements, the record shows that, in fact, only one signed the agreement at issue.

allegation is one that concerns poor financial or business performance, and thus is not the type that would meet the threshold showing for review of a challenge to an affirmative responsibility determination.²

The second prong of the protester's challenge to the agency's responsibility determination is the allegation that the principals of RiverHawk, in contravention of a non-compete agreement, made plans to form that company while affiliated with their prior firm, and then misrepresented the existence of that agreement to the agency. This protest ground likewise does not meet the threshold for our review. As a preliminary matter, the existence and potential enforceability of the non-compete agreement is a private dispute and not for our consideration. See DSG Corp.-Recon., B-213070.2, Dec. 19, 1983, 83-2 CPD ¶ 705 at 1-2. In support of its allegation that the RiverHawk principals misled the agency as to the existence of a non-compete agreement, the protester produced a certificate from the relevant state department of corporations in an attempt to show that the bankrupt firm is a viable concern and that the non-compete clause is still enforceable against one of RiverHawk's principals. That certificate, standing alone, is not sufficient to establish the applicability of the non-compete agreement. Because the non-compete agreement precluded competition by the signers with the products, services, or activities of the prior firm, that firm would have to have remained in the business of ship repair for the RiverHawk principal to be in violation of the agreement; the protester has offered no evidence that the principal's prior firm is still actively engaged in its former line of work. More important, the non-compete agreement was for the benefit of the lender, not the firm, and by its terms expired on or about January 2, 2008, when the assets securing the loan were sold. See Intervenor's Response to Motion to Dismiss, Aug. 15, 2008, Exh. D. The record establishes that the three former principals of the bankrupt firm founded RiverHawk after the previous firm had ceased operations and the loan giving rise to the non-compete agreement was no longer in effect; thus this protest ground—that the RiverHawk

² In any event, the allegation is unsupported by the record. While the protester states that these individuals "took action which resulted in the bankruptcy of [the prior firm] and performance default on two ongoing Coast Guard vessel repair contracts," Protest at 2, the protester provides no evidence in support of its allegation. In fact, the allegation is contradicted by the memorandum and order of the judge who presided over the bankruptcy proceedings. See Intervenor's Comments, Aug. 6, 2006, Encl. Memorandum and Order of the U.S. Bankruptcy Court. Moreover, the record demonstrates that, when making his responsibility determination of RiverHawk, the contracting officer in fact did consider this allegation, as well as the allegation regarding the non-compete agreement. Agency Request for Dismissal, Encls. 1 & 2, completed DHS Form 700-12, Determination of Prospective Contractor Responsibility, and Memo to File from Contracting Officer, both dated July 16, 2008, prior to the contract award.

principals misrepresented the existence of a viable non-compete agreement--lacks a valid legal and factual basis. See Bid Protest Regulations, 4 C.F.R. § 21.5(f).

In summary, the challenge to the agency's responsibility determination does not meet our threshold showing for review. Nor has the protester adequately supported its allegation that the awardee misrepresented to the agency the existence of an enforceable non-compete agreement. Moreover, the record indicates that the agency did, in fact, consider the issues raised by the protester in reaching its responsibility determination.

The protest is dismissed.

Gary L. Kepplinger
General Counsel