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**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

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Decision

Matter of: FN Manufacturing, Inc.

File: B-297172; B-297172.2

Date: December 1, 2005

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Jeffrey I. Kessler, Esq., and Maria B. Bribriescio, Esq., Department of the Army, for the agency.

Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging an agency's affirmative determination of the awardee's responsibility on the ground that there is evidence raising serious concerns that the contracting officer (CO) unreasonably failed to consider available relevant information suggesting that the awardee does not have a satisfactory record of integrity and business ethics is denied where the record shows that: (1) while the awardee was investigated for possible fraud, it was neither indicted nor proposed for debarment; (2) the CO was aware of the information that led to the questions about the awardee's activities under certain previous contracts and did not ignore the matter; and (3) the CO's more recent dealings with the company provided a rational basis for her conclusion that the awardee is a responsible contractor.

DECISION

FN Manufacturing, Inc. protests the award of a contract to Tri-Technologies, Inc. under solicitation No. W52H09-05-R-0190, issued by the Department of the Army for 12,500 bipod assemblies for M249 machine guns. FN challenges the Army's affirmative determination of Tri-Tech's responsibility.

We deny the protest.

BACKGROUND

This protest raises only one contention—i.e., that the Army’s contracting officer (CO) improperly concluded that Tri-Tech has a satisfactory record of integrity and business ethics, which is a prerequisite to being considered a responsible contractor eligible for award of a contract from the federal government under Federal Acquisition Regulation (FAR) § 9.104-1(d). As discussed in greater detail below, Tri-Tech’s performance of previous contracts for bipods—two of them with the Army, and one as a supplier to FN—raised questions, resulting in an investigation, about whether the company had committed fraud, and engaged in on-going efforts to conceal that fraud, or whether it acted unintentionally when it provided bipods made out of a different type of steel than specified in its contracts. In FN’s view, the CO failed to conduct a sufficient review of Tri-Tech’s actions under those earlier contracts to properly conclude that the company was responsible here.

The Army’s Consideration of Tri-Tech for This Award

This procurement began as an intended sole-source award to FN, due to the Army’s urgent need for M249 bipod assemblies, and the fact that FN appeared to be the only company able to produce these items without being subjected to first article testing procedures. Contracting Officer’s (CO) Statement at 13. The agency estimated that first article testing procedures could add at least 120 days to the delivery time. Agency Report (AR), Tab C, at 3. As a result, a Justification and Approval (J&A) for Other Than Full and Open Competition was approved on February 10, 2005, and a synopsis of the intended sole-source award was publicized. CO’s Statement at 13.

In response to the published synopsis, the Army received an expression of interest from Tri-Tech; the Army answered, by letter dated March 1, that issuance of the solicitation was imminent, and that the solicitation would include a requirement for first article testing and an aggressive delivery schedule. On April 8, the agency issued the solicitation; both FN and Tri-Tech submitted proposals by the solicitation’s May 10 closing date. Id.

Upon receipt of the two proposals, the CO noticed that Tri-Tech’s offered price was significantly lower than FN’s price, which led the CO to consider whether Tri-Tech should be allowed to compete for the award. The CO explains, in response to this protest, that her considerations included

whether Tri-Tech could meet the Government’s minimum delivery requirements, whether the proposed prices were reasonable, and whether Tri-Tech was responsible in light of the open fraud investigation.

Id. at 14. The contemporaneous record shows that the CO both requested and received the following information as part of her review: (1) a “Contractor

Performance/Responsibility Review” from an Industrial Specialist at the Army’s Tank and Automotive Command (TACOM), dated June 13; (2) additional information from the TACOM Industrial Specialist about current contracts and delivery obligations, via e-mails dated June 21 and August 1; (3) input from the CO’s legal advisor regarding what the CO describes as “the responsibility question”; and (4) input from the Quality Assurance Representative (QAR) advising that Tri-Tech’s bipods could be exempted from the more extensive first article test procedures if the agency required the inspection of sample units selected from the initial production lot. Id. at 14-15. In addition, the CO advises that she called a meeting with representatives from various TACOM offices to help her understand the issues involved in allowing Tri-Tech to compete. Id. at 15.

At the conclusion of this process, the CO decided to permit Tri-Tech to compete for this award, and prepared a memorandum for the record, dated August 3, documenting her decision. This memorandum briefly, but expressly, recaps her considerations about delivery issues and about first article testing; the memorandum is silent about any concern regarding Tri-Tech’s integrity. In summary, the memorandum states, “After careful review of the past performance information on both contractors, discussions with Quality Assurance, engineering, and the legal office, the undersigned [CO] has determined that Tri-Tech should be considered as a second source.” AR, Tab Y.

By letter dated August 4, the CO advised both companies that Tri-Tech would be allowed to compete with FN for the award, and set August 12 as a second closing date for the receipt of any revised proposals. Upon receipt of a revised proposal from FN, and notice from Tri-Tech that it would proceed with its proposal as originally submitted, the agency began its review. The review showed that Tri-Tech’s proposed price of \$1.2 million remained significantly lower than FN’s price of \$2.3 million. In addition, Tri-Tech proposed a more favorable delivery schedule than FN. As a result, the CO selected Tri-Tech for award on August 29.

Concurrent with her award decision, the CO memorialized her determination of Tri-Tech’s responsibility, by document also dated August 29. The document, in essence, lists each of the general standards of responsibility found at FAR § 9.104-1, and states, summarily, that Tri-Tech is a responsible contractor because it meets each standard. The document expressly includes a finding that the “Contractor has a satisfactory record of integrity and business ethics,” but provides no explanation of the basis for this finding. AR, Tab AM.

The Basis for Agency Concerns about Tri-Tech’s Integrity

There is no dispute in this record that Army representatives have expressed significant concerns about whether Tri-Tech acted with integrity in its past dealings with the agency. During the course of this protest, both FN and the Army provided detailed accounts of the events that led to these concerns. The brief account that

follows is intended to outline only as much of the situation as necessary to provide a context for this dispute, and is limited to matters for which there is documentary evidence in the record.¹

On May 3, 2001, the Army awarded a contract for 3,796 M249 bipods to Tri-Tech, pursuant to contract No. DAAE20-01-C-0054 (the “-0054 contract”). This contract required both a first article test for the items, and that the bipods be manufactured using 16MnCr5 steel. CO’s Statement at 1. After apparent delays in getting underway, the Army sent a letter to Tri-Tech, dated September 18, 2001, which stated:

The Government has reason to believe that you don’t have the material DIN^[2] 16MnCr5, as identified in the technical data package, for the production quantity for subject contract. The partial production delivery of 1,117 each was extended to 19 Jan 2002, and another extension does not appear to be feasible . . . if our belief is incorrect, please provide a copy of the purchase order with the vendor in which the material is being procured.

AR, Tab AS. In reply to the Army, by letter dated September 25, Tri-Tech answered,

We have secured the material with a supplier in England. Although an order has not been placed for the production as we are waiting until First Article Approval. We have no question that they will be able to receive delivery of the 16MnCr5 material in production quantity as needed within 5-6 weeks as quoted.

AR, Tab AT. Appended to the letter is a handwritten quotation that is also dated September 25.

On October 10, 2001, the government’s QAR forwarded Tri-Tech’s first article test report to the TACOM contracting office for review and approval, which was granted on November 14. The first article test report included a document showing that the steel samples tested were 16MnCr5, and two statements signed by Tri-Tech’s vice-president indicating that items tested passed the acceptability requirements, that the

¹ Tri-Tech has elected not to intervene in this proceeding. We reach no conclusion, and intend no inference, about the considerations that may have influenced Tri-Tech’s decision not to intervene.

² DIN is an acronym for “Deutsches Institut für Normung” or the “German Institute for Standardization,” which sets uniform requirements for materials and products, such as the steel at issue here.

testing was performed in accordance with the contract's testing plans, and that the results are true and accurate. AR, Tab AU; CO's Statement at 3.

After the initial flurry of concern that Tri-Tech might not have the specified material, there is nothing in the record to suggest that the Army's concern continued. On August 6, 2003, however, the CO for the -0054 contract (not the CO for the instant procurement) sent an e-mail to her colleagues describing a telephone call from FN. The CO's e-mail advised that FN had a subcontract with Tri-Tech for bipods and had received its first production quantities; that Tri-Tech would not provide certifications for the material used; that FN had sent one of the items to a lab for analysis; and that the lab had advised that the items were not manufactured with the specified steel. AR, Tab BA, at 3. The CO also advised that FN rejected the bipods, and that she was concerned about the bipods the Army had accepted from Tri-Tech. As a result, she asked that the QAR check the first article report, make sure the certification for the material was in the file, target the material for inspection, and ask Tri-Tech for new certifications. Id.

After several inquiries to and exchanges with Tri-Tech, the Army, by letter dated October 21, 2003, again formally asked about the steel Tri-Tech was using to produce its bipods. This letter addresses bipod deliveries to the Army under another contract with Tri-Tech, contract No. DAAE20-03-P-0217 (hereinafter, the -0217 contract), which the agency also views as requiring the use of 16MnCr5 steel. CO's Statement at 3. The letter states:

This is to inform you of a problem with steel that your company is currently using and to request your assistance and cooperation to address this matter. The Government has reason to believe that currently your company is not using the steel or material, DIN 16MnCr5, specified in the technical data package. We understand that you have a certification from your vendor that the material is 16MnCr5; however, we have tested the material at the Rock Island Arsenal metallurgical department and it is not 16MnCr5.

* * * * *

The undersigned requests that you provide as much information as possible concerning your purchase and dealings with the vendor. At a minimum, please provide a copy of the purchase order/contract with your vendor for this material (16MnCr5), which should clearly show quality and dates of delivery. Also, we request that you state whether you've purchased all the material from this company. Essentially, the Government wants confirmation that the product delivered to the Government was made from the same material that was tested at Rock Island Arsenal.

AR, Tab BC.

After several more exchanges, the Army, by e-mail dated January 23, 2004, again asked a direct question of Tri-Tech, which reads, in relevant part, “our Metallurgical Lab is having trouble classifying exactly what steel this is, could you please let me know what the company said that they delivered?” AR, Tab BL. Tri-Tech’s answer, provided via e-mail dated January 27, was:

After reviewing our records I have been able to determine that there is no separate P.O. for material for this contract. We must have used existing stock material. I now believe this stock material was delivered as Alloy Steel MIL-S-18729.

AR, Tab BM. Two days later, the CO on the -0054 contract organized a team meeting to discuss Tri-Tech’s answer. AR, Tab BN. The CO for the instant procurement attended that meeting as did representatives of numerous TACOM offices, including the legal department. CO’s Statement at 8. Although the CO did not take notes of the meeting, she remembers that the conversation considered whether Tri-Tech’s actions regarding the metal it used to manufacture bipods should be considered a mistake, or fraud. Id.

The documents in the record show further involvement by the CO in the instant procurement. For example, the CO here was the author of an additional letter to Tri-Tech, dated February 12, 2004, which states:

As of today the Government still has not received your response [to] our letter dated 21 Oct 2003 concerning information about your vendor for the specified 16MnCr5 material including the certification you should have on file from this vendor.

AR, Tab BT. The second paragraph of the letter is almost identical to the second paragraph of the October 21, 2003 letter, quoted above, which requests a copy of the purchase order for the material, and a statement about whether all of the material was purchased from this company. By e-mail dated February 24, 2004, Tri-Tech’s vice-president sent a response to the February 12 letter to the CO for the -0054 contract, which essentially repeats the information provided on January 27. There is no evidence in the record that Tri-Tech ever provided more detailed answers, nor is there evidence that Tri-Tech ever produced a purchase order for the material.

As part of the Army’s review of how to proceed, TACOM engineers studied the composition of the bipods and concluded that the material used by Tri-Tech, which the CO refers to as “4130 steel,” would perform equally as well as 16MnCr5. Since the steel used was also more widely available than the specified steel, the agency approved an engineering change substituting 4130 steel for 16MnCr5. CO’s Statement at 11. In addition, the CO advised that an additional meeting was held with all team members to decide what, if anything, should be done regarding

Tri-Tech's actions. According to the CO, the consensus of the TACOM team was that nothing should be done because:

(1) the material used by Tri-Tech was equal to or better [than] 16MnCr5; (2) the Engineers had already approved Tri-Tech's RFD [Request for Deviation] and were planning to issue an ECP [Engineering Change Proposal] to change the Technical Data Package to specify the material that Tri-Tech had used (4130 steel); (3) there were no reports of problems with Tri-Tech's bipods; (4) there was no solid evidence of false certifications; (5) there was no actual damage or harm to the Government; (6) with the new specified material, 4130, there would be better competition for any new procurements and (7) the Government urgently needed bipods.

Id.

Finally, the record shows that in September or October of 2004, shortly before this procurement began in early 2005, the CO here attended a meeting with FN held at TACOM. Id. at 13. The CO, who attended the meeting with her supervisor (who was the CO on the -0054 contract), states that FN gave a "presentation concerning Tri-Tech's misconduct and irregularities under the Government bipod contracts and the subcontract with [FN]." Id. at 13. In addition, the CO states that FN provided her supervisor with a volume that contained a report on Tri-Tech's actions, and documentary attachments which FN viewed as supporting its views of those actions. This volume was provided to our Office by the Army as part of the agency report in this protest. It is entitled, "Report of Apparent Procurement Irregularities by Tri-Technologies in Connection with Government Prime and Subcontracts," and is dated September 3, 2004.

ANALYSIS

In its challenge to the CO's conclusion that Tri-Tech is a responsible contractor for purposes of this procurement, FN argues that the CO ignored information regarding Tri-Tech's past conduct, or, in the alternative, did not sufficiently investigate whether Tri-Tech committed fraud in its earlier dealings with the Army. In FN's view, unless and until the CO reaches a conclusion about whether Tri-Tech committed fraud, the CO cannot properly find that Tri-Tech has a satisfactory record of business integrity and ethics, as required by FAR § 9.104-1(d). FN also argues that the CO misapplied the regulatory standard for affirmative responsibility determinations. In this regard, FN contends that if the CO had any doubts about whether Tri-Tech committed fraud under its earlier contracts, she was required to make a negative determination of responsibility.

The underlying premise of every federal contract award is that contracts are only awarded to "responsible prospective contractors." FAR § 9.103(a). There is no

requirement, however, that COs explain the basis for an affirmative responsibility determination, Southwestern Bell Tel. Co., B-292476, Oct. 1, 2003, 2003 CPD ¶ 177 at 8; a written explanation is only required when a CO makes a determination of nonresponsibility. FAR § 9.105-2(a)(1). Thus, even though the FAR expressly requires that “[n]o purchase or award shall be made unless the [CO] makes an affirmative determination of responsibility,” FAR § 9.103(b), a CO’s signature on a contract constitutes the requisite determination. FAR § 9.105-2(a)(1).

Even though an affirmative responsibility determination is construed from the award of every contract, Id., the FAR identifies several standards that must be met before a prospective contractor may be properly deemed responsible; one of these is that the contractor must “[h]ave a satisfactory record of integrity and business ethics.” FAR § 9.104-1(d). In addition, COs are advised that “[i]n the absence of information clearly indicating that the prospective contractor is responsible, the [CO] shall make a determination of nonresponsibility.” FAR § 9.103(b).

The regulatory scheme above reveals the unusual nature of affirmative responsibility determinations—even though no documentation is required, and the vast majority of such determinations arise when a CO signs the contract, the FAR nonetheless identifies seven specific requirements that must be met as a condition precedent to a finding of responsibility. See FAR § 9.104-1(a)-(g). Since the determination of whether a particular contractor meets these conditions is largely a matter within a CO’s discretion, our Office, as a general matter, will not consider a protest challenging an affirmative determination of responsibility, except under limited exceptions. 4 C.F.R. § 21.5 (2005).

On December 31, 2002, our Bid Protest Regulations were revised to add as a specified exception protests “that identify evidence raising serious concerns that, in reaching a particular responsibility determination, the contracting officer unreasonably failed to consider available relevant information or otherwise violated statute or regulation.” 67 Fed. Reg. 79,833, 79,836 (2002). This change was made in light of a seminal decision from the United States Court of Appeals for the Federal Circuit, Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1323 (Fed.Cir. 2001) (“Garufi I”), which held that affirmative determinations of responsibility by contracting officers are reviewable by the Court of Federal Claims under the “arbitrary and capricious” standard³ applicable under the Administrative Procedure Act.⁴ We explained in the preamble to the revision that it was “intended

³ As explained in the Federal Register notice announcing the proposed change, while our Office does not apply the Administrative Procedure Act in our bid protest reviews, we concluded it was appropriate to act consistently with the rationale underlying the Garufi I decision. 67 Fed. Reg. 61,542, 61,543 (2002).

⁴ The Court of Appeals remanded the case to the Court of Federal Claims for further proceedings. On remand, the Court of Federal Claims held that the CO failed to
(continued...)

to encompass protests where, for example, the protest includes 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.” 67 Fed. Reg. 79,833, 79,844; see also Verestar Gov’t Servs. Group, B-291854, B-291854.2, Apr. 3, 2003, 2003 CPD ¶ 68 at 4.

We begin by noting that FN does not argue that the CO was unaware of Tri-Tech’s actions; rather, it argues that the CO’s Statement provided with the agency’s report reveals that the CO knew about Tri-Tech’s actions, but improperly ignored them. Protester’s Comments, Oct. 24, 2005, at 31. As set forth above, the record here shows that neither the CO’s written determination that Tri-Tech is responsible, AR, Tab AM, nor her memorialization of the decision to allow Tri-Tech to compete, AR, Tab Y, expressly addresses Tri-Tech’s actions under its prior contracts to produce bipods. Given that there is no requirement to even document an affirmative determination of responsibility, Southwestern Bell Tel. Co., *supra*, see FAR § 9.105-2(a)(1), we are aware of no requirement that either of these contemporaneous documents address this matter.⁵

The first explanation in this record of the CO’s thoughts about Tri-Tech’s actions under its prior bipod contracts is set forth in the CO’s Statement, provided with the agency report. In this document, the CO explains that she was thinking about responsibility issues, in particular, as part of her consideration of whether to allow Tri-Tech to compete. Specifically, she states:

In order to determine whether I should even consider Tri-Tech’s proposal, I wanted to review whether Tri-Tech could be a viable source in all respects. I had to determine whether Tri-Tech could meet the

(...continued)

“independently investigate or verify the information provided to him” about whether the awardee was controlled by individuals who had been convicted of bid rigging and other crimes. Impresa Construzioni Geom. Domenico Garufi v. United States, 52 Fed. Cl. 421, 427-428 (2002) (“Garufi II”). As a result, the CO’s affirmative determination of the awardee’s responsibility was found to be unreasonable. Id. at 428.

⁵ Nonetheless, the record confirms the protester’s recognition that the CO was aware of these events. For example, the CO here attended several of the meetings where TACOM officials considered Tri-Tech’s actions, and in fact signed the Army’s letter of February 12, 2004, seeking from Tri-Tech the certification for the steel from its vendor, which, she noted, should have been retained in Tri-Tech’s files. AR, Tab BT. In addition, she attended the meeting with FN in the fall of 2004, wherein FN provided its own views and arguments about the meaning of Tri-Tech’s actions. CO’s Statement at 13.

Government's minimum delivery requirements, whether the proposed prices were reasonable, and whether Tri-Tech was responsible in light of the open fraud investigation.

CO's Statement at 14. In addition, the CO explains that she convened a meeting to obtain input from legal and quality assurance representatives at TACOM while considering whether to delay the on-going sole-source procurement to let Tri-Tech compete. In her view, it did not make sense to consider allowing Tri-Tech to compete if the company could not meet the Army's delivery requirements, or was otherwise nonresponsible. Id. at 15. The CO made the determination to allow Tri-Tech to compete on August 3. AR, Tab Y.

On August 29, some 26 days after the decision to allow Tri-Tech to compete, the CO awarded the contract to Tri-Tech. Although she was not required to do so, her responsibility determination is memorialized in the record; however, as noted above, the determination contains only the conclusion that Tri-Tech has "a satisfactory record of integrity and business ethics," without further explanation. AR, Tab AM. In her statement submitted in response to the protest, she explains that she had knowledge about Tri-Tech's recent and current performance, was aware of the open fraud investigation, but was also aware that Tri-Tech had not been suspended or debarred. CO's Statement at 16. She explains her conclusion as follows:

In my opinion and business judgment, Tri-Tech's more current and recent performance on government contracts does not show a pattern of dishonesty or lack of business integrity or ethics. In my opinion, Tri-Tech is a responsible contractor. Prior to this protest, I possessed knowledge and information about Tri-Tech's performance under its government contracts for the M249 bipods as well as its performance in other government contract[s], and I found Tri-Tech responsible and personally awarded 18 contracts to Tri-Tech for various items.

Id. at 16-17.

In addition to the CO's Statement submitted with the agency report, our Office convened a hearing in this protest to take testimony from the CO about her considerations. During the course of the hearing, the CO testified that Tri-Tech is producing numerous items for the Army, has been delivering quality products, and is, in the view of the CO, one of TACOM's best contractors. Hearing Transcript (Tr.) at 27. She also testified that she strongly believes Tri-Tech has business integrity and ethics and that "they are a very good producer of quality parts for our soldiers." Id. at 27-28.

In our view, the CO was a credible witness and there was no testimony produced during cross-examination by the protester that leads us to conclude that she did not consider the things she claims to have considered in her statement or in her testimony. We also note for the record, in answer to the protester's contentions, that

we see nothing in the CO's statement or testimony that contradicts any of the contemporaneous documents in the record; rather, her statement and her testimony "provide a detailed rationale for contemporaneous conclusions . . . [and] simply fill in previously unrecorded details." NWT, Inc.; PharmChem Labs, Inc., B-280988, B-280988.2, Dec. 17, 1998, 98-2 CPD ¶ 158 at 16; see also ITT Fed. Servs. Int'l Corp., B-283307, B-283307.2, Nov. 3, 1999, 99-2 CPD ¶ 76 at 5-7. Accordingly, we find that the CO did not ignore Tri-Tech's actions under its prior contracts, but in fact considered them.

We also disagree with the protester's alternative contention that even if we conclude that the CO was generally aware of Tri-Tech's actions and considered them, we should find that the CO did not sufficiently investigate the situation to reach her own independent conclusion about whether Tri-Tech committed fraud. Moreover, we disagree with the protester's contention that the situation here is indistinguishable from the situation we reviewed in Southwestern Bell.

In Southwestern Bell, the CO was generally aware of allegations of misconduct against Adelpia Communications Corporation (and against the Rigas family members that controlled that entity), but had taken no steps to determine the extent to which those entities controlled Adelpia Business Solutions, Inc., the awardee in that case. Southwestern Bell Tel. Co., *supra*, at 9-10. We concluded that in the absence of any consideration of these control issues, the CO's general knowledge of the situation was not sufficient to show that the affirmative determination of the awardee's responsibility was reasonable. *Id.* at 10-11. Thus, the issue was whether the CO had taken sufficient steps to know whether the awardee was essentially the same entity, or was controlled by an entity against whom serious allegations of misconduct were lodged.⁶

Here, there is no doubt about the awardee's identity. The awardee is clearly the same firm that produced bipods using non-specified steel, and the CO was part of the team that reviewed the situation to conclude whether those actions were intentional or accidental. In FN's view, our decision in Southwestern Bell imposed a requirement on the CO here to personally review all of the exchanges on multiple contracts (for none of which she was the CO), from the beginning of contract performance to the end, in order to determine for herself whether Tri-Tech did, or

⁶ We also note that the Garufi cases turned ultimately on whether the CO had sufficiently reviewed the identity of the awardee to know whether the awardee was, or was not, controlled by entities whose integrity was considered suspect. Specifically, on remand, the Court of Federal Claims concluded that the CO had taken no steps to determine (nor had he relied on advice from anyone else who had determined) whether the terms of the awardee's receivership would leave the company in the control of an individual whose integrity was suspect. Garufi II, *supra*, at 427-28.

did not, commit fraud while performing those contracts. See Protester's Comments, supra, at 31-32. We do not agree that the situation is the same as existed in Southwestern Bell, and, more importantly, we do not agree that the CO here was under any such obligation.

Instead, the record here shows that a team of TACOM personnel, including attorneys, contracting officers, quality personnel, engineers, and others, reviewed this matter, and in the end, decided not to pursue it. CO's Statement at 11. The CO testified that she accepts the team's conclusion and agrees with it. Tr. at 68, 73-74. While FN clearly disagrees with this decision, and has, in fact, met with the TACOM representatives, including the CO here, to attempt to convince them otherwise, FN's disagreement with their conclusion does not translate to additional review responsibilities for the CO here. While we recognize that FN is able to point to certain evidence that the CO has not reviewed herself--such as the compilation of documents it presented to the agency in the fall of 2004--we think the CO's reliance on the judgment of the TACOM team about whether these matters do, or do not, constitute fraud, together with her own involvement in certain of these discussions, gave her a sufficient understanding of the situation to provide a reasonable basis for the determination she made.⁷

Finally, we turn to FN's contention that the CO misapplied the regulatory standard for affirmative responsibility determinations. In this regard, FN argues that because the CO admitted during the hearing to having doubts about whether Tri-Tech did, or did not, commit fraud against the Army (see Tr. at 83), the CO was required to make a determination that Tri-Tech was nonresponsible. FN's argument is based on FAR § 9.103, which requires that "[i]n the absence of information clearly indicating that the prospective contractor is responsible, the contracting officer shall make a determination of nonresponsibility."

⁷ We also note for the record that FN's contention that the CO could not reasonably find that Tri-Tech was a responsible offeror without investigating and independently determining whether Tri-Tech committed fraud in its prior dealings with the Army appears to be based on an incorrect assumption. Specifically, FN argues that if the CO had concluded--as FN claims she must--that Tri-Tech acted fraudulently, then the CO must also conclude that Tri-Tech is not a responsible offeror. Protester's Comments, supra, at 29-30. As the Court of Appeals pointed out in Garufi I, "past criminal activities by a corporate officer do not automatically establish that the bidder fails the responsibility requirement." Garufi I, supra, at 1335 (citing and discussing both Trilon Educational Corp. v. United States, 578 F.2d 1356, 1358 (Ct.Cl. 1978) and the FAR's debarment regulations found at subpart 9.4). Thus, we think the CO could both conclude that the awardee committed fraud in the past, and conclude that its more recent actions provide clear evidence of responsibility.

While we agree with the protester that, at first blush, portions of the CO's testimony during the hearing suggested that she may have misapplied the FAR standard quoted above, our consideration of the record as a whole leads us to conclude otherwise. The exchange most favorable to the protester's position is set forth below:

Q: Was it your understanding that--let me put it a different way--that a company such as Tri-Tech has business integrity or ethics unless you make an affirmative finding to the contrary?

A: Unless I have proof.

Q: Okay.

A: That they did not.

Q: And you had no proof at this time, correct?

A: No proof.

Q: So it's sort of innocent until proven guilty?

A: No comment.

Q: Is that what was going through your head?

A. No. I had no proof that led me to believe they did not have business ethics--integrity and ethics based on their performance under the most recent and current contracts.

Tr. at 104-05.

In our view, this exchange appears to confuse the proof required to find someone guilty of a crime, such as fraud, with the standard set forth in the FAR for finding a contractor to be responsible. Nonetheless, when given an opportunity to express herself at greater length, as in the last answer quoted above, she explained that she had no proof that Tri-Tech lacked business ethics, given their recent performance.

We note that the CO stated an appropriate basis for her responsibility determination on numerous occasions elsewhere in this record. In the CO's statement she explained that, in her experience and view, "Tri-Tech's more current and recent performance on government contracts does not show a pattern of dishonesty or lack of business integrity or ethics." CO's Statement at 16-17. In addition, she explains that she has awarded 18 contracts to Tri-Tech since early 2004, and thus has gained more recent, first-hand experience with Tri-Tech that affects her view of the company's responsibility. *Id.* Finally, we note that even during cross-examination by the protester, the CO explained that she viewed her own knowledge as clearly

indicating that Tri-Tech is currently a responsible offeror, despite the open fraud investigation. Tr. at 107. We think these explanations, despite the answer given during cross-examination, establish that the CO's determination was made consistent with the standard set forth in FAR § 9.103.

The protest is denied.

Anthony H. Gamboa
General Counsel