

# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation

## A LAWYER'S VIEW OF RESPONSIBILITY

May 15, 1990

### RESPONSIBILITY

by Bruce H. Segal

Contracting officials must make thorough investigations of prospective contractor financial and operational capabilities, not only to get highly qualified contractors, but to avoid potential default termination and problems during performance. Contracting officers not only must know the regulations but also what financial and operational information is available for use and where to get that information before making responsibility determinations. This edition of *A Lawyer's View* discusses the subject and gives some practical advice.

#### The Regulations and Case Law

Contracting officers must determine whether the contractor will perform and whether it is eligible for a contract, see FAR Subpart 9.1. Subpart 9.1 covers performance-related standards involving contractor ability, determination and integrity and special standards that are discretionary with contracting officers. In making responsibility determinations, contracting officers must consider contractor financial resources, ability to comply with the delivery schedule, facilities and equipment, management and technical capability, record of satisfactory performance, and licenses and permits.

A contractor must have sufficient financial resources to perform or have the ability to obtain them through various associations. See *Telex Communications, Inc.*, B-212385, January 30, 1984, 84-1 CPD ¶127. The filing of a petition in bankruptcy is factor, but not a preclusion, for responsibility. The contracting officer should always ask whether the contractor has financial capability despite bankruptcy. Because the FAR gives no guidance concerning what constitutes adequate financial resources, contracting officers must use business standards such as ratio of assets to liabilities, working capital, cash flow projections, credit ratings, firm's profitability; and liquidity of assets.

Contracting officers must also consider the contractors will to perform which involves tenacity, perseverance and integrity. Although the FAR does not define integrity, case law states that it means uprightness of character, moral soundness, honesty and probity. See 48 Comp. Gen. 769 (1969).

Contracting officers must determine that prospective contractors are nonresponsible in absence of adequate and timely information clearly indicating that the contractor is responsible. See FAR 9.103(b) and FAR 9.105-1(a) and (b)(1). The determination involves an exercise of discretion. See 49 Comp. Gen. 553 (1963). Because the criteria involve business

judgments, determinations are not susceptible to judicial review in the absence of fraud or bad faith. See *Keco Industries v. US*, 492 F.2d 1200 (1974). Because prospective contractors must establish their responsibility, contacting officers may consider contractor inability or unwillingness to provide this information in making determinations. See *Wallace & Wallace, Inc.*, B-209859.2, 83-2 CPD ¶142 (1983).

#### Information: What You Want and Where to Get It

A excellent instructional booklet, "How To Read A Financial Statement", is available from Merrill Lynch & Co. to understand the business standards used in making responsibility determinations. FAR Subpart 9.1 mentions sources of financial and operational information that are obtainable in libraries or from sources in the public and private sectors and from prospective contractors. Beside the Consolidated List of Debarred, Suspended and Ineligible Contractors, the FAR suggests that contracting officers obtain records and experience data from government administrative and contracting offices; preaward survey reports, information from publications, suppliers, subcontractors, customers, financial institutions, other government agencies, and business and trade associations; and from the prospective contractor such information from bids or proposals, questionnaire replies, financial data, production equipment and personnel. Various financial volumes by Standard & Poors, Moodys and Dun & Bradstreet provide an excellent source of information.

#### Conclusion

I highly recommend that contracting officers use Dun & Bradstreet reports on particular firms, available from the Commerce Library, preaward surveys and information obtainable directly from contractors. For example, subcontractor supply contracts are a key source of operational information determining whether the contractor is capable of meeting government needs. I also recommend that contracting officers ask prospective contractors to provide any information necessary to support responsibility determinations and should consider their inability or unwillingness to provide this information in making responsibility determinations.



**From the Editor** – Bruce Segal, is a Division attorney and presented this subject at the Department's March 1990 procurement conference.

- Comments, criticisms, and suggestions for future topics are welcome. - Call Jerry Walz at FTS 377-1122